

RECOVERY

FINANCIAL SERVICES

One size does not fit all
IPs struggle under new FCA rules

Are investment banks special?
A look back at the industry's use of special administrations

Power to the people?
Is multi-party litigation the future for recoveries?

How do you solve a problem like mis-selling?

The need for IPs to seek the right expertise for the right situation

Is possession really nine-tenths of the law?

The case of a Gibraltar artist clarifies asset ownership rights

Ice cold in Abu

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From the editor

I often write about the public, press and political perception of our profession. Failing to appreciate the importance to our livelihoods of how others see us is a damaging trait, even when only exhibited by a minority. There is a reason why '70s punk bands and their 'I don't care' philosophy died out!

We all need to nurture understanding of what we do and, especially, of the value we add. The new fees regime is an opportunity to do so. What, however, it should not be is an opportunity for commercial gain, exploiting creditors' ignorance and apathy through the presentation of generic and inflated fee estimates, without explaining how they relate to the specific circumstances of the estate. The rules of the game have changed and we should embrace them, in spirit as well as to the letter. As ever, it is the behaviour of a few that affects many. Hopefully the revised provisions of SIP1 will help the many suppress the few – reporting those who do not comply with the relevant laws and regulations and whose actions discredit the profession.

Similarly, we need all to be seen to support the pre-pack pool. Letting pre-pack purchasers know how to use it, and documenting and reporting our invitations to do so, should help the creditor community and government to appreciate that we promote solutions that deliver value to creditors as such.

As we go to press the government's response to their call for evidence on consulting on redundancies in insolvencies has been published. The government's position that there is no conflict between insolvency law and employment law displays a clear misunderstanding of their interaction. Employment law is designed principally to govern relationships between employers and employees in the normal course of business. Insolvency law is designed principally to ensure that creditors are treated fairly as such when claims cannot be paid in full. Entitlement to a period of consultation on prospective redundancies ought, in normal circumstances, to do no more than trigger an unsecured claim for damages to the extent that it is breached by an employer prior to insolvency. Increasing penalties for such breaches goes only to increase the likelihood of damaging creditors' interests in the underlying value of the business, as well as reducing value to the extent of the penalties. It does nothing for employees either individually or collectively.

Other legislative and regulatory developments abound and, as ever, we cover them in *RECOVERY*. Phillip Sykes highlights Jackson and the HRI issues as well as pre-packs (page 7), while Giles Frampton and Charles Turner independently lament the flawed exemption for IPs from requiring FCA authority to give consumer debt advice (pages 8 and 9).

We cover interest rate hedging product mis-selling on page 21. One of the key points to note is that this is a complex problem for IPs acting in estates with relevant claims. Specialist assistance will be required, there may well be conflicts to resolve and the risk of mistakes (and negligence claims) is relatively high.

Our formal theme is financial services, whereas Europe is not only where our president begins his column but also the subject for Adrian Cohen's and Gabrielle Ruiz's legal update (pages 11–13) and John Francis's technical update (page 14).

Vive la différence!



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

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Graham Rumney, CEO of R3 outlines the key issues affecting the profession and some of R3's current activities supporting our members

Whilst our industry continues to be challenged by the state of the economy and increased pressure from regulators. R3 remains at the forefront of discussions to ensure our collective voices are heard across stakeholders.

As we enter into 2016, these key issues continue to influence the activities we perform on your behalf. I hope you will find it informative to hear of the work we have been engaged in throughout 2015:

Fees proposals changed - R3 challenged the government's proposals to prohibit the use of time-costs (in cases where no engaged secured creditor or creditors' committee). Following consultation, the government introduced an 'up-front estimate' of fees in insolvency cases instead, allowing insolvency practitioners to continue to charge on a time-cost basis.

Insolvency remains exempt from the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 - Following lobbying work led by R3, in February the government agreed to extend the exemption for insolvency from the LASPO Act 2012. R3 continues to campaign to have this exemption made permanent.

Small Business Enterprise and Employment Act 2015 changes - R3 convinced the government to modify proposals which members believed would damage the insolvency regime, particularly in relation to creditors' meetings.

Value of the Profession promoted - R3 published research in 2015 highlighting that the insolvency profession had, in the previous 12 months, rescued 41% of businesses from a formal insolvency procedure, rescued 235,000 jobs, advised 135,000 people about their finances, helped 60,000 people through an insolvency procedure, and started work on cases that will repay £5bn of personal debt to creditors in the next five years. Reports were also published for individual UK regions.

Creditor website launched - R3's website for

creditors aims to make it easier for creditors to understand and engage in the insolvency process: www.creditorinsolvencyguide.co.uk

Policy breakfasts briefings - a series of policy meetings bringing together civil servants, insolvency regulators and senior figures for business and consumer bodies were staged in 2015: topics include 'fraud' and 'breathing space'.

“ We are only able to do the work as you continue to support R3 ”

Pre-packs - R3 will monitor the new pre-pack reforms to ensure they are working effectively and do not undermine the UK's world-class insolvency regime.

Taking an active interest in developments in the bonding market - R3 is contributing as much as possible to find a solution which is fair to creditors and allows the bonding market to provide cover to the entire IP profession at a proportionate cost.

Making the case in Brussels - With the European Commission increasingly interested in insolvency reform, R3 will be engaging with policymakers in Brussels to ensure the strengths of the UK's insolvency regime are recognised and protected.

Engaging with stakeholders - R3 will continue its programme of engagement with parliamentarians and creditor groups, to ensure everyone is aware of the insolvency profession's perspective and to ensure that public debate around the insolvency regime is fair, informed, and balanced.

Education & training: Comprehensive options for Learning & Development - R3 offers the most competitive and innovative educational

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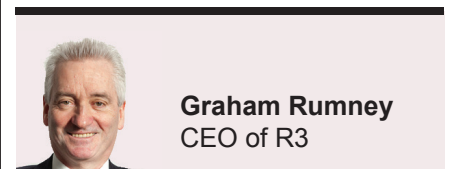
R3 smaller practices group (SPG): R3 smaller practice members make up a vital part of R3's membership. During 2015, the SPG Committee undertook a number of initiatives to support smaller firm members.

R3 Technical: Regular Technical Bulletins keep members updated on topical issues and the technical area of the R3 website continues to be a key benefit to all members. An R3 Academic Forum has been set up to identify, analyse and comment on matters of topical interest.

A specialist R3 Tax Advisory Group has also been set up, in discussions with HMRC on a number of issues, including Real Time Information, the tax treatment of redress for mis-selling of interest rate hedging products, and various compliance and administrative matters. Discussions with government have continued on the problems relating to administration expenses and issues raised by the new consumer credit licensing regime.

Guidance has also been issued on health and safety for insolvency office holders and the Construction (Design and Management) Regulations 2015, and work is continuing in conjunction with the Consultative Committee of Accountancy Bodies on updating money laundering guidance for insolvency practitioners.

These are just some of the activities during 2015 that we are proud to have performed on behalf of all members. There is much more to do and we are only able to do the work as you continue to support R3. We hope as you receive your 2016 membership renewal form over the coming weeks, we can rely on your support.



Graham Rumney
CEO of R3

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President's column

Phillip Sykes looks at potential convergence of insolvency regimes and the pitfalls of LASPO and TULRA.

Financial services will be one of the key issues in the debate over the UK's future in Europe. Does the City need the UK to remain in Europe for international banks and business to choose London over rival hubs like Frankfurt? Or is 'Brussels' holding the City and the UK back as a financial services base?

The EU is pushing ahead with plans to promote a convergence of capital markets and financial services rules (creating a 'Capital Markets Union'), and has identified insolvency as one of the legislative areas to tackle. Different insolvency regimes in different countries, the European Commission argues, are a barrier to cross-border trade and investment.

Cross-border EU work does keep UK insolvency practitioners busy. According to R3's October 2015 survey (thank you to those that took part), 49 per cent of IPs work on cases involving cross-border work within the EU, with almost one in five of UK IPs' cases having a cross-border aspect.

Any 'convergence' is likely to be limited; the Commission says it expects member states to move towards a set of objectives rather than adhere to prescriptive EU-wide legislation. This is wise: insolvency legislation does not exist in a vacuum and any attempt to effect changes to insolvency regimes would require amendments to contract law, company law, laws on trusts, tax and employment, and many others. Additionally, insolvency regimes depend on an effective court system to be enforced. A convergence of insolvency regimes is easier said than done.

The European Commission has formed an 'expert working group' to assist in drafting the proposals, which they are likely to consult on in mid-2016. The UK already has one of the best insolvency regimes in Europe and R3 has already expanded its work in Brussels and is developing a programme of engagement for the next few years.

Whether the UK stays in the EU or not, the way UK IPs work in Europe is set to change in the next five years.

Jackson

In mid-October, Lord Justice Jackson outlined his opposition to the insolvency exemption from the 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act, a piece of legislation partially based on his review of litigation costs. Having

waited so long to hear from the judge, it is fair to say we were disappointed by what he had to say: not because of his opposition to the insolvency exemption, but because of the reasoning behind his arguments.

Lord Justice Jackson appeared to suppose that it is the insolvency profession, rather than ordinary creditors, that primarily benefits from the exemption, for example. And he did not address exactly how insolvency practitioners are supposed to pay for litigation when there is no money left in an estate. R3's full thoughts on Lord Justice Jackson's lecture are available in the R3 Thinks section of the R3 website.

The government has promised to announce details before the end of the year on the exemption's future. R3 and a number of other organisations, including the Federation of Small Businesses, British Property Federation, ICAEW, ACCA and ICAS will continue to put pressure on the government to do the right thing and let the insolvency profession get on with its work under the current regime.

Pre-packs

By the time you read this, the new pre-pack pool and revised SIP16 will have been in operation for a few weeks.

Although pre-packs – and particularly 'connected party' pre-packs – are small in number, they do attract a disproportionate amount of attention and risk, justly or not, tarnishing the reputation of the insolvency regime as a whole. While 'connected party' pre-packs may present the best option for creditors, it should also be easy to understand why there is such a fuss about pre-packs. Creditors, and others, want to see transparency.

Whether or not the pre-pack pool and the revisions to SIP16 will satisfy these demands for transparency remains to be seen. What we do know though is that if the reforms are not seen by government to have made an impact, any connected party sale from administration could be banned. Any feedback on the pool and SIP16 would be greatly appreciated by R3.

Collective redundancy

Many of you will have seen the news of arrests being made for the failure to notify the Department of Business, Innovation & Skills of redundancies in the USC and City Link insolvencies. According to *The Guardian*, this is the first time there have been prosecutions for failing to adhere to

section 194 of the Trade Union Labour Relations Act (TULRA) since it was passed in 1992.

This is a sensitive area, and one that R3 has put pressure on government to make changes to for some time now. Whether or not the government has changed its policy on enforcing TULRA, as *The Guardian* claims, remains to be seen, but either way, more clarity from government is needed.

The wider issue, of course, is that as things stand, employment law is very clear and insolvency is very clear; but there is self-evident conflict where there are no funds or time in an insolvent business to carry out a full consultation with employees as required by law.

R3 will be looking to offer new information and training for insolvency practitioners on this topic to help safeguard them from potential prosecutions. The government has now responded to its own 'call for evidence' on this matter, and is promising to consult further on the issue next year. While we're disappointed that there will be a further delay before any action is taken, we are looking forward to the opportunity to engage with the government on this in 2016. R3 has made a number of recommendations and will keep the pressure on government to ensure that insolvency practitioners, directors and the taxpayer aren't caught up in a legislative tangle.

R3 technical director

Some R3 members may be aware that John Francis, R3's technical director, is to retire at the end of the year. I'm sure, like me, most insolvency practitioners have depended on John's technical updates over the years, and I hope you will join me in wishing him well for the future and thanking him very much indeed for the support he has given the profession. R3 is now recruiting a replacement for John; an advert with more information about the role is included in this edition of *RECOVERY* on page 33. □



PHILLIP SYKES is the president of R3 and the head of London restructuring and recovery at RSM.

One size does not fit all

Troubling times for IPs dealing with consumer credit.

The other day I saw a lady who was struggling with her debt. That should have been unremarkable; it is what I have done day in and day out for over 25 years. This time was different because I could not advise her without risking prosecution. Why was this the case?

As the interview progressed it became clear that she had some credit card debt and an IVA would not be suitable for her. On the FCA's interpretation of the meaning of the statutory instrument that gives IPs exemption from requiring FCA authority to give consumer debtor advice, it followed that I was no longer 'acting in reasonable contemplation of appointment as an insolvency practitioner', and so the exemption no longer applied. In the FCA's view, being 'in reasonable contemplation of an insolvency appointment' does not only refer to the state of mind of the IP at the outset of an advice meeting, but to the state of mind of the IP at *any time* during the meeting. Once the IP's glimmer of hope that a new IVA might be in the offing has been dashed by a professional assessment of the debtor's circumstances, any attempt to advise without being authorised by the FCA runs the risk of a criminal penalty.

Pushing debtors away from IPs

Dear IP 61 issued by The Insolvency Service supports the FCA's interpretation of the exemption.

'Where after considering the debtor's circumstances it transpires that an insolvency appointment is not appropriate, this would not necessarily render the provision of the initial advice outside the scope of the exclusion. This is provided that the initial advice was given in reasonable contemplation of a formal insolvency appointment and that the practitioner did not continue to advise the debtor on entering into a particular debt solution, outside of the scope of the exclusion (eg a debt management plan), once it became apparent that such an appointment would not be made.'

This unhelpful interpretation of the meaning of the exclusion has the following effects:

- The debtor has to find further advice elsewhere, quite possibly from non-IPs whose experience of bankruptcy and IVAs conceivably may not be as great as that of an IP.
- It impinges upon the existing professional duties of an IP to provide impartial, relevant advice. SIP3 quite rightly in my

view, requires the IP to advise on all the options when recommending an IVA but, unless FCA authorised, an IP cannot do so if any alternative solution, including bankruptcy, would be appropriate.

- IPs wishing to continue to offer such advice must be doubly regulated at further cost.

It is also worth noting that where an individual has no consumer debt there is no prohibition on the IP providing full advice, and nor should there be.

“

A consumer in financial difficulty ought to be able to obtain advice about the full range of options from those competent to give it.”

All of this might be understandable if it were possible to discern the mischief or harm that the FCA's interpretation of the IP exemption is supposed to address. None has been cited. Instead, it seems to be about consistent regulation; 'one size fits all'. Superficially that may be attractive but when the result is farcical, bespoke tailoring is desirable.

Handcuffed by regulation?

I recognise that large- and medium-sized firms will probably have obtained FCA authorisation because of their other interests and so some might argue that the issue is not of great importance. I beg to differ. A consumer in financial difficulty ought to be able to obtain advice about the full range of options from those competent to give it. Through their training and experience, backed by regulation, IPs should be among that category of adviser. The FCA's interpretation of the exemption amounts to a devaluation of the qualification. That cannot be good for the profession as a whole.

Secondly, the imposition of over-regulation is always to be deplored

essentially because it adds to cost, which ultimately will be borne by the consumer. Where regulation is inadequate the starting point should be to attempt to improve what exists. Only if it is incapable of improvement to an acceptable standard should alternatives be considered.

Ultimately whether or not the FCA's interpretation of the meaning of the exemption is correct would, presumably, be a matter for the courts, but such an application would seem to be disproportionate when a simple reinterpretation of the exemption or, if necessary, an amended statutory instrument would provide a solution. So ladies and gentlemen of the FCA, please do have a rethink. ■



GILES FRAMPTON is a partner at Richard J Smith & Co. He is a former president of R3 and is currently chairman of R3's policy group.

Present company excepted

Charles Turner asks for a workable insolvency exclusion from FCA authorisation.

Many IPs have become frustrated by the limitations imposed on them in providing best advice to individuals facing financial difficulties. These individuals may be employees, sole traders, partners and even those in professional practices. They will present with a wide variety of issues and it requires IPs with a full understanding of the range of formal and informal insolvency options to carefully consider with them the pros and cons of each option. This is specifically mandated in SIP 3.1 (E&W) and SIP 3.3 (Scotland) when providing initial advice:

SIP 3.1 12(e): *'the debtor is provided with an explanation of all the options available, the advantages and disadvantages of each and the likely costs of each so that the solution best suited to the debtor's circumstances can be identified. This explanation should be confirmed to the debtor in writing.'*

We are subject to scrutiny by our regulators on our effectiveness in carrying out these duties, regardless of whether or not we are paid for these services (more often we are not) or indeed whether or not there is any prospect of an appointment.

Many of us have become skilled at dealing with complex scenarios requiring detailed knowledge of the options including those for unincorporated businesses, which may well involve finance and business restructuring skills. This needs to be coupled with an empathetic approach, obtaining a good understanding of the individual's preferences and an absolute need for clarity and transparency, not least on costs.

However, as well as being answerable to our clients and our regulators we are now potentially answerable to the FCA when advising 'consumers' unless we can pass the exclusion criteria from being authorised by the FCA.

Who can you advise?

The FCA requirements are all about protecting consumers from bad conduct in the financial services industry. None of us will take issue with that. So who are consumers and are we ok to advise individuals in business? Well the FCA handbook describes an individual as 'a natural person' or 'a partnership consisting of two or three persons...' and the relevant legislation (the Financial Services and Markets Act 2000) talks about a consumer being 'the borrower under the agreement...' There are 'regulated credit agreements' and 'exempt credit agreements' with different entry provisions but it is all personal debt and the self-employed will almost certainly have credit agreements. Is it not safer to take the view that pretty well anyone with a range of personal debt is likely to be subject to the FCA requirements? We are not just talking about those who have maxed out their credit cards on the high street.

The legislation has shackled our ability to provide best advice (in accordance with our own regulatory codes) unless we are dual regulated. Debt counselling is regulated under the legislation requiring those providing this and related services to be FCA authorised. Attempts have been made to circumnavigate these limitations by exempting designated professional bodies

(DPBs) – ie solicitors and accountants – from FCA authorisation if they provide insolvency advice but this only works in limited circumstances (including the transitional arrangements). The advice must be 'incidental to' and/or 'arise out of' the provision of professional services. So if we are referred individuals by their own advisers, or they come in 'off the street' and they are not already clients, any advice we give is clearly not incidental to other professional services being provided by our firms. This is the first service to be provided.

Seeking a solution

So we are thrown back on the so-called 'insolvency exclusion' negotiated with the FCA, which enables us to provide advice as long as it is given 'in reasonable contemplation' of an insolvency appointment. This works if an IVA (or Trust Deed) is a viable option but as soon as it is established that an IVA is not viable or desirable we are prohibited from continuing to advise and assist with other options, such as a debt relief order (DRO) or bankruptcy, because there is no (reasonable) prospect of an appointment. It is possible we could be appointed on a bankruptcy but that is the creditors' choice not the bankrupt's. And there may be no assets. Yes we can give information and signpost debtors to FCA authorised advisers but that is hardly helpful to the individual you are seeking to advise when you have to terminate a conversation mid-way through despite being well qualified and probably best placed to advise. These limitations have of course led to many of us (including my firm) to apply for FCA authorisation at no little cost and with extensive form filling. The outcome? Dual regulation.

The answer? A proper insolvency exclusion enabling personal insolvency specialist IPs to advise individuals on the full range of insolvency options whether or not there is any prospect of an appointment ie including bankruptcy and DROs. Job done. ▣



CHARLES TURNER
is an IP and head
of mlm Solutions in
London.





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Europe in union?

Adrian Cohen and **Gabrielle Ruiz** look at the Recast Regulation and the legislative proposal for harmonisation, and whether they'll be a uniting force or a wedge between member states.



Image credit: Clifford Chance LLP

Piecing together the different initiatives of the European Commission in the context of insolvency law in Europe is no mean feat. Over the last couple of years there have been various work streams aimed at modernising insolvency laws across Europe. The two principal initiatives have been the revisions made to the current European Regulation on insolvency proceedings now contained in a Recast Regulation (EU 2015/848), which was approved by the European Parliament on 20 May 2015 (the Recast Regulation) and will apply, broadly speaking, to proceedings commenced after 26 June 2017; and the European Commission's Recommendation, a new approach to business failure and insolvency, dated 12 March 2014 (the Recommendation). This includes the Commission's announcement on 30 September of its intention to put the themes of the Recommendation on a legislative footing. In this article we discuss the progress of both initiatives. This shift towards further legislation is driven in part by, and is in keeping with, two of the Commission's flagship initiatives: the Capital Markets Union and the Internal Markets Strategy.

Recast Regulation

While the Recast has been enacted, most of its provisions do not take effect until after 26 June 2017. The most significant changes relate to:

- (i) extending its scope to include pre-insolvency and rescue style proceedings;
- (ii) clarifying the rules on jurisdiction in relation to the determination of centre of main interests (COMI) and establishment of a debtor;
- (iii) synthetic secondary proceedings, which allow an insolvency practitioner in the main proceedings to provide an undertaking to avoid secondary proceedings being opened;
- (iv) the introduction of group coordination proceedings;
- (v) the introduction of standard notices and claim forms; and
- (vi) publicly accessible insolvency registers in each member state, which are interconnected across Europe.

Scope

The changes mean that from 26 June 2017, pre-insolvency and rescue proceedings, including those where the debtor remains in possession (which are all included in

an exhaustive list in Annex A to the Recast Regulation), will benefit from automatic recognition and will be effective throughout Europe. For example, the different types of French safeguard proceedings are listed in Annex A, as are the new Spanish refinancing agreements. Schemes of arrangement are not included in Annex A, as they are not derived from insolvency law and the UK government lobbied to ensure they were kept outside of the Recast Regulation. There is also no distinction between the types of proceeding that can be used in main and secondary proceedings. Under the current Regulation, secondary proceedings were limited to winding-up proceedings only. This limitation was removed in the Recast Regulation on the basis that it was a barrier to rescuing businesses with cross-border interests.

Jurisdiction

Much of the uncertainty and jurisprudence that arose out of the current Regulation focused on the differing interpretation by member states' courts on what was meant by COMI. COMI is the principal basis on which courts decide whether they have the jurisdiction to open main insolvency proceedings. Following the decisions of the »

European Court of Justice in the cases of *Re Eurofoods* [2006] C341/41; *Interedil* [2011] C396-09; and *Mediasucre* [2011] C191-10, what is meant by COMI is now fairly well settled. The principles set out in these cases, namely that a debtor's COMI is the place where the debtor conducts its administration on a regular basis and is ascertainable by third parties have now been encompassed in the main provisions of Article 3 of the Recast Regulation. In addition, in order to deter improper forum shopping, entities that have moved their COMI within three months of opening the proceedings, may not rely upon the registered office presumption. There is to be a study on abusive forum shopping under the Recast Regulation by June 2020. Clarification has also been provided in relation to the location of asset rules, for example the determination of where a bank account is located under the Recast Regulation by reference to an IBAN number and is now more intuitive in recognising the location of deposits in local branches as opposed to looking to the COMI of the bank.

Secondary proceedings: undertakings

In recognition of the facts that a multiplicity of insolvency proceedings may not be the most efficient way of dealing with entities that have interest in more than one member state, the Recast Regulation allows the insolvency practitioner in the main insolvency proceedings to provide a written undertaking to avoid the need for secondary proceedings to be opened. In order to protect creditors located in the establishment jurisdiction, the undertaking must adhere to local rules and ensure that any local priority rankings are protected. In order to provide the undertaking, the insolvency practitioner is also required to adhere to the voting requirements and thresholds relating to the creditors in the establishment jurisdiction. In practice this may be difficult to ensure, and insolvency practitioners may be reluctant to provide such undertakings; some may argue that in doing so the process is more cumbersome and uncertain than opening separate secondary proceedings.

Co-ordination of group companies

In addition to recognising the importance of cooperation between different insolvency practitioners and the different courts, and also the role that protocols and bilateral arrangements can play in group situations, one of the most controversial areas of the Recast Regulation is the introduction of a group coordination proceeding. These are essentially procedural in nature and overlay the individual insolvency proceedings taking place at each company level. An independent insolvency practitioner acts as a coordinator. The proceedings are completely voluntary and the insolvency practitioners appointed in relation to the individual group members can effectively

choose to opt in or out at any time. The main purpose of the proceedings is to facilitate a restructuring solution on a group-wide basis. They do not replace the courts' ability to appoint a common insolvency practitioner, or find a common COMI for companies in the same group, but provide an additional option for groups of companies in distress. Given the complexities involved, and in addition the potential increase in costs of the coordination proceedings themselves (which are spread across the participating groups), it remains to be seen whether such proceedings can be effectively used in practice. There is to be a review of group coordination proceedings under the Recast Regulation by June 2022.



One of the most controversial areas of the Recast Regulation is the introduction of a group coordination proceeding.

Practical changes

These fall into two categories, the first deals with the standardisation of the notification and claims process for creditors. The aim of this measure is to reduce the costs and time for creditors making claims wherever they are located. The second relates to improving transparency in the different processes, and the Recast Regulation obliges member states to have publicly available electronic registers by June 2018 with a view to there being interconnected registers across Europe by June 2019.

The main changes to the Regulation enshrine the European Commission's commitment to pursue a strategy that boosts investment, jobs and growth throughout Europe. In particular, the emphasis in the Recast Regulation on efficient restructuring procedures and recognising their importance in a wider economic context to facilitate the continuation of viable businesses is clearly visible in the Recast Regulation. The practical measures such as the standardisation of claims and creation of public registers is also in keeping with improving the efficiency of the processes themselves.

The recommendation

The second aspect of the Commission's initiative was launched in the form of a Recommendation in March 2014. The Recommendation has no legislative force and is not binding on member states, but it articulates the views of the Commission, and suggests a course of action for member states to follow. The key areas that were the focus

of the Recommendation were to encourage (i) member states to have a preventative restructuring framework and (ii) to ensure individual debtors had a second chance, providing a reasonable period for discharge. The Recommendation proposed minimum standards as a means of harmonising these aspects of the law.

Evaluation of the implementation of the Commission Recommendation

On 30 September 2015 the Directorate-General for Justice and Consumers of the European Commission published their evaluation of the implementation of the Recommendation (Communication C (2014) 1500 final). It reads very much like a school report beginning with the naming and shaming those member states (Cyprus, Denmark, Ireland and Malta) who have not yet responded to the Commission's questionnaire. The Recommendation notes that only a few member states have undertaken reforms and, even then, there has only been a partial implementation.

Preventative restructuring framework

In assessing how each of the member states has performed in relation to the preventative restructuring procedures the Commission approached the valuation by adopting the same six conditions that in the context of the Recommendation are cumulatively thought to increase the efficiency of restructuring procedures. They are:

- (i) the possibility to file early to avoid insolvency;
- (ii) allowing the debtor to remain in possession;
- (iii) the availability of a stay on individual enforcement;
- (iv) adoption of the restructuring plans by creditors;
- (v) the protection for new finance granted in restructuring; and
- (vi) the extent of the court's involvement.

In terms of the summaries contained in the evaluation, the UK seems to fare well. There are, however, a couple of aspects of the evaluation in relation to the UK that don't seem to accord with the law and practice, for example, there is a reference to the fact that new financing during a restructuring receives super priority or a special status in subsequent insolvency proceedings. Of course while it is possible for creditors to agree to a priority in practice, this is not a feature of the law itself. Likewise, when evaluating the performance of member states in relation to limiting the extent of the court's involvement, it refers to the fact that the court must be involved at the beginning of the process, although negotiations between the debtor and creditors and voting takes place outside of the court. This seems to be a reference to schemes of arrangement but appears to overlook the existence of company voluntary arrangements, which of course can take place entirely outside of the court, unless challenged.

Second chance provisions

In relation to the second chance provision, the evaluation notes that there are still gaps where certain member states do not have any possibility of discharge or have no definite discharge period and in total only eight of the member states comply with the Recommendation.

Member states – could do better?

The conclusion resulting from the evaluation is that while several member states think that they are already compliant, those that do not comply have not taken any action to propose reform and overall the Commission does not consider that the Recommendation has had the desired effect. As such the Commission believes that there is continuing legal uncertainty and investors continue to incur additional costs in assessing the risks and barriers relating to the restructuring of companies in Europe. While the conclusion is clear there is no hint whatsoever as to the Commission's next step within the evaluation paper itself. This is left to a separate document released on the same date by the Commission in the context of the Action Plan for Capital Markets Union (the CMU Action Plan).

CMU Action Plan

The Action Plan is primarily designed to encourage business funding and investment finance. It is based on four key principles:

- (i) creating more opportunities for investors;
- (ii) creating finance for the real economy;
- (iii) fostering a stronger and more resilient financial system with a wider range of funding and ensuring that EU citizens and companies are no longer vulnerable to financial shock; and
- (iv) deepening financial integration and increasing competition.

The Action Plan suggests that a convergence of insolvency and restructuring procedures would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable businesses in distress. Its suggestion for harmonisation is derived in part from the responses received in the Green Paper on CMU, where respondents, it suggests, broadly agree that inefficiencies and diversion of insolvency laws make it harder for investors to assess credit risk especially in cross-border investments. In this respect the analysis also draws upon the assessment of insolvency framework carried out in the World Bank Doing Business report from 2015, which states that many EU member states are five per cent below the average for OECD countries when assessed in relation to the strengths of their restructuring regimes.

Economic analysis

Further insights into the Commission's approach and decision to include a legislative proposal in the Action Plan are contained within the Economic Analysis the Action Plan Comm (2015) 468. The

analysis is based on a combination of factors including responses received in relation to the CMU Green Paper; an INSOL Europe (2010) study on the harmonisation of insolvency law at EU level; and the World Bank Doing Business report 2015. All of which indicate that ineffective and divergent regimes were a deterrent to investment especially when compared to the US.

Much of the analysis appears to relate to the high costs associated with assessing the risk across 28 different member states. These risks appear to be compounded where differences in insolvency framework incentivise debtors to relocate and that relocation results in the application of a different insolvency regime than expected. The difference can also make the

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It is unclear as to what has changed to convince the Commission that it has now become practical to impose a law with such universal scope.”

restructuring of cross-border groups more difficult. Interestingly, and not surprisingly, these aspects do appear to have already been addressed in the Recast Regulation in a number of ways. First, in the assessment of risk, investors will soon (by June 2016) have access to comprehensive summaries of the different regimes operating in the member states to be published by the Commission. Secondly, the extension of the scope of the Recast Regulation to include pre-insolvency and rescue proceedings is clearly in keeping with making the recognition and effect of the proceedings consistent across Europe. Finally, the inclusion of a new mechanism to address group company situations (which at present may appear to be impractical) does provide an additional option for restructuring groups of companies in distress.

The road to a Europe in Union

In the context of the call for evidence on the Recommendation, we have previously suggested that the harmonisation of insolvency law should be left to natural convergence. We had recommended that it should be allowed to evolve naturally at an individual member state level, so that each member state can develop their own regimes in response to the legal and commercial demands, in keeping with the overall themes to promote growth and investment. The recent legislative proposal indicates that the Commission is not content to let things progress in this way. It will be interesting to see how this

aspect of the Action Plan is implemented. The Commission will be under no illusion of the difficulties this will entail, having recently surfaced from the three-year ping pong match with the European Parliament on the Recast Regulation. Interestingly, the recitals to the Recast Regulation still state at paragraph 22 *'This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union.'* It is unclear as to what has changed to convince the Commission that it has now become practical to impose a law with such universal scope. It should be noted the Recast Regulation was an exercise that involved amending the existing Regulation, and mostly consisted of tinkering around the edges or embracing the development of rescue and pre-insolvency proceedings that was already apparent at an individual member state level. The challenge of harmonising the laws (albeit limited to restructuring frameworks and second chances) will, in our view, be quite a tall order.

The Commission's ambition is clearly to ensure that Europe is on a firm footing to compete on a global stage in terms of investment and financing, but whether a harmonised insolvency law is the answer, remains to be seen. One thing is for certain, while the legislative proposal has momentum, it is likely to be some way off. However, it is something we should be monitoring, and seeking to influence.

From a practitioner's perspective, the proposal for legislative change will inevitably involve some challenges but there will also be plenty of opportunities especially for jurisdictions that are renowned for having established restructuring regimes with experienced practitioners. In this regard the Action Plan notes that the proposal for reform *'will seek to address the most important barriers to the free flow of capital, building upon the national regimes that work well.'* This will hopefully mean that the UK is well placed to take advantage and influence the European proposal, as it progresses towards the legislative solution. ▣

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Technical update – Europe, is there more to come?

How will the EU changes affect the UK?

Mention the European Union in the context of insolvency, and most people would probably think of the EC Regulation on Insolvency Proceedings, and possibly the various special regimes for specific institutions. But it is likely that there is more on the way.

The EU Commission has for some time been taking an interest in member states' insolvency regimes. Back in October 2007, as part of its action plan on the European Agenda for Entrepreneurship, the Commission issued a communication addressed to the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, entitled *Overcoming the Stigma of Business Failure – for a Second Chance Policy*. This was discussed by Richard Heis in this column in the summer 2008 edition of *RECOVERY*. To recap – the thrust of the paper can be summarised as follows: growth and jobs depend on support for small- and medium-sized enterprises, and the fostering of a more entrepreneurial culture. Entrepreneurship is inherently risky, but essential for a properly functioning market economy. Addressing the negative consequences of business failure and its

negative image will help to boost enterprise and promote innovation and job creation.

Making the grade

In 2013 the Commission issued a consultation on a new European approach to business failure and insolvency, following which, in March 2014, it issued a Recommendation, the objective of which was to 'encourage member states to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty' and to 'give honest entrepreneurs a second chance'. It set out minimum standards for how it suggested this could be achieved. The Commission expressed the view that: *'The discrepancies between national restructuring frameworks, and between the national rules giving honest entrepreneurs a second chance lead to increased costs and uncertainty in assessing the risks of investing in another member state, fragment conditions for access to credit and result in different recovery rates for creditors. They make the design and adoption of consistent restructuring plans for cross-border groups of companies more difficult. More generally, the discrepancies may serve as disincentives for businesses wishing to establish themselves in different member states.'*

The Commission suggested that, by adopting the minimum standards it set out,

the cost of assessing the risks of investing in another member state would be lowered, recovery rates for creditors would improve and the difficulties in restructuring cross-border groups of companies would be removed. It is the Commission's belief that this would promote entrepreneurship, investment and employment as well as contributing to the reduction of the obstacles to the smooth functioning of the internal market. The Insolvency Service issued a call for evidence on the Commission's Recommendation in February 2015.

In its response to the Commission The Insolvency Service said: *'The UK has a flexible and effective restructuring and insolvency regime that is very much in keeping with the general themes of the EU Recommendation and is recognised across the world for its efficiency, emphasis on business rescue and high levels of returns to creditors. Business recovery, and the restructuring frameworks that enable it, are very important to both national and global economies; that the European Commission is looking into these issues is therefore welcomed... rescue and insolvency however, cannot be viewed in isolation from other national laws that govern fundamental issues such as: security rights, contract law, company law, trusts, tax and employment. The UK's legislative framework is flexible and updated*



as needed in the light of experience and changing market conditions.' Quoting the R3 response to the call for evidence, The Insolvency Service added: 'the effectiveness of a legislative regime depends not only on the rules themselves, but also on the quality of the courts which enforce them, the ability of the practitioners who implement them, and the general prevailing commercial and business culture.'

It is R3's view that in most respects the UK regime already meets, or exceeds, the criteria for a good insolvency and rescue framework set out in the Commission's Recommendations.

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Addressing the negative consequences of business failure and its negative image will help to boost enterprise and promote innovation and job creation.”

Taking action

More recently, the Commission has issued an Action Plan on Building a Capital Markets Union. This follows a consultation carried out in February this year. The purpose of the Action Plan is to: unlock more investment from the EU and the rest of the world; better connect financing to investment projects across the EU; make the financial system more stable; and deepen financial integration and increase competition. The Commission is particularly anxious to improve access to funding for SMEs and identifies a number of obstacles that it considers stand in the way of cross-border investment in the EU. Among other factors it mentions divergent national property and insolvency. The Commission notes that respondents to the consultation broadly agreed that both inefficiency and divergence of insolvency laws make it harder for investors to assess credit risk, particularly in cross-border investments. The 2015 World Bank Doing Business report ranks countries on the strength of their insolvency frameworks on a scale of 0–16. The EU simple average is 11.6, which is five per cent below the OECD average for high income countries (12.2). Some member states score below eight.

The Commission therefore suggests that convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable cross-border groups of companies in financial distress. It proposes principles-based legislation on business insolvency and early restructuring. The objective will be to

build on national regimes that work well and ensure that insolvency regimes across all member states are best in class.

It is very likely that there will be more legislative developments in this area in the near future.

Revised regulations

As for the Insolvency Regulation itself, it has now completed the protracted process of revision and renegotiation, and the final text of the revised Regulation has been agreed. Among the more significant changes are the following:

- Scope – the revised Regulation will encompass a greater variety of proceedings in various member states, including rescue and debtor-in-possession proceedings and so-called pre-insolvency proceedings. UK Companies Act schemes will not be included.
- COMI – if there has been a change of COMI within three months of the opening of insolvency proceedings, the rebuttable presumptions of the location of the COMI will not apply. The court, or in the case of out-of-court appointments, the office holder, must examine whether it has jurisdiction. The debtor or a creditor may challenge the decision opening the proceedings on the grounds of international jurisdiction.
- Secondary proceedings will no longer be restricted to 'winding-up' proceedings, but may be any of the proceedings listed in Annex A. Old Annex B is omitted (old Annex C becoming new Annex B).
- Local creditors and 'Synthetic' secondary proceedings – office holders in main proceedings will be able to give an undertaking that when distributing assets located in another member state in which secondary proceedings could have been opened, they will comply with the distribution and priority rules applicable in that other member state. This should avoid some of the problems and costs currently associated with secondary proceedings, while protecting the interests of local creditors.
- A court receiving a request to open secondary proceedings will have to give notice to the office holder in main proceedings, and give him an opportunity to be heard.
- There are special rules for international jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them.
- Creditors' claims – there will be a standard claim form to enable foreign creditors to submit their claims.
- Insolvency registers – each member state must establish an insolvency register, and the national registers will be interconnected via the European e-Justice Portal. The system has already been piloted for seven member states.
- Groups – there are provisions for group coordination proceedings, which will nevertheless remain voluntary.

The revised Regulation will come into effect in June 2017.

Technical Bulletins

Technical Bulletin 111 was issued in August. Its contents included:

- HMRC – direct recovery of debts.
- Corporate rescue exemption from tax on release of debts.
- Fees – Pension Protection Fund guidance.
- Health and safety for office holders and the Construction (Design and Management) Regulations 2015.

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It is R3's view that in most respects the UK regime already meets, or exceeds, the criteria for a good insolvency and rescue framework set out in the Commission's recommendations.”

- Conditional fee agreements do not infringe human rights.
- Conditional fee arrangement not available in special administration regime.
- IVA – funds received after issue of certificate of completion.
- Companies Act schemes – need for full supporting information.
- Collective redundancies and meaning of 'establishment' – CJEU judgment.

Technical Bulletin 112 was issued in September. Its contents included:

- Legislative Changes Coming into Effect on 1 October 2015
- Aircraft and Airframes – the Cape Town Convention
- Construction Industry Scheme – Changes Effective from 6 April 2015
- VAT – Relocation of VAT 426 Repayment Processing Work
- Pension Schemes – Notes for IPs Issued by the Pensions Regulator
- Wrongful Trading – High Court Decision
- Subject Access Requests – High Court Guidance. □



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Recent case summaries

Latest insolvency update from **Paul J. Dean**.

PERSONAL INSOLVENCY ▼

Rt Hon Rhodri Viscount St Davids v. Lewis [2015] EWHC 2826 (Ch)

Mr Lewis is the trustee in bankruptcy for Viscount St Davids (Lord St Davids). On 19 May 2009 Mr Lewis served a notice upon Lord St Davids pursuant s307 IA 1986 to claim for his bankruptcy estate the beneficial interest of a company in the Seychelles.

S309 IA 1986 stipulates that such a notice must be served within the 42 day period 'beginning with the day on which it first came to the knowledge of the trustee...'

Lord St Davids did not object to the notice until he issued an application five and a half years later. His case was that Mr Lewis had the 'knowledge' required by s307 on three earlier occasions. The application was dismissed.

Lord St Davids was refused permission to appeal by the Registrar but succeeded on paper with Asplin J. Henderson J heard the appeal. He set out the background facts, as found by the Registrar, which included [8] that Lord St Davids:

- was made bankrupt on 17 June 2002;
- failed to cooperate with the OR (Mr Lewis was appointed on 9 April 2003) so his discharge was suspended;
- set up a group of companies in 2003 with a turnover in excess of €250m/yr;
- stated in evidence that 'I ignore Mr Lewis' and 'if a lunatic writes to me, I ignore it';
- completed two bankruptcy questionnaires, which stated that he had not acquired any property since his bankruptcy;
- was discharged from bankruptcy on 28 July 2006.

Decision

The judge noted the commentary in *Sealy & Milman*, which explains that s307 relies upon the bankrupt being honest and informing the trustee that he has acquired property post-bankruptcy via s333(2) and s353(1).

At paragraph 29 the judge said: 'I consider that the court should be slow to accede to a self-serving claim by the bankrupt that his trustee first obtained knowledge at a significantly earlier date... with the convenient result that the section 307 notice served by the trustee would be out of time... in such cases a trustee should normally be held to have first obtained the relevant knowledge... only when it becomes clear to him, on cogent evidence verified to his reasonable satisfaction [and]... it is entirely reasonable that the standard of knowledge required from his trustee... should be set at a fairly high level of certainty.'

The judge found that the Registrar's judgment was 'unassailable' [46&64] and could not 'be faulted' [68]. He concluded that the Registrar adopted 'a realistic approach to the question where the boundary should be drawn between knowledge of an allegation and actual knowledge of a fact...' [69].

Notwithstanding 'determined advocacy' the appeal was dismissed.

CORPORATE INSOLVENCY ▼

Re SSRL Realisations Ltd (in administration) [2015] EWHC 2590 (Ch)

The company was involved in the operation of a well known chain of restaurants. The administrators were appointed as part of a complex pre-pack administration.

The purpose of the administration was to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration): paragraph 3(b) of Schedule B1 Insolvency Act 1986.

Some of the company's assets were sold to STL. This included a Licence to Occupy the Property, pending a formal assignment of the lease to STL by the landlord.

The administrators applied to the landlord for consent to assign the lease or for it to accept a surrender whereby the landlord paid the administrators £1.3m. That request was refused and the landlord served a forfeiture notice for two reasons (1) insolvency and (2) parting with possession.

The administrators refused to consent to forfeiture on the basis that no prejudice would be caused to the landlord as the passing rent would be paid while the company retained the property for the benefit of the administration.

The administrators made a second application for consent to assign. It was refused. The landlord issued an application pursuant to paragraph 43 against the administrators and the tenant company seeking permission to forfeit a lease. The administrators then made a third application for consent. It was also refused.

The administrators' case in evidence was that the landlord's consent to assign had been unreasonably withheld [47]. The administrators also contended that the landlord had a collateral purpose: gaining a financial windfall from refusing consent.

Prior to the hearings in June 2015 the

landlord terminated a Seating Licence, which was not part of the lease in question but was personal to the company. This became a significant event.

The administrators successfully remarketed the property shortly before the first hearing in June 2015 and submitted further evidence. Before the next hearing the landlord obtained evidence from one of those interested parties, which effectively withdrew their interest once they discovered that the Seating Licence had been terminated.

HHJ Spearman QC referred to paragraphs 18–24 (p.174) of *Sunberry Properties Ltd v. Innovate Logistics Ltd* [2009] BCC 164 where the Court of Appeal applied the guidance for s11(3)(d) IA1986 in *Re Atlantic Computers Systems plc* to an application brought under paragraph 43.

He also followed the application of those principles by Briggs J in *Lazari GP Ltd v. Jervis* [2013] BCC 294 to discern the central issues as follows, whether (1) forfeiture was likely to impede the purpose of the administration [90] and (2) if so, how should the legitimate interests of the landlord and the creditors be balanced [110]?

Decision

The judge found that consent to assign had not been unreasonably withheld [92]. He also concluded that forfeiture would not impede the purpose of the administration because the value of the lease (absent to Seating Licence) was 'modest' compared to the estimated shortfall [107–109]. The judge also considered the balancing exercise if the purpose was impeded. He concluded [110] that there were 'grounds for doubting that the Administrators would be able to unlock whatever value the leasehold interest may have' and if successful it would have a 'modest effect on the administration'.

The landlord was given unconditional permission to forfeit. ▣



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► **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

Lee Sennett answers your insolvency questions.

Q I am a liquidator of a company in members' voluntary liquidation (MVL). It is unclear whether the Pensions Regulator (tPR) will issue a financial support direction (FSD) against the company as a result of an insufficiently resourced sister company. How is this dealt with in the liquidation?

A In the first instance, the liquidator will need to ascertain whether a claim has been made or asserted. The liquidator should therefore take appropriate advice, based on the circumstances of the case, as to the likelihood of an FSD being issued. If, based on the advice provided, – FSD is unlikely, the liquidator may declare their intention to make a full and final distribution in the usual way and set a date by which the creditors (including tPR) must submit their claim.

“The liquidator should ascribe a value to the claim based on an active and independent estimate and so long as there is a proper estimation of the claim, the court should not interfere.”

This has two benefits (1) it may cause tPR to step forward in which case the liquidator can consider the claim accordingly or (2) in the absence of the submission of a claim, tPR would be excluded from participating in the distribution (rule 4.182A(5) of the Insolvency Rules 1986 (the Rules)). If there is only one distribution, the creditor loses any right to claim against the company.

If, having taken advice, there is a reasonable prospect of an FSD, then tPR should be treated as a contingent creditor. The Court of Appeal in *Ricoh Europe Holdings BV and others v. Spratt and another* [2013] EWCA Civ 92 confirmed that an MVL can have the effect of compromising a contingent claim despite the fact that

“If, having taken advice, there is a reasonable prospect of an FSD, then tPR should be treated as a contingent creditor”

an MVL is thought of as being a process which pays creditors in full. Further, the purpose of the relevant provisions of the Insolvency Rules 1986 was not so much as to achieve a fair result for each creditor but to allow the liquidation to proceed as efficiently as possible. There was no basis for imposing a duty on a liquidator that would have the effect of putting the progress of the liquidation at the mercy of contingent events.

The liquidator should ascribe a value to the claim based on an active and independent estimate and so long as there is a proper estimation of the claim, the court should not interfere. The liquidator should then advise tPR of the amount (rule 4.86(1) of the Rules) and then proceed as advised above. There is no requirement for the liquidator to delay the distribution awaiting final determination unless there is evidence to suggest that the determination was imminent. There is also no requirement for the liquidator to create a retention fund (although they may wish to do so) as there was nothing in the Rules that gives the liquidator a duty to create one.

Q I am acting as an administrator and the sole director of the company wants to resign. Is this possible?

A The Companies Act 2006 provides that a private company must have at least one director (section 154) who is a natural person (NB corporate directors will be banned from October 2015). Where a company is in breach of this requirement, the Secretary of State can issue a direction (section 156) specifying what the company must do to comply with the direction and the time frame involved. Further, there is

case law that provides that in the absence of a director, the shareholders of the company will appropriate the powers of that director.

From the administrators' perspective, the question is more a practical one (ie is the director required during the administration) and is also dependent largely on whether the company will survive the administration. Arguably, if it is likely that the company will move from administration to creditors' voluntary liquidation or dissolution, then it is questionable whether a director will be missed going forward (the administrator effectively displaces the director as regards control of the company with the wide ranging powers prescribed by Schedule 1 of the Insolvency Act 1986 and the director is still under an obligation to assist/cooperate with the administrator irrespective of whether they resign their

“There is case law that provides that in the absence of a director, the shareholders of the company will appropriate the powers of that director.”

position). If, however, the company is to survive administration, there will need to be a director to hand the company back to. If the individual is resolute on resigning his position in these circumstances, then the administrator will have to comply with the procedures in the company's articles of association to appoint a new director. ▣



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Turbulent times

Crispin Jones and **Renuka Khanna** look at how the FCA and PRA interact with IPs.

In the wake of the financial turbulence that dogged 2008, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) replaced the Financial Services Authority in April 2013 to regulate UK financial services. Broadly, the PRA provides supervision of deposit-taking institutions. The FCA regulates all other entities that carry out a 'regulated activity'. Some entities, including banks, are regulated by both the PRA (in relation to capital, liquidity and risk), and the FCA (for their conduct). This article considers the practical implications and sector-based impact on IPs who might find themselves exposed to the regulatory control of the FCA and PRA.

“In an environment that scrutinises the conduct of banks and IPs, any adverse publicity is unlikely to be helpful.”

Practical considerations

The scope of entities regulated by the FCA/PRA is surprising. At the outset of any engagement, a prudent IP should search the online Financial Services Register at <https://register.fca.org.uk>. IPs should establish whether an entity is regulated, as the FCA/PRA have locus to:

- apply to court to: (i) obtain an administration order; (ii) challenge an administrator's conduct; (iii) challenge voluntary arrangements; (iv) obtain an order pursuant to section 423 of the Insolvency Act 1986; (v) petition for winding-up and/or bankruptcy; and (vi) apply for special administration orders over investment banks (note that IPs have special powers under this regime that are not considered here); and
- be represented at: (i) court hearings, including any hearing at which a receiver applies to the court for directions; and (ii) creditors' meetings, which means the FCA/PRA should be provided with

the same notices/reports that are sent to creditors.

Accurate search terms should cover the name of the entity and, if the court's decision in *M.T.B Motors Limited* [2010] EWHC 3751 (Ch) is to be followed, variants of the entity's name should also be searched. If the entity is regulated there are certain implications, namely:

- the written consent of the FCA/PRA (where the entity is PRA-regulated) is required to validate the proposed appointment of administrators by a company (or its directors). This consent should be filed at court with either the notice of intention to appoint (NOI), or the notice of appointment. Technically, a failure to obtain the consent (if required) constitutes a defect in the appointment capable of validation by the court once the consent has been filed at court. As the FCA/PRA's consent could take a couple of days, it should be sought well in advance of any administrators' appointment, although current case law has shown that the consent filed a day after the NOI will not invalidate such an appointment; and
- IPs, once appointed, should: (i) promptly notify the FCA/PRA and provide the same notices/reports that are sent to creditors; and thereafter (ii) keep the FCA/PRA apprised if either a regulated activity has been carried out by an unauthorised/non-exempt entity, or if the IP wishes to trade a regulated entity.

“At the outset of any engagement, a prudent IP should search the online Financial Services Register.”

Sector impact and publicity

The FCA and PRA also have extensive investigatory/information gathering powers. Recently, Mazars and Promontory Financial Group have been appointed by the FCA as 'Skilled Persons' to investigate allegations that RBS's Global Recoveries

Group was guilty of 'systematic and institutional behaviour in artificially distressing otherwise viable businesses.' The review will sample GRG's former customers, examine these customers' experiences (of GRG), conclude whether poor practices were systematic and make recommendations. Mazars' role as a skilled person, while high profile is also challenging – KPMG's role in a similar capacity reviewing a 'redress scheme' linked to the alleged bank mis-selling scandals, was considered capable of judicial review by the courts.

It will be interesting to see what conclusion the FCA reach following the Mazars review of GRG. However, in an environment that seeks to scrutinise the conduct and independence of banks and IPs,

“Some entities, including banks, are regulated by both the PRA (in relation to capital, liquidity and risk), and the FCA (for their conduct).”

any adverse publicity is unlikely to be helpful. As one of the most important stakeholders in any restructuring or recoveries scenario, the impact of this adverse publicity on financial institutions has a knock-on effect on IPs, who often assist with the restructuring strategy. For those IPs appointed as independent reviewers, their role and independence from the banks could face scrutiny from the media and the courts. It seems that the long tail to the financial turbulence of 2008 isn't quite over yet. ▣

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How do you solve a problem like mis-selling?

Mark Beaumont delves into the murky depths of IRHP mis-selling and advises how IPs can avoid the risks.

Some businesses would have survived the recession were it not for a mis-sold interest rate hedging products (IRHP), but now find themselves insolvent. A successful claim against a bank for mis-selling and the consequential losses is therefore a potential source of revenue for some insolvent businesses, and their creditors. There are though many challenges in bringing a claim of this type because of the:

- complex nature of derivatives contracts;
- banks aggressive approach to litigation;
- challenges in proving consequential losses;
- need for significant litigation funding and after the event (ATE) legal expenses insurance.

Thousands of insolvent businesses are passing through a review set up by the FCA in 2012 (the FSA at the time). This followed the finding that banks had mis-sold IRHPs to SMEs across the country.

Almost 3,500 reviews of consequential loss have been completed, but just four firms have been awarded over £1m by their bank. With so few insolvent businesses receiving significant funds, despite the catastrophic effect of mis-selling on some businesses, there is clearly a need for a comprehensive solution to support IPs and businesses in securing the appropriate redress, but first, let's look at the background.

What is an interest rate hedging product?

IRHPs are products sold to customers at the same time as taking out new loans or renewing existing lending facilities. IRHPs were marketed by banks and financial institutions as an alternative to fixed rate loans as a mechanism to reduce or negate the risk of rising interest rates.

The FCA has identified four principal types of IRHPs:

1. swaps – agreements in which a floating interest rate is 'swapped' with a fixed rate;
2. caps – where a ceiling is set for interest rates above which the customer would not have to pay;
3. simple collars – that give customers a range in which interest rate rises can be limited;
4. structured collars – where the customer

bears the risk of interest rates falling below the lower limit of the collar.

Problem, what problem?

When properly sold, IRHPs can protect customers against the risk of interest rate fluctuations, but some UK banks didn't restrict sales just to those that needed the protection. Many customers did not understand the products or the potential costs ramifications for their business, and yet were put in a position where they felt that they had to purchase an IRHP.

In cases of mis-selling we can ask questions of the bank, such as: did the bank consider whether an IRHP was actually appropriate for the business? Were exit (breakage) costs explained to the customer? Was the IRHP matched to the borrowing, in terms of both value and duration? Did the client understand the impact of the hedge on the banks loan to value (LTV) calculations? Was the bank manipulating the underlying interest rates (LIBOR) while selling the hedge?

Where a business may have fallen victim to a mis-sold IRHP, there are several causes of action to bring a claim against the bank. These include a breach of an established duty of care or failure to comply with regulatory obligations, fraudulent manipulation of underlying interest rates, or negligent and/or fraudulent misrepresentation at the time of sale.

Solution, what solution?

The FSA (now the FCA) identified the problem of IRHP mis-selling and, in agreement with the banks, established a review of sales made since 2001 to 'unsophisticated' customers. Because of the narrow scope of this review, many businesses have been unable to achieve appropriate redress: their business falls outside the parameters of the review, or their most significant losses fall outside the parameters, or the banks are only offering basic redress and not consequential losses.

This means that litigation may be the only viable option to achieve genuine redress for businesses, especially those where the consequential losses are exacerbated by insolvency. Which brings us back to the complex nature of derivatives contracts, and therefore the deep understanding needed to

successfully pursue a claim against a bank.

What IPs need is a professional partner capable of identifying viable claims and accessing the necessary expertise across several key areas:

- understanding the FCA review process, including issues relating to set-off, swap-for-swap offers and tax liabilities flowing out of accepted basis redress offers;
- legal expertise in both insolvency and banking litigation, including specialist lawyers and barristers willing to act on CFAs;
- forensic accounting skills to establish consequential losses;
- consequential liability expertise to assess the true (hidden) LTV ratios being used by banks to assess customers with derivatives contracts;
- innovative 'stepped' litigation funding and ATE insurance to maximise recoveries (funding agreements starting at just 5 per cent of damages recovered).

Pulling all of this together can be complex and expensive, and yet the risks of ignoring potential claims are high for an IP – consequential loss claims can be worth tens of millions, and depriving creditors of the right to pursue claims of this nature could be deemed negligent or worse.

IPs with concerns, or possible claims, should find a partner with genuine expertise in this area and a willingness to triage files for free, with a view towards funding and insuring them for litigation. Once a file has been reviewed there will either be a potential claim or the IP will have comfort to close the file without risking accusations of wilful ignorance. Any genuine claims can then be pursued under a fully funded and insured model that completely de-risks the IP and creates an opportunity to bring value back into the insolvent business to pay off outstanding fees and creditors. ■



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Are investment banks special?

Henry Page reflects on the industry's use of special administrations for investment banks.



Special administrations for investment banks were introduced under the Investment Bank Special Administration Regulations 2011 (SAR), following the financial crash of 2008, and the failure of Lehman Brothers. The government highlighted that investment firms were central to the economy and improvements were needed to ensure that the relevant insolvency professionals had the ability to deal with future failures of investment banks. The SAR therefore sought to learn lessons from Lehman, and were seen to be a means of resolving the conflict between using a traditional administration and allowing for the protection and return of client money.

When do the SAR apply?

The SAR apply to investment banks (see box) and, with the exceptions of needing

“

The government highlighted that investment firms were central to the economy and improvements were needed.”

to achieve the objectives of the special administration (as set out opposite); needing a court appointment, and other minor technical differences such as setting bar dates for client money claims; the procedure is largely the same as that set out in Schedule B1. Therefore, while any insolvency of a financial institution does

require careful planning and experience (as well as appropriate legal advice), the procedure for dealing with a special administration will be essentially familiar to everyone reading this article.

The definition of an investment bank is broad, and will include entities that do not initially stand out as ‘investment banks’. Examples may include foreign exchange brokers, asset managers or stockbrokers. If the SAR apply, because the entity falls within the definition above, special administration is the only option available unless certain conditions are met, essentially that the FCA consents to an alternative procedure, or otherwise does not object for a period of two weeks after being given notice of the preliminary steps taken in respect of the alternative procedure. It should be noted that, where the investment bank is a deposit taker, the bank (or building society) special administration or bank (or building society

What is an investment bank?

Investment banks are institutions, which for the purposes of the SAR, are defined in the Banking Act as:

- having permission under Part 4 of the Financial Services and Markets Act 2000 (FSMA) to carry on at least one of the following regulated activities:
 - *safeguarding and administering investments; and/or*
 - *dealing in investments as principal; and/or*
 - *dealing in investments as agent;*
- holding client assets (whether or not on trust and including money); and
- being incorporated or formed under the law of any part of the UK (this includes companies, limited liability partnerships and partnerships).

However, the regulations do not apply to insurance intermediaries.

insolvency regimes, established by the Banking Act 2009, apply.

Practically, this means that whenever acting in the financial sector an IP will need to ensure that they gain a full understanding of exactly what operations the business carries out, and whether it is authorised under Part 4 of the FSMA and/or the Banking Act.

The special administration objectives

While there are still three objectives to be achieved in a special administration, they are not prescriptively ranked by the SAR, or exclusive of each other, with all three objectives to be pursued, rather than the waterfall ranking of Paragraph 3(1) of Schedule B1 (which we all know and love!). This gives the special administrator the flexibility to prioritise the objectives within the special administration proposals (unless otherwise directed by the FCA) in order to achieve the best overall result for clients and creditors.

The special administration objectives are:

- to ensure the return of client assets as soon as is reasonably practicable;
- to ensure the timely engagement with the authorities (the Bank of England, the Treasury and the FCA) and market infrastructure bodies; and
- to rescue the investment bank as a going concern or to wind it up in the best interests of the creditors.

The FCA does have the power (after consultation with the Treasury and the Bank of England) to direct the insolvency practitioner to prioritise one of the objectives at the expense of another if necessary to maintain the public confidence in the stability of the UK financial markets. Although under the FSMA the FCA has always had the ability to override an administration appointment, they do not have the ability to intervene in the pursuit of an ordinary administrator's objectives. The ability to impose such a direction on

a special administrator is a significant difference of the SAR regime.

As with a normal administration, the special administrators will set out how the special administration objectives will be achieved in a statement of proposals to be approved by the creditors, and circulated to both the creditors and the clients of the investment bank, along with the relevant authorities.

Potential for insolvencies great and small

The first special administration under the SAR was MF Global UK Limited, where KPMG were appointed on 31 October 2011, some eight months after the SAR came into force. At the time of writing MF Global is approaching its fourth anniversary, having

“
The scope of to whom the SAR apply is broad, encompassing many financial markets businesses, where options in insolvency will be restricted without the authority of the FCA.”

largely achieved its objectives of returning substantially all client money, and having paid unsecured dividends approaching 90p in the pound.

However, over recent years the perception of the SAR has moved on from being solely associated with the likes of Lehman and MF Global style mega-insolvencies, to being a legitimate, usable tool in any relevant qualifying insolvency situation. Indeed, a qualifying investment bank, as defined above, must enter special administration as opposed to another insolvency process unless otherwise approved by the FCA, and indeed the regulation notes that some of the businesses may be small businesses. Recent special administrations undertaken by a number of medium-sized insolvency practices demonstrate the more widespread use of the SAR. Other such appointments include City Equities Limited, Hartmann Capital Limited, Pritchard Stockbrokers Limited, LQD Markets (UK) Limited and Boston Prime Limited.

Having been involved in various aspects of a number of special administrations since initially trading MF Global claims three years ago, it struck me earlier this year that the SAR apply to many financial markets businesses whose insolvency options are therefore limited. Advice in relation to

various special administrations has included assisting investors with money tied up in special administrations on how to comply with conditions attached to bar-dates for submitting claims, as well as offering more general advice on the implications and requirements contained within the often acronym- and jargon-heavy proposals and reports issued by joint special administrators. We have also provided pre-appointment advice to corporate clients prior to entering special administration.

IPs have become used to regulation change and the absorption of new laws as part of our day-to-day working lives, and some of the changes made it more difficult to achieve a successful outcome from an insolvent situation.

However, having now got to a point where there have been a significant number of special administrations, undertaken by a number of different firms and with interaction broadly across the industry, we have a regime that seems to be working well. While it is still relatively early days with the legislation only in its fourth year, it seems to provide the ability to deal with client assets, and minimise disruption to the financial sector, as it set out to do.

Responding to crises

Credit must go to the profession for not approaching the SAR with trepidation, which others less used to regulation change might have done and for getting to grips with the regime and achieving successful outcomes for clients and creditors.

Other special administration regimes cover railways companies; water, electricity and gas transporters and suppliers; air traffic service providers; NHS and Foundation Trusts; and public-private partnerships. Other industries such as oil and gas are potentially ripe for the implementation of a special insolvency regime.

Special regimes are obviously something that are here to stay, and have become the standard response to crises in industries of national importance such as health, transport and the financial markets, where the underlying national interest must be promoted ahead of creditors. At a time when the profession is facing challenges in relation to its public perception on a number of issues, to be central to successive governments' response to such crises, ensuring that core services, logistics and markets are kept operational, is potentially rewarding. □



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Power to the people?

Steven Mash asks if multi-party litigation is the future for recoveries.

For many years, group litigation and class actions have been synonymous with the United States: big claims, reams of claimants and damages measuring in the many millions. More recently, however, we are seeing litigation being brought in this jurisdiction by groups of claimants, borrowing in some respects from the US model but applying a very British spin to it. Are the English courts about to be inundated with American style class action proceedings and, if so, are they adequately equipped to cope with them?

In short, the answer to the first question is no, or at least not for a while. While Americans are more litigious as a nation and claimants reap the benefits of punitive damages, the English model of litigation doesn't encourage litigation for the sake of it. Our 'loser pays' costs system discourages speculative litigation and although third party funding is becoming more and more prevalent, it is still not universally accepted or understood (and funders, ultimately, are

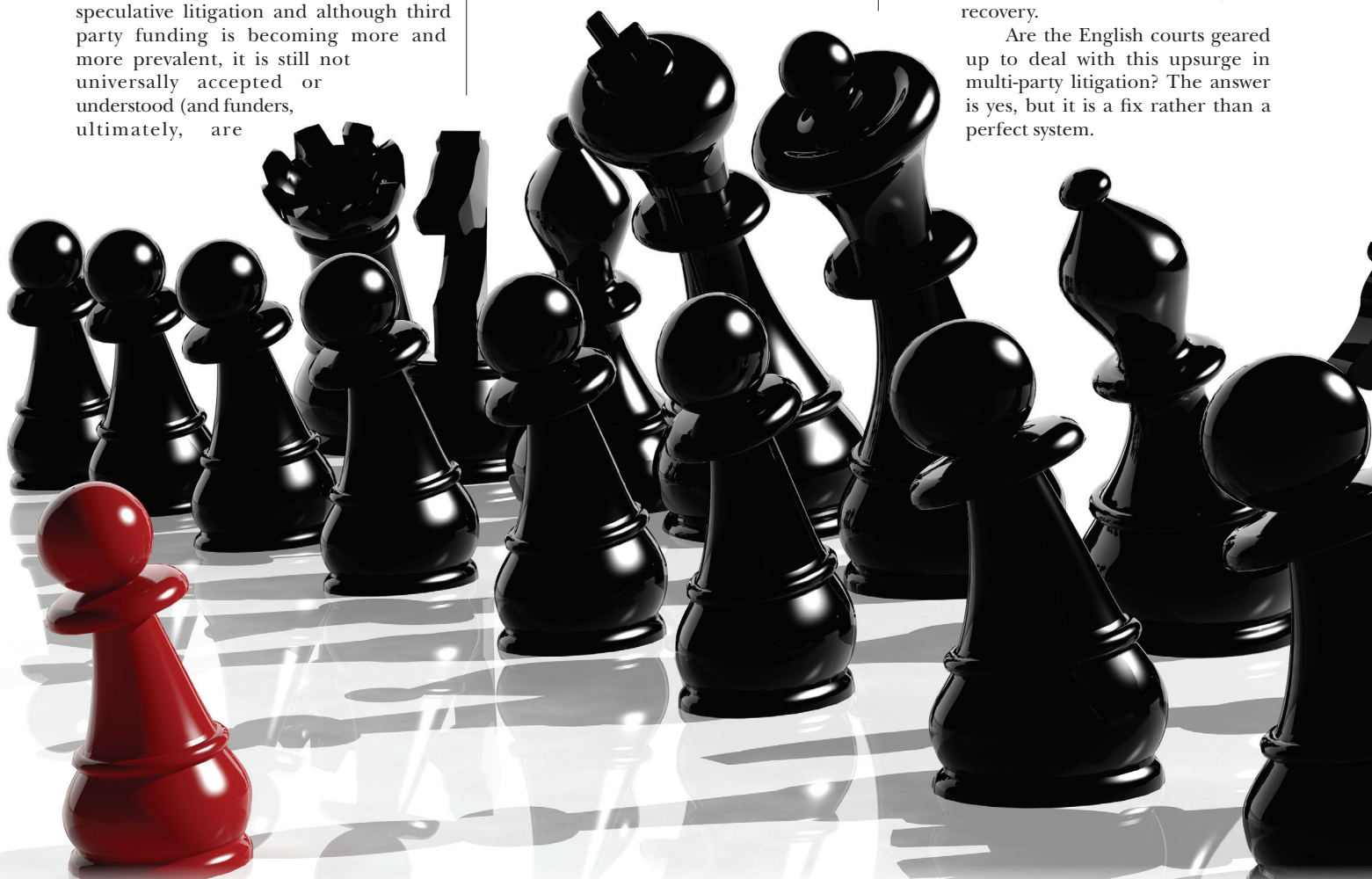
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While Americans are more litigious as a nation and claimants reap the benefits of punitive damages, the English model of litigation doesn't encourage litigation for the sake of it.”

businessmen who want to achieve a return so won't fund a matter unless there are good prospects of success).

However, businesses are becoming more alert to the concept that litigation is not just for when a contract has gone wrong or for when someone has not done as they agreed to do. Forward thinking companies, and individuals, are recognising that litigation can be and is a business tool that can reap substantial rewards. The recent or threatened multi-claimant actions against Royal Bank of Scotland, Lloyds Bank, Tesco plc and Volkswagen demonstrate that individuals and businesses alike are joining together in very substantial proceedings (the above claims vary in total value from the hundreds of millions to billions of pounds) in order to take steps to get restitution from institutions where one would not automatically assume there was a right of recovery.

Are the English courts geared up to deal with this upsurge in multi-party litigation? The answer is yes, but it is a fix rather than a perfect system.



Group litigation orders

Under the US class action model, a claim is brought by a claimant on behalf of the class of claimants who have suffered loss against the same defendant in the same way. Once endorsed by the appropriate court, the class is certified and anyone who falls within the class criteria is deemed included within the class, unless they elect to opt out. If they choose to opt out, they cannot take advantage of any favourable judgment that the class action might obtain, but similarly they are not bound by an unfavourable settlement and can bring proceedings in their own right if they so desire.

The English model is very different. Rather than class actions, we have group litigation orders (GLOs). GLOs are made where there are a number of claims, a number of parties and 'common issues of fact or law' will arise in those claims. A claimant does not have an automatic right to a GLO: the court has to sanction it and, depending on which court the GLO is being sought in, will have to receive consent from the head of that division.

Of particular import, however, is that unlike the US model there is no concept of automatic inclusion in a class (although see below for a recent development that qualifies this general position). Rather, under English law there is a need for a wilful 'opt in' by a prospective claimant, in that the prospective claimant will need to commence proceedings (which can be done in common with a number of other parties if they have community of interest) in order to bring that claim under the provisions of

the GLO. Once the GLO is granted, all claims that fall within the issues identified in the GLO as being 'GLO issues' will be dealt with together under that GLO. They will be entered on the Group Register and will be bound by any judgment or order made in relation to the GLO issues, but it is a necessary first step on the part of a prospective claimant that they issue a claim that falls within the provisions of the GLO.

“
Businesses are becoming more alert to the concept that litigation is not just for when a contract has gone wrong or for when someone has not done as they agreed to do.”

There is no catch-all class concept in our jurisdiction.

In order to obtain a GLO:

- two or more claims need to have common issues of fact or law;
- the application for a GLO can be made before or after the claims have been issued;
- the application needs to provide a summary of the nature of the litigation, the number and nature of claims already issued, the number of parties likely to be involved, the common issues of fact or law that are likely to arise in the litigation and whether or not there are any matters that 'distinguish smaller groups within the wider group'.

Conducting a claim

Assuming the Court is satisfied that the case is suitable for case management under the provisions of a GLO, it will order that a GLO be made and that a group register be established. The register records all of those claims that fall to be governed under the provisions of the GLO. The court will then hand down further directions for the conduct of the claim, in some instances identifying claims on the register as being suitable to be prosecuted as test cases (in which instance the other claims subject to the GLO will be stayed pending resolution of those test cases) and appointing a lead solicitor to have conduct of the claims on behalf of the claimants (or, in some instances, defendants).

Why should claimants seek a GLO? There are two main reasons:

1. community of interest among the claimant group means that it is possible for claimants who would not normally have either the financial ability or access to technical resources to go up against substantial institutions, and to band together to bring claims that without the GLO mechanism would either be economically or logistically impossible to bring;
2. if the claimant group is unsuccessful in relation to some, or indeed all, of the GLO issues, each individual claimant member is liable only for an equal proportion of the common costs (being costs that are not specific to one particular party) incurred in the GLO proceedings. There is no joint liability for costs: a claimant is only liable to pay its discrete share of those common costs and accordingly isn't exposed to other claimants' proportion of those costs should they fail to (or be unable to) pay them.

As alluded to above, there has been a very recent development, which potentially changes how multi-party claims are brought in this jurisdiction following the enactment of the Consumer Rights Act 2015. That Act has amended the Competition Act 1988 and now provides that where collective proceedings are brought before the Competition Appeal Tribunal (the CAT) and the CAT makes a collective proceedings order, those proceedings can be declared by the CAT to be either 'opt in' or 'opt out' proceedings (namely requiring a conscious decision to join into the proceedings or requiring a conscious decision to exclude your claim from those proceedings). There is, therefore, for the first time in our jurisdiction the concept of a class action if the CAT makes an 'opt out' collective proceedings order.

Whether or not this change to how competition cases are conducted will have a material impact on how multi-party actions are brought in this jurisdiction is something to keep under careful observation, but it is unlikely to result in a dramatic change in the short term. As of the time of writing, there are only 17 GLOs recorded at the Ministry of Justice as being in effect. It seems we have some way to go until the English legal landscape looks like that of our colleagues across the Atlantic. □



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Ice cold in Abu

Crowdfunding the Caterham Formula One team to the final race.

In October 2014 Finbarr O'Connell, Henry Shinnars and Anthony Spicer were appointed joint administrators of Caterham Sports Limited (CSL) and then in November 2014 joint administrators of 1 Malaysia Racing Sdn Bhd (MRT). Together these companies raced as Caterham Formula One (CaterhamF1).

CSL provided the technical expertise, equipment and employees to allow CaterhamF1 to race. MRT was the racing entity and Formula One participant, which contracted with the drivers and some of the key race partners/suppliers.

As administrators of both CSL and MRT, we looked to sell CaterhamF1 as a going concern. Our advisers, motor racing experts Wyles Hardy, had informed us that the value of the assets, intellectual property, premises and even the right to race in Formula One would be greatly enhanced by doing so.

However, by the time we were appointed joint administrator of MRT, CaterhamF1 had already missed two races and was at risk of elimination from the competition, and thereby from future seasons, if it were to miss two more.

Problems reaching the start line

Although we immediately publicised CaterhamF1 as being for sale we received little immediate credible interest in the team. Unfortunately, nobody came forward that could immediately purchase CaterhamF1 or was willing to fund participation at the season's final race in Abu Dhabi. Our Formula One advisers informed us, in no uncertain terms, that unless this team raced it was as good as dead.

Participating in Abu Dhabi was crucial if we were to have any prospect of saving CaterhamF1 as a going concern, preserving hundreds of jobs, maximising realisations in the administration and preserving an iconic Formula One team. We all felt that it was a case of 'Abu Dhabi or bust'.

Both companies in administration had been in financial difficulty for some time and had no cash reserves to call upon. Major creditors, although incredibly supportive of our efforts to race the team, were not able to cash fund CaterhamF1 at Abu Dhabi.

We refused to accept that CaterhamF1 would not be able to race in Abu Dhabi and potentially lose out on very significant asset value enhancements. Also, there was a \$1.6m (c.£1m) penalty from Formula One Management (FOM) for each race missed.

With only just over two weeks to the race, a week until equipment would have to start to be shipped to the Middle East,



and race suppliers looking for immediate commitments, we needed to stay cool, hold our nerve and move quickly. We had initially considered borrowing from alternative lenders and we did secure some short-term funding to assist us in the initial race preparations. However, we needed additional funding and to raise awareness of the opportunity to purchase CaterhamF1.

Fan-funded Formula One

After some deliberation, where a variety of ideas were considered, we turned to crowdfunding. Initially we thought that, with a worldwide appeal, we might find a few thousand fans to each fund £1,000. However, it quickly became apparent to us that this would not be possible but that we might be able to attract a much larger pool of funders, although each with a smaller individual contribution.

With this in mind, we were introduced to Crowdcube (@Crowdcube, www.crowdcube.com). Luke Lang, co-founder of Crowdcube, immediately saw the potential for a global crowdfunding appeal and from our very first meeting he and his team were incredibly supportive. Together with Crowdcube, our partner Guy Rigby, Wyles Hardy and our lawyers Mishcon de Reya, we devised the infrastructure of the crowdfunding appeal within 72 hours.

CaterhamF1 and Formula One fans embraced the idea of supporting the appeal and were each rewarded with CaterhamF1 memorabilia whose value was relative to the value of their support. There are many possible crowdfunding structures and the one we elected for was a reward-based approach, rather than the more usual equity contribution variety.

Within two weeks we received more than 6,000 pledges of support worldwide,

raising sufficient funds to enable us to compete in the Abu Dhabi Grand Prix.

Without the funds raised from this crowdfunding appeal and the support received from our key racing partners (being Renault, Red Bull and Pirelli), who contributed their support in kind, CaterhamF1 would not have been able to participate in the Abu Dhabi Grand Prix.

The final flag

Unfortunately we were unable to sell CaterhamF1 as a going concern. As you might imagine the running costs of a Formula One team are not for the faint hearted and many large corporations and even billionaires have shied away from acquiring a Formula One team. However, through the increased public awareness of CaterhamF1, brought about by virtue of its crowdfunding and racing efforts, we did, ultimately, sell all of its assets for considerably more than originally estimated.

We are always looking for ways to realise value for companies and/or creditors in distressed scenarios. Through our initiative in this case, the restructuring community now considers crowdfunding as part of their toolbox to raise funds for distressed businesses alongside more traditional high street or peer-to-peer methods. □

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020 7131 4339

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023 8082 7600

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Smith & Williamson is delighted to announce the appointment of Greg Palfrey as the new National Head of Restructuring & Recovery Services and Henry Shinnars as the new Head of Restructuring & Recovery Services in London. Together, they have almost half a century of insolvency and restructuring experience.

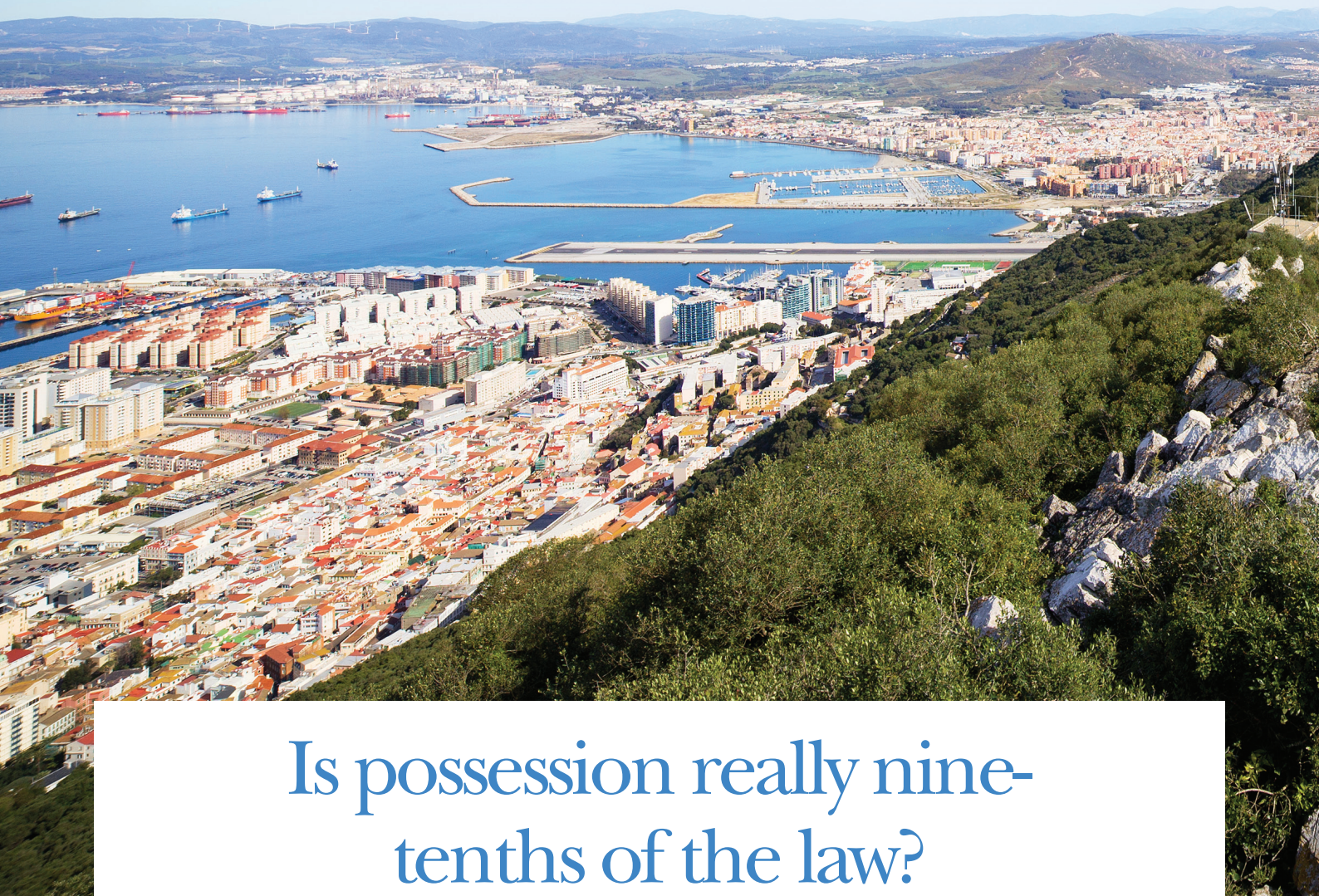
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* Accountancy Age, 2015

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Is possession really nine-tenths of the law?

Adrian Hyde paints a picture of the tricky issues around asset ownership rights.

Over recent months several situations have arisen where we've been forced to consider who owns an asset, and how title is decided where the evidence of ownership is imperfect. The most challenging of these cases has just been resolved in a trial and I thought that a review of the law on the area may be of use to practitioners.

So, following our appointment as provisional liquidators of a partnership operating a law firm, we took possession of the office premises. We were subsequently appointed liquidators of the firm, on the winding-up hearing, and thereafter trustees in bankruptcy of the individual partners. However, in addition to the usual office furniture, business records and case files, there were a large number of paintings and other artefacts. The paintings included a collection of some 60 works by Jacobo Azagury, a famous Gibraltar artist. The collection comprises the majority of his surviving works. These, and other items, were expected to realise a substantial sum and this was therefore an issue of some importance in the case.

Claims to the items were received from members of the bankrupt's family (in various

guises), but they disclosed no documentary evidence to support their alleged ownership. A search of the premises also uncovered no meaningful records that could shed any light on the ownership of the items.

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The law in this area goes back centuries.”

Stand and deliver

The family's position was simple – they relied on the principle ‘*nemo dat quod non habet*’, basically, you can't give better than what you have, ie they said that we couldn't give anyone title to the assets when we ourselves didn't have title. But that rather put the cart before the horse as the more important question was who, as a matter of law, was to be regarded as owner in the first place.

The law in this area goes back centuries, with many cases involving criminal possession of items. The basic principle can be seen from this example: a robber (lets call him Highwayman 1) has stolen a watch and treats it as his own. He himself is then

robbed by Highwayman 2. Rather boldly, Highwayman 1 sues Highwayman 2 to get 'his' watch back. Assuming that Highwayman 1 can evidence that he previously had the watch, but neither Highwayman can show that they purchased the watch, how does the court decide?

The owner of an asset has *de facto* possession of that asset, and conversely, *de facto* possession of an item gives the party holding it *prima facie* evidence of ownership¹. The application of this principle to the Highwayman facts leads to the conclusion that when Highwayman 1 had the watch, he was owner (at least he was as against Highwayman 2). So, on the basis that he could show that the watch was stolen by Highwayman 2, he was entitled to it back!

Turning back to the office premises, the items were in the possession of the firm at the point when the provisional liquidators were appointed. Applying the *de facto* possession analysis, there is therefore an evidential presumption that the firm, as party in possession, is the owner of the same². This gave the liquidators *prima facie* evidence of title, and that presumption continues unless and until someone can show that they have superior title. The important point for us as office holders was



that the burden of proof rested with those claiming title – we had our position arising from possession, and unless they could demonstrate a superior interest, the court would properly declare us to be the owners of the assets, and allow us to proceed with a sale. The family needed to provide enough evidence to rebut the presumption.

While it sounds like a simple matter to say whether or not evidence provided does rebut the presumption, in practice, it is far from simple. In this case, the items concerned were paintings, antiques and other artefacts. Due to the age of the items, and the period during which they appeared to have been owned by the family, there was no possibility of producing receipts. The issue for the court was therefore to consider the explanation put forward by the defendants, and the evidence to support it, and balance that against the presumption to which the liquidators were entitled.

Missing papers

The family had put forward several explanations, and as holes were pointed out in each, new ones were alleged. It was initially alleged that the paintings formed part of a family trust, but when investigations were carried out we found

that the documentation for this had never been completed and the trust never formed. The family alleged that the art formed part of their father's estate, was therefore transferred to their mother under his will, and from her to them under her intestacy. Again, on investigation, the value of their father's estate for probate, and of their mother's under letters of administration, could not have included the collection.

Ultimately, there was any number of ways by which the paintings could have passed from the estate of their father into the hands of the firm; they could have been on loan to the firm from the father or mother, or from the partners and their siblings. They could have been an *inter vivos* gift by the father or mother to the partners of the firm – the permutations are endless. In the circumstances the court found it improbable that there had been any *inter vivos* disposition without any documentation, and that there were flaws in each of the scenarios advanced by the family, none of which were supported by cogent evidence. Accordingly the court found that there was insufficient evidence to rebut the presumptions in the liquidators' favour.

When an insolvency situation ensues, rarely, if ever, are the documents in 'apple

pie order' to deal with every situation that a practitioner comes across. It is worth bearing in mind, when you find yourself in possession of assets and perhaps unsure as to what to do, and most importantly, what your rights are regarding those assets, that you consider the position carefully. A situation that can appear quite bleak because of a lack of evidence in your favour can in fact be far more positive if no-one else is actually in a better position... and in those situations, possession really is nine-tenths of the law. ■

1. Halsbury's Laws of England/Personal Property - Volume 80 (2013) 5th Edition, Paragraph 839: Possession by owner; and see also The Winkfield [1902] P 42 at page 60.
2. Halsbury's Laws of England/Civil Procedure - Volume 11 (2009) 5th Edition; Volume 12 (2009) 5th Edition, Paragraph 1071: Acts of ownership.



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Shining a light on statutory demands

Chloe Poskitt takes a look at whether there is greater clarity on statutory demands following recent High Court rulings.

All practitioners will be aware of the increase to the bankruptcy threshold from £750 to £5,000 on 1 October 2015. The limit was last set 30 years ago, in 1986, and some consider the change to be long overdue, arguing that a threshold of £750 was far too low. Others say it will make debt recovery more difficult.

A statutory demand, as a precursor to bankruptcy proceedings, can be an effective tool as it does not involve the courts, it is relatively quick and inexpensive and it often results in prompt payment of a debt, or flushes out details of any disputes/cross-claims. Once served with a statutory demand, a debtor must either satisfy the debt within 21 days or apply to have the statutory demand set aside within 18 days from the date it was served (or from the date it was advertised, if applicable).

When an application to set aside a statutory demand has been made, the time for complying with the demand stops until the application is determined or dismissed (rule 6.4(3), Insolvency Rules 1986 (IR)). One of the conditions for the presentation of a bankruptcy petition is that there is no outstanding application to set aside a statutory demand (section 267(2)(d), Insolvency Act 1986).

Under IR 6.5(4), the court can grant an application to set aside a statutory demand if:

- '(a) the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or*
- (b) the debt is disputed on grounds which appear to the court to be substantial; or*
- (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or*
- (d) the court is satisfied, on other grounds, that the demand ought to be set aside.'*

This article will look at the tests applied by the courts under grounds (b) as to a

substantial dispute, including the test when a dispute is raised on an application to annul a bankruptcy order, and (d) other grounds including some recent decisions concerning illegality and cross-claims where the debt was reduced below the bankruptcy threshold.

Substantial dispute and the threshold of evidence

Substantial dispute under IR 6.5(4)(b) is commonly the most relied upon ground and reflects the policy reasons underlying the use of statutory demands. Statutory demands serve to identify whether the debtor has grounds to challenge a debt. If not, then the creditor is usually entitled to present a bankruptcy petition. If, however, there is a dispute about the indebtedness, the appropriate course is for the creditor to bring ordinary proceedings in either the county or High Court. The rationale behind this is that the bankruptcy courts are not the appropriate forum for resolving such disputes.



It is clear that there is a high threshold to be applied to the evidence before the court in determining the application.

Therefore, when dealing with an application under IR 6.4(4)(b), the hearing should not be a mini trial of the debtor's liability to the creditor but rather establishing whether a trial should in fact take place.

As to what a debtor needs to show in order to establish that the debt is disputed on grounds which appear substantial, the approach by the courts has not been entirely clear. This is further complicated by the second test outlined within the Practice Direction

on Insolvency Proceedings 2014, which states that where, *'the debtor (a) claims to have a counterclaim, set-off or cross-demand (whether or not he could have raised it in the action in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand or (b) disputes the debt (not being a debt subject to a judgment, order, liability order, costs certificate or tax assessment) the court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue.'*

The courts have confirmed that the meaning of 'genuine triable issue' is equivalent to the Civil Procedural Rules test of a real prospect of success in a summary judgment application (*Ashworth v. Newnote Limited* [2007] EWCA Civ 793 (para 33), [2007] All ER (D) 436 (Jul)). The same test applies to applications to set aside a statutory demand where the debtor alleges that he has the benefit of a counterclaim, set-off or cross-demand under IR 6.4(5)(a). The debtor does not need to prove (as he would at trial) his counterclaim, set-off or cross-demand but rather must satisfy the court that he has a real prospect of successfully establishing those defences.

The requirements to satisfy this test are set out in *Colliery P & MJ Wright (Holdings) Limited* [2008] 1 WLR 643 where Lady Justice Arden held that *'the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there was some evidence to support the applicant's version of facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it was inherently implausible or if it was contradicted, or was not supported, by contemporaneous documentation'* (at 653B).

It is therefore clear that there is a high threshold to be applied to the evidence before the court in determining the application.



Conflicting approaches by the courts

Sometimes a debtor may not apply to have the statutory demand set aside and, therefore, a creditor presents a petition for the debtor's bankruptcy. However, that does not preclude the debtor from raising a dispute at the hearing of the bankruptcy petition or, in certain cases, at the hearing appealing the bankruptcy order itself.

The courts have adopted conflicting approaches as to the tests applied in relation to a statutory demand and the hearing of a petition on the one side and an application to annul a bankruptcy order on the other. In the case of *Guinan III v. Caldwell Associates* [2004] BPIR 531, the court held that the test for all cases is whether there is 'a genuine triable issue'. However, in *Flett v. Revenue and Customs Commissioners* [2010] EWHC 2662 (Ch), the court held on an application to annul a bankruptcy order, that the burden of

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When dealing with an application under IR 6.4(4) (b), the hearing should not be a mini trial of the debtor's liability to the creditor but rather establishing whether a trial should in fact take place.”

proof was on the debtor to demonstrate that, on the balance of probabilities, the petition debt is not owed. The court held that it was

not enough for a debtor to say at the time of an application for an annulment that he had an arguable defence to the petition debt; he had to establish that he did not in fact owe the money.

This conflict was explored in the recent case of *Woolsey v. Payne* [2015] EWHC 968 (Ch), which concerned whether the test for an application to set aside a statutory demand or to defend a bankruptcy petition, where the debt is disputed on grounds that appear to be substantial, is the same as the test for annulling a bankruptcy order already made. One ground that a court may annul a bankruptcy order is under section 282(1) (a) of the Insolvency Act 1986 if at any time it appears that 'on any grounds existing at the time the order was made, the order ought not to have been made.'

In *Re Payne*, a creditor, who was a property developer, lent money to a husband »

and wife. He served statutory demands on both of them and subsequently obtained a bankruptcy against the wife only, as a bankruptcy petition had already been issued against the husband by another creditor (which was subsequently dismissed). The wife applied for annulment of the bankruptcy order and the husband applied (out of time) to have the statutory demand set aside.

The court in *Re Payne* adopted the approach in *Guinan III*, and decided there was no such distinction, and the test that applies is whether the debt is genuinely disputed. There were a number of reasons for this decision, one of which being that the application of different tests at different stages could produce curious results, insofar as, in *Re Payne*, it might have led to the husband succeeding in setting aside the statutory demand, but the wife failing to overcome the higher hurdle in respect of setting aside the bankruptcy order.

Accordingly, the same test applies regardless of what stage in the process the dispute is raised.

Cross-claims and illegality

Other grounds under IR 6.5(4)(d) is a broad area as the court has a residual discretion to set aside a statutory demand that 'ought' to be set aside.

As to in what circumstances a demand 'ought to be set aside', the recent case of *Maud v. Libyan Investment Authority* [2015] EWHC 1625 (Ch) confirmed that the correct test to apply where an application to set aside a statutory demand that is founded on IR 6.5(4)(d), is for the court to consider whether the interests of justice require it.

In that case, the Libyan Investment Authority (LIA) served a statutory demand claiming a debt of more than £17.5m pursuant to a guarantee entered into by Mr Maud, as his company had defaulted. There was no dispute that the debt was due and Mr Maud acknowledged that he did not have the means to pay the debt.

Mr Maud challenged the statutory demand on the basis that to pay would amount to a breach of a sanctions regime in place against Libya and he relied on the illegality of the payment as either constituting a substantial dispute under IR 6.5(4)(b) or 'other grounds' under IR 6.5(4)(d).

Applying the interests of justice test, the court held that it would be unjust if a creditor were able to present a bankruptcy petition in circumstances where to otherwise make any payment of the sum demanded would be in breach of a sanctions regime and expose Mr Maud to criminal penalties. Accordingly, the statutory demand was set aside.

While this case will have limited application in light of its facts, it does provide some useful authority that where a sum claimed in a statutory demand can only be paid by undertaking an illegal act, the demand ought to be set aside under IR 6.5(4)(d).

What can also be taken from that case is that what amounts to being in the 'interests of justice' is dependent upon the facts. For example, historically, case law has established that in a case where part of the debt specified in the statutory demand is disputed and the undisputed part is less than the bankruptcy

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A statutory demand, as a precursor to bankruptcy proceedings, can be an effective tool as it does not involve the courts, it is relatively quick and inexpensive and it often results in prompt payment of a debt, or flushes out details of any disputes/cross-claims.”

threshold, it is appropriate to set aside the demand pursuant to IR 6.5(d).

However, the court in the recent case of *Mark Howell v. Lerwick Commercial Mortgage Corporation Ltd* [2015] EWHC 1177 (Ch) decided that a similar principle should not apply where the debtor did not raise a dispute to the debt, but instead raised a cross-claim, which, if set-off against the debt, would leave less than the bankruptcy threshold outstanding.

The High Court held that a statutory demand should not necessarily be set aside just because under IR 6.5(4)(d) the debt would be less than the threshold, if there is a suggestion of any other debts. The reasoning behind this decision is as follows:

1. There is no requirement that each individual debt contained within a statutory demand must amount to at least £5,000. There could be a number of debts included in a statutory demand that aggregate to £5,000, and each debt is claimable within the statutory demand.
2. An amount under £5,000 will not on its own justify presenting a petition, but the creditor may have another debt and can seek to add these together, or may join with another creditor.
3. The fact that the undisputed part of the debt is less than £5,000 does not alone mean that the debt (or statutory demand including the debt) is liable to be set aside under the court's residual discretion under IR 6.5(4)(d), as the creditor can rely on the undisputed part of the debt forming at least part of the basis for a petition.

Therefore, the widespread belief that all a debtor had to do to set aside a demand was

demonstrate that the debt was disputed or that a cross-claim existed, to reduce the debt demanded to less than £5,000, no longer rings true. The distinction in the *Howell* case is that there were other debts owed by the debtor, not solely limited to those contained within the statutory demand.

In situations such as this, the key issue will be whether there are other debts or creditors. If a debt and cross-claim are close, debtors will be seeking to demonstrate that there are no other debts/creditors and creditors will seek to demonstrate that even if the undisputed sum is less than £5,000, the debt could still form the basis of a petition in conjunction with other debts/creditors. Practically speaking, this may also result in creditors joining forces as if one debtor owes debts to several creditors, each of which is under £5,000, one statutory demand may succeed if the evidence of the other creditors' debts can be produced.

Comment

Statutory demands serve a vital role in the bankruptcy system but they are often used in the wrong circumstances as it is not for the Chief Registrar to determine substantial disputes of fact in insolvency proceedings. This is why where the debt is 'genuinely disputed', the use of insolvency proceedings is not the appropriate course of action. Whether there is a genuine dispute can often be difficult to determine and where a debtor is 'trying it on', creditors should persevere but with the knowledge that if the court finds it all too difficult to determine summarily, there may be costs consequences in doing so.

The courts are clearly adopting a more holistic approach as to the solvency of the debtor by looking at all of the other debts or creditors, not just solely those contained within the statutory demand. Even if a debtor raises a dispute by maintaining that he has a cross-claim, the debtor still has to establish that there is a 'genuine triable issue' in respect of the disputed debt. Further, the decision in *Howell* demonstrates that a small undisputed debt can still form the basis of a petition in conjunction with other debts/creditors.

Therefore, make sure to keep your friends close but other creditors closer. □



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R3 Vacancy – technical director

Applications are invited from suitably qualified candidates for this important role within R3. The present incumbent will be retiring around the end of 2015 and it would be desirable for their replacement to commence beforehand.

The role

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- Arranging, and sometimes drafting, content for R3's Recovery magazine.
- Liaising with the Education, Courses and Conferences Committee, and presenting on technical matters at R3 and other relevant conferences.
- Ensuring the R3 internet site's technical content remains up to date.
- Managing support staff.
- Occasionally delivering technical training.
- Providing support to the Chairman of the R3 General Technical Committee.
- Acting as secretary of the General Technical Committee, general committee support, and liaising with committee members and working groups as required on ad hoc projects.
- Liaising with R3 Scottish Technical Committee.

R3's Technical Director should...

- Have at least 10 years professionally qualified as an accountant or lawyer.
- Be an insolvency licence holder, or be JIEB-qualified.
- Possess demonstrable, practical experience of UK corporate and personal insolvency work (an awareness of Scottish personal insolvency procedures being helpful, but not a prerequisite). This will include a familiarity with: tax issues affecting IPs and the estates they manage; recent legislation; and judgements bearing upon the work of insolvency professionals.
- Have confidence in their own ability; and be well used to working with internal and external committees comprising technical experts.
- Be able to deliver personal work on time and to standard; and, where 'managing' others, recognising that industry members of R3 committees have full time day jobs.
- Be able to articulate and explain complex, technical insolvency issues to both fellow experts and 'lay' people: politicians, press and other stakeholders.
- Be highly skilled in analysing and interpreting statutory and regulatory instruments, rules and regulations and related documents, to identify issues that require consideration by and guidance from R3's General Technical committee.
- Possess well developed Committee Secretary skills, involving the preparation of advance papers; and subsequently producing quick and informative minutes, with associated action plans.
- Be familiar and confident with online delivery channels.
- Be experienced in delivering technical training.

Remuneration: To be negotiable, but based on experience, consistent with a NFP, members' association; and with an accompanying "benefits" package.

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Applications, which must include a C.V. and covering letter, should be sent to R3's CEO:

By post, marked "private and confidential" to:

Graham Rumney, Association of Business, Recovery Professionals,
8th Floor, 120 Aldersgate Street,
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Or by email:

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- **Associate members** are individuals who do not meet the requirements for full membership but work significantly within the business recovery sector.
- **New Professional (Student) members** are individuals preparing to take the Joint Insolvency Examination Board (JIEB), Certificate of Proficiency in Insolvency (CPI) or Certificate in Insolvency (ICAEW) qualifications. Pass students of the JIEB are eligible to apply for full R3 membership.
- **New Professional (Networking) members** are individuals who have recently joined their firm, and/or are new to the business recovery sector and wish to network with R3 members. This category receives electronic copies only via access to the R3 website.

A welcome from the new Chairman

Simeon Gilchrist takes up the mantle of Chairman of the SPG committee.

Welcome to SPG corner! The first duty of any incoming chair is to thank the outgoing chair and his team. In my case, this is not a duty but an absolute pleasure; having spoken to members about Andrew Tate, and the fabulous work that he and the SPG committee have undertaken, both Andrew and the team deserve lavish thanks. I am grateful that Andrew leaves his support team at R3 in place, and that together with the SPG committee there will be continuity and experience as I take up the reins.

I was delighted to have been considered for the SPG chair, as not only do I see SPG as the cornerstone or bedrock of R3 but, also, the SPG community has been the cornerstone of my own practice as an insolvency and restructuring specialist for over 20 years. From my early days as an articulated clerk at my first firm, Alsop Wilkinson, to my present practice as an Edwin Coe insolvency partner, SPG members

have been central to my and my firms' day-to-day work.

There are significant challenges ahead of us in an evolving landscape; the legislative framework is changing, the regulatory requirements with it, and there is of course ever more keen competition in what the statistics would suggest to be a tightening market.

To my mind, the importance of SPG as a forum for discussion and debate has never been more keenly felt; the new SIP9 (and to a lesser extent the modified SIP1) present new challenges while the RPBs' guidance requires further clarity; October has seen substantive changes to the '86 Act with certain parts of the Small Business Enterprise and Employment Act coming into force; the Insolvency Rules now appear to be in their final recast form ready to be rolled out in 2016 and, of course, we have amendments to both administration and bankruptcy procedures, in the introduction of SIP16 review and the adjudicator respectively.

This is, however, a resilient community, an enterprising community and a community always prepared to make itself heard. So, as we move through this year of change, I am in no doubt that the SPG community will rise to the challenge presented by the changes we know about and those about which we have yet to learn.



SIMEON GILCHRIST is a partner at Edwin Coe LLP and Chairman of the R3 SPG committee.

The SPG Forum round-up 15–16 October 2015

As always, we'd like to say a big thank you to those who attended and we hope you enjoyed this year's programme. For those of you who couldn't make it this time, here's what you missed!

Day one

The Forum kicked off with a mock application to the court for the appointment of a provisional liquidator led by Mr Justice Peter Smith, with Stuart Adair and Robert Avis acting as the barristers in the case. Mr Justice Peter Smith dealt with the application with his well-known caustic style and sharp wit – much to the amusement of the attendees. This was a tough act to follow, but Robert Morris and Rachael Healey from RPC did not disappoint – they gave attendees useful tips for identifying and mitigating potential claims, and managing risk.

Later in the day, Andy Taylor (Isadore Goldman) gave a comprehensive and practical corporate legal update, which was very well received by attendees. We also heard from Judge Stuart Robertson (North West Regional Employment Judge) regarding the clash between insolvency law and employment law – particularly the need to consult meaningfully. Judge Robertson recognised the difficulties with consulting

in an insolvency situation, but stressed that the length of the protective award may be reduced if steps have been taken to consult as far as possible.

After lunch the attendees were treated to a 'pick-me-up' in the form of a fantastic motivational speaker, Caspar Berry, who gave a rousing talk on risk-taking. In a presentation interspersed with humour, he conveyed the message that by being prepared to fail more often, a person opens up to the potential to achieve a bigger success. This was an excellent start to the afternoon, which went on to include break-out sessions (one on MVLs and the other on developments in technology), a session on alternative sources of funding, and a long-awaited panel session, which explored the future of insolvency regulation (touching on fees, the move towards restructuring work, JIEB exams, and European harmonisation). At the end of Day 1, delegates enjoyed a drinks reception and gala dinner, including live jazz music by the Royal Northern College of Music.

Day two

Day two continued to deliver on the quality of content. We heard from Dan Sejas (Shakespeare Martineau LLP) on tax avoidance schemes and APNs; Charles Turner (mlm Solutions) gave an excellent

review of FCA regulated activities and the need for IPs to have FCA authorisation; and a comprehensive legal update was given by Simon Passfield of Guildhall Chambers. There was also a very interesting RPB panel discussion led by Michelle Butler, discussing common pitfalls seen by the regulators, and other regulatory hot topics.

Looking forward to 2016

All in all it was a great event with excellent content, which was well received. We are aware of some comments on the new venue, which we will be taking into consideration in our planning for next year's Forum. The new 2016 venue will be announced shortly – we hope it will meet our members' expectations, and we look forward to seeing you there! ▣



FAY ROBINSON is R3's policy and committee support executive.

Email:
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Save the dates

10 March 2016 R3 Annual Dinner
Landmark London Hotel**18–20 May 2016 R3 Annual Conference**
InterContinental Budapest, Hungary

R3 events, courses and conferences

Date	Event title	Venue
1	South West & Wales Oktoberfest & AGM	Bavarian Beerhouse, Bristol
3	West Midlands Beer Tasting Event	Purecraft Bar, Birmingham
3	Northern Ireland Half Day Conference	Merchant Hotel, Belfast
3	Managing the Interests of Key Stakeholders in Insolvency	Hilton Tower Bridge, London
7	North West Regional Meeting	JMW LLP, Manchester
8	Introductory Series – Introduction to Insolvency and Non-Insolvency	Prospero House, London
8	Insolvency Litigation	Cheltenham Chase, Cheltenham
10	Insolvency Day	Gateley LLP, Manchester
16	Yorkshire Women's Group Cinema Screening	Everyman Cinema, Leeds
17	Eastern Region Drinks Event	All Bar One, Norwich
20	Pensions Breakfast Briefing	Grant Thornton UK LLP, Birmingham
4	Directors' Duties in the Twilight Zone: Advising on Compliance and Prosecuting Breach	Copthorne Tara, London
9	Asset Tracing, Fraud and Forensics	Radisson Blu Edwardian, Manchester
10	Pensions Breakfast Briefing	Grant Thornton UK LLP, Leeds
10	North East Regional Meeting	RSM, Newcastle
25	Beginners Guide to Independent Business Reviews	Novotel London City South, London
25	Pensions Breakfast Briefing	Grant Thornton UK LLP, Manchester
3	Pensions Breakfast Briefing	Squire Patton Boggs (UK) LLP, London
4	East Midlands Region Excuse me Lunch	Trent Bridge, Nottingham
8	Social Media for Insolvency Professionals	Holiday Inn Regents Park, London
8	Employees in Insolvency – A Legal and Practical Guide	Holiday Inn Regents Park, London
10	R3 Annual Dinner	Landmark Hotel, London
17	Directors' Duties in the Twilight Zone: Advising on Compliance and Prosecuting Breach	Marriott City Centre, Leeds

 **Regional events**

 **R3 events**

For further information on R3 courses and conferences, please visit the R3 website – www.r3.org.uk.

Alternatively, call the Courses team on 020 7566 4234 to request further details.

26TH ANNUAL CONFERENCE

SAVE THE DATE



18 - 20TH MAY 2016
InterContinental Budapest
Hungary

The annual conference of **R3 The Association of Business Recovery Professionals** brings together senior insolvency professionals to discuss the challenges faced by the industry.

Each year the programme focuses on the key issues affecting both large and smaller firms.

Register your interest by emailing: courses@r3.org.uk

A nighttime photograph of the Budapest skyline, showing the illuminated city and the Chain Bridge over the Danube River. The lights of the city and the bridge are reflected in the water.

2016

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“Alex Horsbrugh-Porter, a licensed insolvency practitioner, and a qualified lawyer in the UK, Guernsey and the Cayman Islands has joined David Rubin & Partners (CI) Ltd as a director in the Channel Islands office effective from 6th October 2015.

Alex qualified as a solicitor in the City in 1998 and was admitted as an attorney in the Cayman Islands in 2004 where he practised for 7 years latterly as a partner in a local firm. He then joined one of the major off-shore law firms in Guernsey in 2011 and worked on a range of insolvency matters. He also qualified as a licensed insolvency practitioner in 2007.”

Trudi Clark, managing director of the David Rubin & Partners Channel Islands office said:-

“We are very excited to welcome Alex on board in Guernsey he has extensive experience and legal knowledge in various offshore jurisdictions. This experience coupled with his insolvency qualifications will enable us to offer a unique range of skills to our clients as well as to expand the work we currently do, particularly in relation to cross border work.”



Interview with...

Stephen Allinson

Matt Jukes speaks to **Stephen Allinson**, chairman of the Joint Insolvency Examination Board (JIEB) and non-executive board member of The Insolvency Service.

Stephen Allinson biography

● Stephen is currently involved in the new government legal apprenticeship schemes and his book entitled 'Enforcement of a Judgment' is to be published at the end of the year.

● As well as being a Solicitor Licensed Insolvency Practitioner, he is an Associate Member of the Association of Property and Fixed Charge Receivers. He is Deputy Independent Examiner for the Institute and Faculty of Actuaries and one of the Chairmen of the Methodist Church Disciplinary Process.

● Stephen has specialised in credit, debt and insolvency work since 1987, and has extensive experience in dealing with the full range of these procedures. Prior to setting up his own consultancy, he was a business recovery and insolvency partner at a major law firm. He now undertakes work for Lester Aldridge Solicitors and pursues many other projects in the legal, insolvency and credit fields.

● In addition, he is a member of the Legal and Technical Committee of the Civil Court Users Association, and a Director of The Money Charity and the Churches Mutual Credit Union.



Q It's well documented that you were the youngest lawyer to receive an insolvency practitioner's licence. How did this come about?

A I was at a regional firm having qualified in late 1984 when the new insolvency legislation was beginning to be discussed. When it became law in 1986, I told the partners that I found insolvency interesting and thought it was an area where I could develop their business. I established professional relationships in the West Country and beyond and developed my insolvency expertise. I was made partner at that law firm on 1 January 1988.

Q What skills did you need to be a practitioner back then? What helped you?

A I was a criminal lawyer. I learned my trade in the magistrates' courts; it taught me to think on my feet and develop oral arguments. Insolvency is largely about responding to urgent situations. You're faced with a person who's got immediate financial problems or a company with a myriad of issues, and you have to deal with them immediately.

One of the things I find unfortunate is the amount of pressure on young IPs nowadays to earn fees, hit targets, and develop within their career. I believe that their eye is taken off the ball in the bigger picture. These days, IPs are pigeon-holed into a specialism early. Gaining knowledge of different areas of law, and of the different people you need to deal with, through a breadth of training, was really important. Sadly, we don't get that these days.

Q Is that one of the reasons you took on your JIEB role?

A As I've got older, and having come out of the partnership, I've got the opportunity to consult with other strands and in other areas. I think older practitioners, be they lawyers, accountants

or insolvency practitioners, have a duty to develop the younger professionals. That is what the JIEB should be doing and that's what I want to do. I'm fascinated by education and developing their careers.

Q The JIEB tests solely the technical knowledge; what about testing the other skills and qualities needed by the profession, such as ethics and communication?

A Currently, the JIEB is only part of the process. The licenses are granted by the recognised professional bodies (RPBs). As part of their consideration candidates have to pass the JIEB, so, inevitably, it is an academic examination. It's a post-degree qualification and a necessarily severe examination, but it is at the moment an examination.

We will not remove the JIEB, but we'll develop it so that it's an exam, and a process that looks at all the aspects needed to be an IP. So, for example, do we need these other skills to be a part of the exam case study or continuous assessment work? Or is it right that we keep the examination and test the other qualities through other methods? Given the way professional life and education is developing, practical elements are always something that should be considered. That's my personal view. It will be interesting to see how it'll develop.

Q There has been almost universal opposition from the profession, and some regulators, to split qualifications for personal and corporate insolvency. Why would the JIEB contemplate and enact such a system?

A I've been involved in some of the debates around it, but the bottom line is the government has brought it into force. Once the government has brought in legislation we have a duty to abide by it. I know R3 was at the forefront of trying to defeat the move to partial licenses, but that has been brought in and it is our duty to reflect it in our examination, training and qualification process. I've had multiple meetings with the

RPBs and The Insolvency Service to explore how we adapt our qualification process to reflect that.

We are looking at how we believe the process should develop in 2016 and beyond. We hope to get together with the RPBs and The Insolvency Service in 2016 to look at all these questions.

“

We as a profession do have responsibilities at the front end rather than being seen as the ‘grim reapers’ at the back end.”

Q You’ve recently joined the board of The Insolvency Service. What prompted you to take up this responsibility?

A In June I was appointed as a non-executive board member of The Insolvency Service. It is an opportunity to really involve myself in what is happening in the profession at this time and hopefully make a difference. With so much going on in the last six months it’s a fascinating time. I don’t think, since the Insolvency Act of ‘86, that I’ve seen as much change as we’re seeing at the moment. This puts pressure on IPs to respond to the changes based around pre-pack pools, new fee regimes, a new set of insolvency rules next year and a new set of provisions concerning directors coming through with the Small Business, Enterprise and Employment Act (2015). This makes education and training even more crucial.

The fact that we have falling numbers is well documented in both personal and corporate insolvency, and responding to this is relevant and important for the Service. I think one of the trends in the next two years is bound to be how we harmonise insolvency across the various countries. The Service is already doing a lot of work with its European colleagues and this is at the front of its mind.

Q What change do you think is going to affect IPs most moving forward to 2016 and beyond?

A Let me be controversial. The amount of publicity around the pre-pack pool far outweighs the impact that it’s going to have. I don’t think that it’s going to alter dramatically the way practitioners and directors want to deal with pre-packs. It’s currently voluntary and there are several concerns surrounding the way that it’s been brought in. The numbers of pre-packs that have been done are declining. The number of pre-packs with significant assets is quite small.

It’s going to be an extra cost that directors will not want to cover. If you’re going to do a pre-pack, you should be talking to your creditors anyway and ensuring that they’re all onside, regardless of whether you’ve gone to the pre-pack pool.

More significant is the new fee regime; this must be embraced as an opportunity by insolvency practitioners. They must not see it as a threat. It gives significant opportunities for good PR and marketing, and innovative ways of developing their practice – that can only be a good thing in a competitive environment. It should also help the creditor understand the work we’re trying to do. I’m passionate about creditors becoming more engaged in our process and fees is the one thing that comes up repeatedly, whether you’re a lawyer, accountant or IP.

Going forward, the changes and developments will continue. I think this makes it an exciting time for younger people to enter the profession, and for us to respond to the pressures and changes. I’m as energised now about insolvency as I was 30 years ago.

Q Indeed, you are still involved in a lot related to the profession, both paid and pro bono.

A Pro bono work has helped my professional career and those whom I come across. For example, I was asked to become a director and trustee of the Money Charity because of my knowledge and work in the industry. I work with that charity to further their work in educating people, reducing the financial difficulties people find themselves in, and raise awareness of the consequences of money mismanagement. As a profession, we have responsibilities at the front end rather than always being seen as the ‘grim reapers’ at the back end.

“

I’m as energised now about insolvency as I was 30 year ago.”

Q Insolvency is a challenging issue: what can IPs do to promote the good work that they do?

A It’s a real challenge and it’s a challenge for all of us in the profession. Often we are dealing with situations where things have gone wrong. And often we are called in where there are difficulties and competing interests, and we’re saying ‘by the way you’ve got to pay us’.

There’s a great deal of good work that goes on in the profession and sometimes, perhaps, we don’t sing about it enough. As

lawyers, accountants and practitioners in the restructuring profession, we have a unique skill set and there are many opportunities to use those skills in pro bono work. If I were managing partner of a firm, I would encourage my juniors to get involved in voluntary work as part of their development. There are a lot of problems regarding the human element that every insolvency job has. It’d really help if we used our skills and showed that it’s more than complying with legislation and that we care.

“

Often we are called in where there are difficulties and competing interests and we’re saying ‘by the way you’ve got to pay us’.”

Q We’d like to end on a lighter note, so could we ask how your interests in Yeovil FC are doing?

A I’m passionate about Yeovil Football Club as those who know me will tell you! It was the right time to step down earlier this year as a director of the men’s team, but it was also linked with a growing interest in women’s sport. I was asked to become chairman of Yeovil Town Ladies at a time when women’s sport was growing hugely. Yeovil is the twelfth most successful club in the country in terms of Women’s Super League. It will be interesting to see, considering the problems that have been caused by money in the men’s game, how it deals with those challenges as it becomes ever more professional and marketable as more money comes in. I now sit on the management committee at the Football Association for the Women’s Super League as well.

I have done quite a bit of sports insolvency and it’s kind of a symbiotic relationship. If you walk into a board room to talk to directors who have difficulties, drawing on your knowledge of football, you immediately get empathy, which hopefully allows you to do a great job and work with them in a sector you understand. □



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



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