Spring 2024

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RECOVERY

Minding the gaps

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

> **This financial squeeze is particularly being felt by government-funded, and dependent, entities where there is a gap between the funding available and the funding required**

From the editor

Hopefully, the New Year has started well for you. Has it started well for the economy? Recent insolvency numbers suggest not, and we are now in a "mild" recession, whatever that it is! Inflation is not falling as fast as some had hoped and interest rates are yet to reduce.

This financial squeeze is particularly being felt by government funded, and dependent, entities where there is a gap between the funding available and the funding required.

We therefore look at the need and effects of that funding gap on various sectors. Matthew Atkinson and Faye Dunn give us interesting insights into the current financial distress in the higher education sector and what central assistance is required.

Cathryn Williams and Paul Muscutt from Crowell & Moring consider finance shortfalls in the charity sector and Frances Coulson looks at how funding shortages are creating issues in the discovery of fraud and the processes needed to recover the proceeds of those crimes.

Carmel King from Grant Thornton looks at the challenge of applying insolvency law to the fast moving world of cryptocurrency, while our offshore focus this edition is on Cyprus and Stephen Michaelides and Darren Reeds of Grant Thornton look at how insolvency processes have evolved following the last financial crisis.

In other features in this edition, Gary Hargreaves at FRP Advisory, and Lucy Corner at Cornerstone Care Solutions look at the challenges for turnaround in the care home sector.

Armando Nardo of Teneo looks at the challenges of ever increasing amounts of data for insolvency practitioners in respect of investigations.

And finally, Rob Peck from Official Receiver Services explains the Insolvency Service's new aftercare function team.

I hope you enjoy the content and, as ever, all feedback greatly received.

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

Regulars

R3 matters

Legal updates

Survey: After-the-event insurance

Features

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Looking back and looking forward

In her final column as President, **Nicky Fisher** looks back at her year in office and at what lies ahead in 2024...

It is hard to believe I am writing my last column for *Recovery*. My year as president has gone very quickly, and I would like to use my final piece in this magazine to look at some highlights, as well as updating you on what is coming up at R3 over the next few months.

Regulatory reverse

One key success last year was the news the Government would not be introducing a single regulator for the profession. We had lobbied hard against the proposals for a government regulator for the first half of my year as president and most of my year as vice-president, so it was hugely positive to see that the Government had listened to us, and others, and changed its thinking and plans.

> **"The challenge will be ensuring that the personal insolvency consultation covers the full breadth of the framework rather than just the processes mentioned in the Government call for evidence"**

Hopefully we will be as successful in our campaign against the introduction of the compensation scheme.

Personal insolvency progress

Another key priority for me was making sure we had a strong voice in the debate around personal insolvency reform, and I was pleased to see the Government's announcement that it would launch a consultation — something R3 had been calling for since 2022 — on this issue this year.

The challenge, alongside making this happen in a general election year, will be ensuring that the consultation covers the full breadth of the framework rather than just the processes mentioned in the Government call for evidence, and that is something I will be keeping a close eye on as past president.

Coming back together

I had been president for about a week when we headed off to Italy for our Annual Conference in Venice. More than 200 professionals joined us to hear from a line-up of first-class speakers, which was well worth the year of work we had put in to make the conference happen.

Another highlight of my presidential year was the 2023 SPG Forum — both for the quality of the speakers and content, and for the fact that we brought the SPG community together again, which I had missed during the pandemic years.

Speaking of bringing communities together, visiting the R3 regions and nations has been a key part of my year in office. I know how important the regional networks are and want to make sure I have met members from every one before my year in office ends.

Out of the blocks

The R3 team have had a sprint start to this year. Events have taken place in five of the R3 regions, Scotland held its traditional Burns Night supper, and Northern Ireland has held its half-day forum.

We have also held the first two of our specialist conferences, the Fraud Conference (in partnership with the Fraud Advisory Panel and INSOL Europe), and the Personal Insolvency Forum, both of which were hugely successful.

Work continues on the 2024 Annual Conference, which this year is held at St Andrews and will have a global theme covering issues that include post-Brexit casework, working outside Europe in different jurisdictions and more UK-based content.

We will also be hearing from some of the younger members of the profession through our 'Class of 2024' initiative, which will see newer professionals present sessions at the conference.

Speaking of the future of the profession, the Training Academy has started work on its next round of New Professionals Forums (tickets are due to go on sale very shortly for June's) and launched a new course covering all the aspects of directors duties under the Companies Act.

> **"I could not be more delighted to be handing over the presidency to Tim Cooper. Tim has been a bastion of R3 for many years"**

Passing on the chain

Christina warned me that my term of office would go quickly, and she was right. It has been my great pleasure and privilege to have been your president, but as the saying goes, all good things must come to an end. Now it is time to introduce the person who will be taking over as president.

I could not be more delighted to be handing over the presidency to Tim Cooper. For those of who you who have not come across him, Tim has been a bastion of R3 for many years, serving on a range of committees and working groups, as well as being the driving force behind R3 in Scotland, which has been one of our busiest and most engaged of the R3 regions and nations for a long time.

Tim has also been a valued member of R3's Council for a long time and has been an energetic and enthusiastic source of counsel and support during his time as my vice-president. I know he has a lot of great ideas for his time in office for how we can embed R3 even further in the profession and deliver more value to our members, but I will let him share those with you in his column in the next edition of this magazine.

Good luck, Tim — if your experience is anything like mine, your time as president will fly by!

Nicky Fisher is a partner at Herron Fisher and president of R3

Legal Q&A

Simon Clarke and **Charlotte Evans** answer your insolvency queries

Q When acting as an administrator, to what extent should I be concerned about incurring personal liability for duties conferred on an 'officer' of the company?

A The risk of an administrator incurring personal liability for duties conferred on an 'officer' of the company is now diminished, following recent case law.

In *R (on the application of Palmer) v. Northern Derbyshire Magistrates Court*, the Supreme Court held that an administrator of a company is not an 'officer' of the company within the meaning of the phrase "any director, manager, secretary or similar officer of the body corporate" for the purposes of sections 194(1) and 194(3) of The Trade Union and Labour Relations Consolidation Act 1992, which provides that such persons are guilty of an offence if they do not give notice to the secretary of state at least 30 days before making 20 or more employees redundant.

> **"Legislation should be considered on a case-by-case basis. Administrators should be mindful of the statutory framework within which they are operating and act accordingly"**

Given the frequency of redundancies in administrations, this decision clearly reassures administrators that as they go about implementing any necessary day-one employee decisions, they are not at risk from this particular offence. However, it also has broader application to other duties and benefits conferred on an 'officer' of a company where this language is used in other legislation. For example, the Health and Safety at Work Act 1974 and the Environmental Protection Act 1990 (EPA) both contain similar wording.

As a result, following this decision, the risk of incurring liability as an officer of the company for various statutory offences is reduced. Of course, notwithstanding Palmer, administrators have separate duties and obligations to act within their statutory framework as officers of the court, and the company to which administrators are appointed may still incur significant fines for failure to comply with any relevant legislation.

Finally, note that legislation should be considered on a case-by-case basis. For example, the EPA provides that IPs may nevertheless attract personal liability in circumstances where they have acted unreasonably. Administrators should be mindful of the statutory framework within which they are operating and act accordingly.

Q What should an IP be aware of where a borrower is owned by its secured creditor?

A We have seen many recent situations where lenders have taken ownership of distressed borrowers from existing shareholders, while providing new money on a secured basis. Given the challenging economic environment, these businesses may need further restructures and one of the issues to consider is the consequence that the secured creditor and borrower are 'connected' for the purposes of the Insolvency Act 1986.

Under section 245 of the Act, a floating charge created by an insolvent security provider in the period 12 months prior to the commencement of an administration or liquidation will be invalid except to the extent that the holder of the floating charge advanced new money (or equivalent value goods or services) to that security provider at the same time as the charge was granted. However, if the security provider and the holder of the floating charge are 'connected', that 12-month period is automatically doubled to 24 months, and there's no requirement to prove the security provider was insolvent at the time. In contrast to many other antecedent transactions that require an application to the court by the IP, the operation of this clause is automatic.

What is critical for insolvency practitioners to consider is what value has been received by each security provider from the connected-party lender during that 24-month period. In situations where you have a company that was the borrower and received the proceeds of the loan directly, that should be clear. But where related group companies have provided guarantees of that debt, without receiving any loan proceeds directly, there is a real risk that such floating charge security will be automatically invalid.

While section 245 does not apply in relation to fixed-charge security, given the risk that a fixed charge may be recharacterised as a floating charge and that, for example, with operating companies within the group there may only be floating charge assets, this may have a material consequence on the estimated outcome.

Such an issue will also be relevant when considering the 'relevant alternative' to a restructuring plan or the vertical comparator in a CVA as such assets may be available for unsecured creditors if the floating charge is automatically invalid.

Simon Clarke is a senior associate and **Charlotte Evans** is an expertise lawyer at Ashurst

Recent case summaries

The latest insolvency update from **Natalie Kearney** and **Kirsty White**

Re Lyhfl Ltd [2023] EWHC 2585 (Ch)

The High Court considered the question of standing in relation to director applications for administration orders pursuant to paragraph 12(1)(b), schedule B1 of the Insolvency Act 1986 and the role of r12.64 of the Insolvency (England and Wales) Rules 2016, and reinforced the need to comply with the formalities within articles of association.

Lyhfl Ltd had two directors, Abigail Boura and Leigh Harmer. After an acrimonious falling out, Boura applied for an administration order without the agreement of Harmer and a valid board resolution.

Harmer objected, claiming that Boura had no standing. 'Directors' in paragraph 12(1)(b) meant all or a majority of directors pursuant to a board resolution, and 'only' meant that the court had no power to hear an application unless made by such a person.

Boura relied on other cases in which administration orders had been made on the application of a sole director, including Re Brickvest Ltd [2019] EWHC 3084 (Ch).

> **Practitioners should be aware that while r12.64 can potentially remedy procedural issues, it will not remedy more fundamental issues that threaten the integrity of the decision itself**

The unsurprising conclusion of David Halpern KC was that a director cannot apply for an administration order without the approval of the majority of the directors and a valid board resolution. He distinguished Brickvest from other cases. Brickvest saw a sole director apply for an administration order and seek the court's discretion in r12.64 to negate the problem that the company's articles required there to be three directors. In the present case, the issue was one of substance, namely that the other director in the company was excluded from making a decision plainly in breach of the substance and intention of the company's articles.

The judge further held that in the alternative, the plain meaning of paragraph 12(1)(b) is that a majority is required, and the court has no power to appoint an administrator of its own motion. On the facts of Lyhfl there was no such majority, and r12.64 was not a warrant to dispense with jurisdictional requirements.

Practitioners should be aware that while r12.64 can potentially remedy procedural issues, such as failure to give notice to prior-ranking qualifying floating charge holders, it will not remedy more fundamental issues that threaten the integrity of the decision itself.

Re Bodystretch (UK) Limited (in liquidation) [2023] EWHC 2735 (Ch)

A director was ordered to repay sums that he transferred to himself and third parties while the company was insolvent. The transfers were deemed to amount to a preference or a transaction at an undervalue (TUV) contrary to s238 of the Insolvency Act 1986, further reinforcing the unlawfulness of retrospectively relabelling payments as 'salary' or other remuneration.

Bodystretch was incorporated on 7 June 2002, and Mr Nadeem was the sole director and shareholder until June 2011, when his wife became a 50% shareholder. The company entered compulsory liquidation on 10 May 2016, having ceased trading in September 2015 and sold its property. All the sale proceeds had been distributed by Nadeem by the time of the liquidation, either by payments to himself or to third parties, leaving an outstanding deficiency to creditors of approximately £1.8 million.

ICC Judge Mullen concluded that:

1. On the facts, the company was insolvent from April 2015;
2. Unexplained payments of £95,079.39 that Nadeem had made to himself before September 2015 were TUVs, and ought to be repaid. He was not an employee entitled to a salary, neither were those payments made as repayment of permitted expenses pursuant to the company's articles;

> **The judge placed no weight on Nadeem's argument that there were items in the company's books and records that would have supported his defence – he was offered every opportunity to inspect them and chose not to do so**

3. Payments of £140,939.50 of 'salary' made in September 2015 constituted a breach of the company's articles and, thus, a breach of Nadeem's duty to act in accordance with the constitution pursuant to s171 of the Companies Act 2006. Even if Nadeem was correct that he was owed salary and expenses, the payments created a preference and were to be repaid; and
4. Payments made to third parties totalling £170,153.10 in September 2015 plainly constituted preferences, particularly given that there was no commercial basis for making the payments when the company was unable to continue trading.

Nadeem was refused relief under s1157 of the Companies Act 2006, as there was no basis on the facts to find that he acted reasonably and honestly.

It was a notable feature of the judgment that the judge placed no weight on Nadeem's argument that there were items in the company's books and records that would have supported his defence – Nadeem was offered every opportunity to inspect them and chose not to do so.

Natalie Kearney and **Kirsty White** are barristers at St Philips Chambers

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Higher education needs access to a proper restructuring regime

With an unhelpful economic environment and limited restructuring options, one of the UK's biggest exports needs more money and new legislation, says **Matthew Atkinson**

It is well known that many universities are in, or headed for, financial trouble and you do not need to look far to establish why. It is important to say that there is huge diversity across the sector and many higher education institutions (HEIs) are fine, with significant reserves and assets to weather these issues.

In this article, I will focus on English universities and what it means from a central government perspective. Each of the devolved administrations have different oversight regimes and more concentrated markets with their own challenges.

The government perspective

There are four overall challenges for the sector, and they are the worst four any government could face. For context, a 2016 white paper entitled 'success as a knowledge economy', published by the Department for Business Innovation and Skills, said: "The possibility of exit is a natural part of a healthy, competitive, well-functioning market and the Government will not, as a matter of policy, seek to prevent this from happening. The Government should not be in the business of rescuing failing institutions — decisions about restructuring, sustainability, and possible closure are for those institutions' leaders and governing bodies."

In truth the sector wants independence and autonomy. Senior civil servants have said to me, HEIs want private sector freedoms and autonomy but they also want government bailouts when things go wrong. My response to that: "All true, except you set the price per student and haven't changed it since 2012."

The challenges for HEIs affect at least three government departments but have an impact on the wider economy too.

The policy gap

For now, the Government is sticking to its 2016 line. You have autonomy: do what you like. This has led to HEIs targeting international students to subsidise the losses incurred providing for domestic students. Under the Government line, this would be fine, except that some of the Home Office's immigration policies are having a detrimental effect on overseas recruitment. There is also a strong lobby in the sector to keep government out of higher education, which over the years has stymied the introduction of a special administration regime and a powerful well-equipped regulator.

The regulatory gap

Putting further distance between government and HEIs is the independent regulator, the Office for Students (OFS). The OFS has an incredibly difficult — probably impossible — job and will still be blamed if something goes wrong. The OFS' mandate is to protect students, but it needs to take advice and hire people with skills suitable for the sector's financial situation. You can't regulate your way out of a cash crisis. Each university has to submit a student protection plan, which is a lot of work to produce (and to read) but the plans are also incredibly difficult and expensive to implement with no budget cover. A regulator is needed that has restructuring powers, the right skill sets, advisers and a budget to match.

UK higher education in numbers

- 285 HEIs in the UK
- 2.9m students
- The sector contributed £71billion to GDP in 2021/22 (international students make this the UK's fourth biggest export)
- 40% of HEIs are running deficits
- By 2026, 66% of students will be international (as the only means for a university to survive)
- Funding rates for domestic students are now £6000 in real terms (accounting for inflation, etc). Not the £9250 students pay

Source: PwC and Matthew Atkinson

Editor editor@r3.org.uk

Pressure points for HEIs

The challenges fall into one, two or both of the following categories: student experience and finance.

- Accommodation and maintaining large estates with current equipment
- Digital transformation requirements
- Net zero targets to be met by 2030 (which could cost over £1 billion for a large university)
- Indebtedness of the sector — over £14 billion, often unsecured.
- Overreliance on a less certain market for foreign students
- Cost of living and student debt affecting admissions and retention/attrition
- New entrants and competition from vocational education providers
- A lack of realisable assets
- Almost never any M&A, and a genuine lack of crisis expertise in the sector
- Almost all HEIs are not companies and not subject to any insolvency regime

Source: Matthew Atkinson

HEIs tell me that the OFS is a burden; in other words, another thing to engage with that does not provide any value to the institution. But the OFS also has the power to take away an institution's degree-awarding powers, which would be a death knell for the HEI.

If government is to intervene in HEIs, and it is inevitable that they will have to, they will need two things that are both in short supply and which would be met with resistance: money and legislation.

The budgetary gap

Currently allocating budget to HEI rescue is hard and this will continue to be so for the next few years. The sector is incredibly important (much more so than steel, which is state-sponsored these days) and can be a driver of growth and productivity that is desperately needed. A university is often the biggest employer in its locality and has an economic value of multiple times its income. But how far does government want to go in respect of allocating money to HEI rescues and, if it happens post-election, how would a change of administration affect this?

> **"If a university does fail, confidence in the entire sector will be severely damaged"**

I was brought in to the Department for Education (DfE) in 2016 to restructure the further education (FE) colleges sector. This was achieved via mergers and proper provider-level forecasting. Crucially, we had a budget to deploy, and FE colleges were incentivised by money to do the right thing. When there is a pot of cash available, the right things happen. The alternative is emergency, ad hoc and less well-governed injections of cash or a failure, which is very expensive to the taxpayer.

Due to a lack of insolvency regime, it's eminently possible that a medium-sized institution failing mid-year would end up with a student compensation bill running to hundreds of millions of pounds. And you can add to that unpaid creditors, loss of employment, loss of economic value to the area and the cost of the process.

The legislative gap

What would govern the failure of a HEI? As mentioned above, there was sector resistance to HEIs being included in any special administration regime when FE college special administration was included in the Technical and Further Education Act 2017. With hindsight this looks like a mistake.

It is possible that a restructuring plan could be put in place for a HEI, but this is untested. If the plan failed, the institution could be wound-up in the public interest as an unregistered company upon the petition of the board of governors. Again, this is untested, but in my view a court is likely to agree to such a process in the absence of any other option. This would require work with the Insolvency Service, funding and probably a special manager. The closure costs alone would be significant. If there was an 'orderly' process towards the end of an academic year, learning would need validation, exams sitting and coursework marking. I suspect lecturers could be the most awkward of all ransom creditors in such a process. And who wants a degree certificate that says 'University of ………… (in liquidation)'?

If a university does fail, confidence in the entire sector will be severely damaged. And if potential overseas students decide against studying in the UK due to the risk of an institution failing, even the most financially robust of HEIs would be in trouble. Unless there is radical and rapid funding reform, an insolvency regime of some type is desperately needed, and quickly.

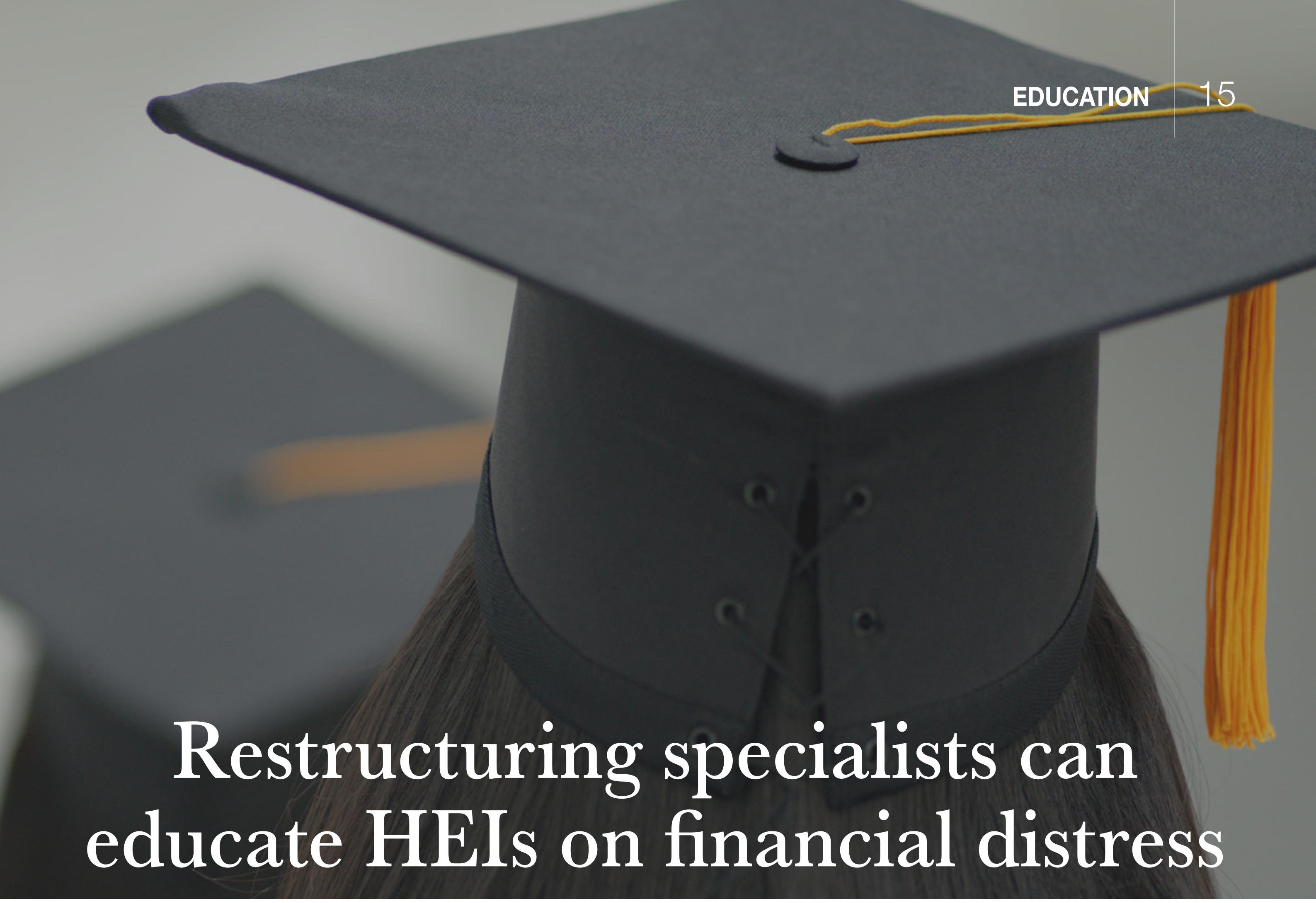
Unfortunately, the stress on HEIs is only increasing and not all of the 'usual' restructuring methods and tools are available. M&A activity in the sector is extremely rare, and the types of collaboration likely to be required will be new to the sector. Creditor sentiment is now changing for the worse.

Due to the nature of their constitution, it is incredibly difficult to merge two HEIs. As well as regulatory approval and the usual diligence and governance that accompanies a merger, you might need Privy Council approval. This is aside from the academic snobbery that will arise due to each institution's respective position in league tables. Urgent legislation is needed both to allow HEIs to merge and to facilitate it.

The higher education system deserves support, it is one of the things we are best at. We should be proud of our universities; they are one of the UK's biggest exports. But the economic and legislative (and sometimes political) environment is unhelpful. Without money and legislation, the situation will get worse before it gets better. And the sector will need the help of the recovery profession in performance improvement, cost reduction, restructuring, M&A and accelerated M&A.

• *For more on HEIs, see 'Restructuring specialists can educate HEIs on financial distress'*, page 15.

Matthew Atkinson is an independent turnaround advisor and previously was market oversight and finance director at the Education and Skills Funding Agency



Restructuring specialists can educate HEIs on financial distress

University board members, managers and regulators have a skills and knowledge gap that restructuring specialists are well placed to fill, says **Faye Dunn**

How do you address the policy, regulatory, budgetary and legislative gaps that are affecting a sector as large and as valuable as higher education? Here, I will address the practical things that we can do in this industry in the short-to-medium term and provide an insight into what a higher education restructuring looks (and feels) like.

The current facts and figures for higher education institutions (HEIs) suggest that any decrease in student numbers will take its toll over the next three to four years, and there remains a huge dependency on international students to generate income. If you compare this to the Office for Students' figures on international students seeking to study in the UK, you quickly see that demand by HEIs outstrips the actual number of international students available. Some HEIs will not be able to recruit the numbers that they need, which may make or break the institution for that financial year.

When a UK university is faced with a stressed, distressed or failing financial situation, it can feel like turning a tanker – it cannot be done within such a small window of opportunity. This feeling was relayed to me by a number of different universities during my time at the Department for Education (DfE).

“It became very clear to me that the sector was unaccustomed to seeking the advice of restructuring, insolvency and turnaround specialists”

As I reflect on my years working with various distressed businesses – starting out in banking in the late 90s, and then with the DfE – while there are a number of issues relating to each specific industry, there are also several that occur within any type of restructuring. This means that there are some potent skills within the restructuring community that would greatly assist HEIs when looking at their strategy.

In 2020 I set up and led the team for the higher education restructuring regime through the Covid-19 pandemic. This was the first and only time the DfE had sought to publicly work with HEIs that needed funding. The regime temporarily allowed HEIs to apply for funding loans to deal with the financial pressures caused by Covid.

It became very clear to me that the sector was unaccustomed to seeking the advice of restructuring, insolvency and turnaround specialists. This skill set is precisely the missing piece that higher education needs. As such, I have been working with various HEIs to address this skills gap within board and management structures to demonstrate the value that the restructuring sector can deliver.

So, where are the opportunities and what are some of the skills that the restructuring sector could assist with?

- Forecasting — in the short term and when seeking to address strategy and restructuring plans.
- Modelling — to address potential scenarios and their financial outcomes.
- Restructuring/Insolvency practitioners — advising the board and executive management and assisting them to fully understand their options and get comfortable with the new scenarios they face.
- Legal insolvency advisor —working with both the board and executive management

teams to understand the legal implications on the day-to-day issues of distress and the planned restructuring solution.

• Non-executive directors — providing expertise on an ongoing basis once the plan is in place. Historically non-executive directors have been unpaid in higher education, but increasing demand for the roles is leading to remuneration for those that undertake them.

• Turnaround director/CRO — this could be short, medium or long-term, depending on the scenario faced and the time needed to find a path back to sustainability. There are very few professionals with experience within this sector that can work across finance, government and HEIs.

Working with the Government

As you work through a financial distress situation with a HEI, the list of stakeholders grows longer. The level of understanding of the situation will differ for each of the stakeholders, which introduces additional complexities to the work.

Along with ensuring the usual stakeholders, such as boards, management teams and financial partners, understand the significance and legal implications of the action being taken, you also need to manage the regulator, the Office for Students (OFS). You need to ensure that the OFS understands the HEI's position and actions. Its key aim is to protect continuity of study for the students, not continuation of the institution.

> **The higher education restructuring regime was opposed by the sector, which, coupled with a distrust of government intervention, disliked the word 'restructuring'**

The DfE will also need to be kept fully informed so that ministers can be briefed. The DfE will likely keep other government departments aware in real time too, such as the Student Loans Company and the Office of Independent Adjudicators for Higher Education (OIAHE). OIAHE is the body set up to review student complaints – it will need to understand where complaints come from and if they are linked to changes made under a restructuring plan.

On my most recent case, a distressed university was looking at the options available, including insolvency, which resulted in a daily meeting with all of the parties mentioned above alongside a number of individuals from each institution. If you are also looking at a merger option, this will increase the size of the working group to include advisers, senior management and, potentially, some of the board members.

Addressing the policy gap

When the higher education restructuring regime was set up during Covid, it was the first time the DfE was instrumental in setting up policy and process to assist institutions with funding. However, it was opposed by the sector which, coupled with a distrust of government intervention, disliked the word 'restructuring' despite that was what was happening. This dislike and distrust meant that many universities did not come forward with an application when the regime could have helped.

> **Without an insolvency regime for higher education or a direct funding pot beyond existing approved funding, the OFS would not be able to assist even if it wanted to**

I have also dealt with a number of institutions that required funding to help them turnaround their fortunes which, if they hadn't received it, would have led to their insolvency. I was grateful for my experience in restructuring to be able to direct those universities to seek advice they needed from the restructuring community.

But, what about those institutions that did not seek funding? A number of property sales were conducted to raise cash or sales and leasebacks were undertaken. While this raised funds in the short term to address the immediate issues of Covid, it also removed an ongoing income stream for many. This loss of income still needs to be replaced today and has led to the increased levels of stress and deficits seen in the sector. It is the old cliché of 'kicking the can down the road'.

Addressing the regulatory gap

As mentioned, the OFS will not look to save an institution. Its role is to ensure quality and continuation of study for students. Without an insolvency regime for higher education or a direct funding pot beyond existing approved funding, it would not be able to assist even if it wanted to.

> **A form of special administration specific to higher education would assist institutions in addressing scenarios not normally within their grasp, such as running a sales process or undertaking merger talks with other HEIs or investors**

The big question here is whether the OFS should have a pot of funding for stressed and distress situations? And should it be dealing with those situations? Is it in the right position and does it have the right people and skills to handle a distressed university? Maybe not at the moment, but that's something that could be addressed if a critical decision was made and the right skill set recruited to the regulator. If that doesn't happen, then where does that skill set need to lie? Is it with the DfE?

Addressing the legislative gap

There continues to be a need for a special administration that covers the legal situations within higher education. This would be complex to establish and is probably the reason that higher education was excluded from the regime for further education colleges brought in by the Technical and Further Education Act 2017. However, having a form of special administration specific to higher education would assist institutions in addressing scenarios not normally within their grasp, such as running a sales process or undertaking merger talks with other HEIs or investors.

Financial distress is largely unfamiliar territory for HEIs and, without processes being implemented and gaps addressed, restructuring specialists will be needed to teach the educators how to deal with it.

• *For more on HEIs, see 'Higher education in 'desperate need' of an insolvency regime'*, page 12

Faye Dunn is an independent turnaround advisor at Dunn Healy Advisory. She is currently working as an interim director of operations at a UK university

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Boiler-plate constitutions rarely fit for purpose in financial failure

The uncertain legal status of unincorporated registered charities poses reputational risks for lenders and can be fatal to recoveries, say **Cathryn Williams** and **Paul Muscutt**

The latest insolvency statistics for England and Wales show a record number of companies entered an insolvency process in 2023. Faced with the perfect storm of current economic challenges, exacerbated by the ongoing situations in Ukraine, Gaza and the Suez Canal, an unexpected rise in inflation and slow decreases in interest rates, it is not anticipated that the economy will improve in the short term to limit insolvencies. And that's excluding Brexit-related problems.

It is not only commercial businesses that are affected by current economic conditions — many charitable institutions are also feeling a significant pinch, exemplified by the recent closure of the House of St Barnabas in Soho, a members' club and charity devoted to raising funds to help the homeless. The charity stated that the pandemic had significantly eroded its reserves, and a recent ceiling collapse, coupled with vastly increased energy costs, rendered the continuing work of the charity unsustainable.

The problem for charities is that their running costs are often funded by grants from local authorities and donations from the general public. Given that many local authorities in England and Wales are experiencing their own financial difficulties (seven at the time of writing — Northamptonshire, Slough, Croydon, Thurrock, Woking, Birmingham City and Nottingham City — having issued notices in the last five years under section 114 of the Local Government Finance Act 1988, meaning that they have no funds to meet spending commitments), charities previously reliant on such funding are hitting the buffers.

Deficient finance documents

In straitened economic times, donations to charities fall away, and charities without reserves are left with a significant hole in their funding. Consequently, the House of St Barnabas is not the only charity victim of the current economic climate. A number of charitable institutions have been forced to close and seek advice on how to wind down their activities, and the options for such entities vary depending on the nature of the legal entity by which the charity operates. Many charities (such as the House of St Barnabas) are set up as limited companies and are thus subject to the provisions of the insolvency legislation applicable to the administration and winding-up of commercial companies registered in England and Wales. However, a number of charities are not established as limited companies, which can cause difficulties if the charity becomes insolvent.

> **If VAT is applied to school fees at 20%, there is a real risk that pupils will vacate the private education sector and leave some schools facing closure and/or insolvency**

Further complications can arise for lenders to charities, especially where the legal entity status of the charity has not been properly considered by the lender at the point of lending. Lenders' standard finance documents will rarely contain sufficient provisions suitable for an unincorporated charity. Where enforcement action is required by lenders (leaving aside the reputational risk of enforcing against a charity), deficient finance documents can be fatal to the lenders' recovery prospects and early advice should be sought prior to enforcement.

Reduction in children enrolling

A further threat to charities may arise from proposals by the Labour Party to charge VAT on private school fees. Many private schools are registered charities and while Sir Keir Starmer says that he isn't trying to abolish private schools — merely to stop a means of education generally reserved for the rich from being exempt from tax — if VAT is applied to school fees at 20%, there is a real risk that pupils will vacate the private education sector. This will leave some schools facing closure and/or insolvency.

The education sector is already facing significant challenges from many directions. An example of this is the recent failure of a pre-school that was a registered unincorporated charity. The pre-school's income dropped as a result of a reduction in children enrolling, their reserves had been decimated by the failure to apply for furlough payments for staff during the pandemic and a rodent infestation had required a prolonged period of closure. All of these factors meant they were unable to continue operations. Several staff employed by the pre-school were made redundant and one of the issues faced by the charity trustees was how they could ensure that the staff would receive redundancy payments, given that there were insufficient funds within the charity to meet them.

> **It seems anomalous for the trustees of a charity to be held personally liable for the redundancy payments simply because the charity did not have the benefit of incorporation**

The fact that the pre-school was an unincorporated registered charity had a number of implications.

While it was clearly insolvent, as a registered unincorporated charity, it could not be wound-up under the provisions of the Insolvency Act 1986 — it could only be wound-up by the provisions of its constitution.

Trustees pursued personally

As the charity could not enter liquidation, the employees could not apply to the Redundancy Payments Service (RPS) to meet the redundancy payments due. They would need to get an award from an employment tribunal first.

Government policy, reduced enrollment and post-pandemic issues could add to the significant challenges faced in the education sector.

"Indemnity was no comfort to the trustees given that the pre-school had insufficient assets to meet any claims under the indemnity"

The charity could apply to the RPS for financial assistance to meet the redundancy payments, but the guidance provides that if such payments are made, it will create a debt to the RPS which may take enforcement action if the debt is not repaid. In the absence of repayment, there was a risk the trustees of the charity could be pursued personally to recover that debt, notwithstanding that the trustees of the charity acted as such on a voluntary, unpaid basis.

This position seems unfair, given that if the charity were a limited company and able to enter liquidation, the directors of that insolvent company would not have been personally liable to repay the RPS. It therefore seems anomalous for the trustees of a charity to be held personally liable for the redundancy payments simply because the charity did not have the benefit of incorporation.

As a final housekeeping point, following the closure of a charity, the Charity Commissioners must be notified so that the charity can be removed from the register, and the trustees must arrange for its accounting books and records to be kept for at least three years (for an incorporated charity) or at least six years (for an unincorporated charity).

When a charity is set up, the last thing being considered is what is to happen if it fails, and whether one operating structure is better than another in the event failure occurs. A charity's constitution will regularly be based on templates that contain boiler-plate provisions rarely fit for purpose in an insolvency scenario, or they will contain no provisions dealing with winding-up and closure at all.

In the pre-school in question, the constitution of the pre-school provided that the charity could be wound-up by a resolution of the trustees passed at an extraordinary general meeting, but no guidance was otherwise given, except that any surplus assets should be transferred to another charity with similar objects. This left the charity trustees needing advice on the process and how to limit their exposure, which was provided on a pro bono basis. While the constitution provided for an indemnity in favour of the trustees for any liabilities they may incur, the indemnity was no comfort to the trustees given that the pre-school had insufficient assets to meet any claims under the indemnity.

If a charity runs out of money and comes to you for advice, the moral of the story is that it may not be as straightforward to wind-up the charity as you expect.

Cathryn Williams and **Paul Muscutt** are partners in Crowell & Moring's restructuring and insolvency practice

Companies House reforms benefit IPs, but fraud needs more action

Lobbying to demonstrate the value of insolvency in fighting fraud can sometimes founder in the mire of policy and middle management, says **Frances Coulson**

In our daily engagement in our profession, we know we have some very dedicated civil servants in the police, the Courts & Tribunals Service, the Insolvency Service, National Crime Agency and HMRC, and that our judiciary is second to none. However, there are simply not enough resources to make a difference to the rising tide of fraud, especially international and organised fraud. These types of fraud are more and more empowered in their pandemic (if I am allowed to mention the word, defined by the OED as "a widespread occurrence of an infectious disease over a whole country or the world at a particular time") by technology including AI.

Fraud is the biggest challenge facing law enforcement, and it feeds and festers upon other nasty crimes and terrorism. I can confidently bet that every one of you has been a victim of fraud in the last 12 months. While physical crimes are devastating to the victim, fraud can also be so damaging to people that it can lead to suicide — aside from the financial ruin that can be a consequence for victims and a drain on the UK economy. It undoubtedly is a drain, whether funds are sent out of the country to organised crime, state-sponsored actors or single fraudsters, or because the fraudsters are not paying their share of tax and creating unfair competition for legitimate traders.

> "Smart crooks can use contractual camouflage, such as arbitration clauses, to defeat access to justice"

Dodgy goods from abroad not matching any official description but hiding money laundering and the supplier's overall failure to provide value to innocent customers; recurring payments going unnoticed (instigated through 'pay only postage and packing' frauds, for example); illegal data harvesting; identity theft; or card cloning. It is hard not to be a victim these days. Don't we all get fed up with cyber training and the multiple layers of protection we need to get through to send an e-mail just because some rat thousands of miles away is a phishing fiend? And what is the cost to society in money and social attitudes? The Government's National Cyber Security Centre claims to have received 27 million reports of scams to date, as of December 2023, and yet how many victims bother to report?

High-volume victims

The National Crime Agency says that an estimated 86% of fraud instances are unreported. This means that the scale of fraud is very significant, but that under-reporting hampers their understanding of the threat.

HMRC estimates that losses to tax fraud amount to £16 billion annually, which is nearly half of its estimated tax gap of £34 billion.

Victims can rarely seek redress through prosecution, and cannot afford the civil courts, not least as systematic fraud can work on a basis of high-volume, low-margin victims, thus dividing and conquering any possibility of a 'tooled-up' opponent. Smart crooks can use contractual camouflage, such as arbitration clauses, to defeat access to justice. Recurring payments or 'only post and packing' frauds, for example, rely on card payments where losses are small per person (c. £300) but the arbitration clauses in contracts — including those of the card companies — preclude a class action.

Government needs to make smart use of the private sector. Allowing some greater civil service operational autonomy at lower levels, especially locally with regular audits, and allowing at least some of the recovered assets in more areas to fund successful projects going forward would make a great difference. This does seem to be anathema to the Treasury, but not allowing this seems to punish success. If something works, do more of it. Of course, there should not be too much autonomy without audit, which has occurred in so many local authorities such as the scandalous Thurrock case, but there should be a sensible level of operational autonomy with a sensible level of checks and balances.

> "We know that use of insolvency powers can make a difference to fraud disruption and asset recovery and that while the limited liability veil is often used as a shield by fraudsters, it can be a springboard to better recovery through Insolvency Act powers"

Government is huge and amorphous, and it is difficult to sustain conversations through multiple changes of civil servants, ministers, and (soon perhaps) political parties, but we have to keep at it. We know that use of insolvency powers can make a difference to fraud disruption and asset recovery and that while the limited liability veil is often used as a shield by fraudsters it can, in insolvency, be a springboard to better recovery through Insolvency Act powers.

Not enough faith in insolvency

Through R3, its liaison with the Fraud Advisory panel and the Insol Europe Anti-Fraud Forum, we will continue to press for the wider use of insolvency professionals and tools. We may only get occasional wins but even some is better than none for victims and for society.

The R3 Fraud Group (now, the Fraud and Asset Recovery Professionals Group) was set up during my presidency (if I can remember that far back!) in 2011–12 at a time when the profession's focus was very much in recovering from the financial crisis. There was not much faith in insolvency from the press — readers may remember the cartoons in the press depicting IPs as funeral directors. We got bad press but had many good stories to tell, not only in rescue and restructuring but also in preventing and detecting fraud and recovering fraud assets. We felt that we needed to promote that facet of our work much more and spread the word beyond those creditors and pockets of government that understood and had experienced the marvels that use of insolvency powers could achieve. We also wanted to try to speed up and streamline communication and investigations.

We lobbied hard to retain the recoverability of success fees and ATE premiums for insolvency, at least obtaining a three-year temporary exemption from the ban until 1 April 2016. It remains my view that this was the better way to help IPs deliver best returns to creditors and maintain the strongest pool of IPs and lawyers (including counsel) who would take cases on risk.

> “We have found pockets of enthusiasm in several departments/agencies but action and engagement remain inconsistent and patchy”

In 2016, we promoted the insolvency express trials pilot with the great support of (now) Chief ICCJ Briggs, which gave speedy hearing dates to insolvency applications (including s236 applications) and limited costs recovery to £75,000. This had limited success but largely because it was difficult to spread the word to encourage solicitors to use it (despite articles in *Recovery*). It was an excellent way to shorten the investigation period.

We have engaged, and continue to engage, considerably with the public sector because (as evidenced by the public sector losses to fraud as well as mere company failure) they, and so we, are the biggest losers financially and we can help reduce that gap. We have found pockets of enthusiasm in several departments/agencies but action and engagement remain inconsistent and patchy and can often founder in the mire of policy and fear of empowering middle management. It is a shame because so many of those making up that group are dedicated and enthusiastic, working far beyond their contractual hours and pay grade and yet are hidebound by increased compliance requirements and policy overlay that delays and often derails timely action. You do usually need to be speedy, and sometimes bold, in attacking fraud cases, while of course being evidentially careful.

We spent a lot of time in the Fraud Group lobbying for Companies House reforms, which are very welcome as written

Fraud in numbers

1 in 10	**Britons were a victim of fraud in 2023, at a cost of £7.5 billion** — *Global Anti-Scam Alliance (GASA) survey*
£3.5bn	**Stolen by fraudsters in the year to Q2 2023** — *money.co.uk Fraud and Cyber Crime Report*
£12bn	**Tax fraud gap (the amount not collected in tax that is lost to fraud)**— *estimated by HMRC*
27m	**Reports of scams to the National Cyber Security Centre in 2023**
£25.3bn	**Total spending on the police force in 2022/2023** — *statista*

in the Economic Crime and Corporate Transparency Act 2023. We hope that the cooperation and technical platforms between Companies House and other agencies are practical, efficient and wholehearted. Initially there was total resistance to, for example, director identification, with Companies House saying (correctly) they were only a registry. Certainly, the prospect of the changes appear to have been welcomed with enthusiasm by the Insolvency Service and HMRC, and IPs should benefit from the data when needed in investigation cases where they are the office-holder. These changes will bring a welcome expansion to agency cooperation and public private sector cooperation too it is hoped.

Mixed results from pilot

We have filed responses to various consultations on Companies House, AML and anti-terrorism provisions and we will continue to do that.

The ECPG pilot (Economic Crime Prevention Group) sponsored by the Home Office began in 2012 and consisted of several agencies and several IPs from the CPS' Proceeds of Crime Act panel. The ECPG ran for years, producing some results for victims and introducing new agencies to the concept of the use of insolvency powers in anti-fraud work but, while there were many hurdles overcome e.g. in terms of data sharing, clearance by legal departments and adoption of the pilot, it proved very difficult to get a sufficient inflow of cases to cover the time investment by the IPs. It did benefit government significantly in terms of disqualifications produced, sidebar discussions, closer working among those civil servants energised by the pilot's activities, as well as some (but not enough) significant case

> “We may get a new government and have to start again with new ministers, but never give in to fraud which causes such misery and social, economic and environmental damage to us all”

wins returning money to public and private sector victims. It has operated to engage a wider number of agencies with insolvency and its powers and has informed pockets of effective work, some of such projects have long tails even now.

The Fraud Group has engaged with the various stakeholders in government and beyond in expert roundtables and learning sessions, and the group will continue to do so, and to lobby where it is felt such is needed.

Malcolm Weir (R3 Council member and director of restructuring and insolvency at the Pension Protection Fund) is to chair the new Public Sector Faculty of the R3 Council, which I will be a member of from the Fraud Group, such that the anti-fraud/insolvency powers message is not lost among all the discussions on terminal loss relief and redundancy payments.

We may get a new government and have to start again with new ministers, but never say die, and never give in to fraud which causes such misery and social, economic and environmental damage to us all.

Frances Coulson is a partner and head of insolvency and restructuring at Wedlake Bell. She is also chair of the R3 Fraud and Asset Recovery Group and deputy chair of the Fraud Advisory Panel

UKJT statement likely to offer more certainty to stakeholders

Case law in respect of digital assets has been progressing at a phenomenal rate, but the enforcement of judgments has yet to be fully explored, says **Carmel King**

The UK Jurisdiction Taskforce (UKJT) ran a consultation late last year on the application of insolvency law to digital assets. The UKJT is made up of senior judges, lawyers, a law commissioner and the Financial Conduct Authority, and intends to issue a legal statement on digital assets and insolvency law in early 2024, once the results of the consultation have been considered.

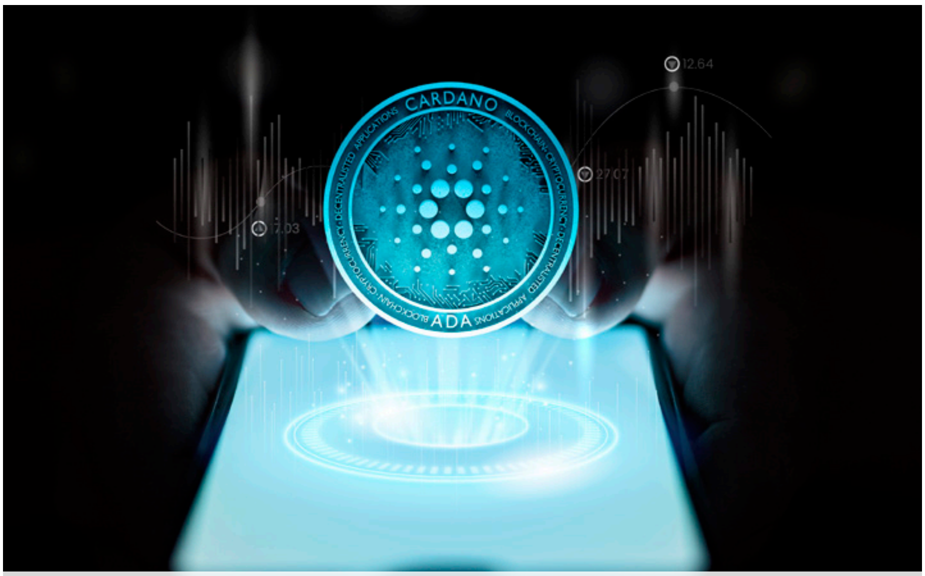
This consultation followed a UKJT 'statement on digital securities', published in February 2023, which concluded that the common law system in England and Wales is well-positioned to accommodate existing and new types of digital asset. An earlier UKJT legal statement on the 'status of crypto assets and smart contracts' was released in November 2018.

The Crypto Fraud and Asset Recovery Network (CFAAR), a group of professionals comprising IPs, lawyers, barristers, forensic accountants, corporate intelligence and asset recovery specialists, was pleased to respond to the most recent consultation, being strongly of the opinion that insolvency legislation offers a powerful tool for upholding justice within financial systems, which can and should be applied to digital assets.

It is often said that crypto is 'just another asset'. IPs deal with a multitude of assets on a daily basis, from fine art and intellectual property, to mining interests and claims in litigation. IPs are generalists at heart, and well-prepared to call in specialists when the asset requires. There are, however, certain questions highlighted by the UKJT that have wider implications for an insolvency that involves digital assets, and which have not been definitively answered in case law. Liquidators currently grappling with those questions, such as the New Zealand liquidators of Cryptopia and the Japanese liquidators of Mt Gox, are carving a pragmatic and sensible approach with the assistance of the court. The anticipated guidance by the UKJT will be significant for liquidators in this jurisdiction.

Digital asset classification

Case law in England has long-established that Bitcoin and NFTs are property (see, for example, *AA v. Persons Unknown & Ors, Re Bitcoin* [2019] EWHC 3556 and *Osbourne v. Persons Unknown Category A* [2023] EWHC 36, respectively), and are accordingly capable of being subject to injunctions, disclosure orders and other remedies in litigation brought with a view to asset recovery.



IPs face a plethora of industry terms such as 'staked tokens', commonly used for cryptocurrencies such as Cardano.

> **"Insurance for IPs in this space is limited, costly and subject to onerous conditions"**

This definition may cause difficulties in circumstances where a creditor may hold a claim to digital assets as it would not be a claim for a liquidated sum, and so not capable of founding a statutory demand and winding-up petition. Case law in Singapore has produced mixed results, with *Aaron Loh Cheng Lee and anor v. Hodlnaut Pte Ltd and ors* [2023] SGHC 323 distinguished from the earlier *Algorand Foundation Ltd v. Three Arrows Capital Pte Ltd* (HC/CWU 246/2022), and so CFAAR is hopeful that the UKJT will consider this thorny issue in its legal statement.

Custody

Digital assets are notoriously volatile as an asset class and an IP needs to consider whether any additional obligations apply in relation to such assets in an estate.

The pattern observed so far is that IPs tend to retain digital assets in their original form rather than converting to fiat currency at the outset for ease of storage. This is due to a multitude of factors, such as the duration of these insolvency events combined with a general upwards trend in value, and customer terms and conditions, etc. A parallel issue is that the vast majority of IPs are not prepared, and do not have the adequate infrastructure in place, to manage the necessary taking control, and secure storage, of digital assets. Most IPs have no awareness as to the various custody options available, and their relative risks, costs and benefits.

Insurance for IPs in this space is limited, costly and subject to onerous conditions. Whether an IP finds themselves appointed administrator over a trading virtual asset service provider (VASP) or trustee in bankruptcy over an individual with a more modest holding, an unprepared IP is going to face a bewildering plethora of industry terms such as hot, cold and warm custody (according to the degree of internet connectivity involved), staked tokens (which participate in the validation process and are a means for owners of earning passive income), gas fees (transaction fees) and omnibus or segregated wallets (consolidated or distinct holding of tokens). They may find that the onboarding process for a regulated third-party custodian is a months-long matter rather than days or hours, while in a self-custody set-up they remain uninsured and vulnerable to hacks and other attacks. A failure to get custody right in the first days of an appointment could result in catastrophic losses to the estate, criticism from a creditor group that tends to be technically very astute and vocal, and censure from their RPB.

Clarification from the UKJT regarding whether any additional obligations might apply when holding or realising digital assets will be very welcome and will further assist regulators and the RPBs in providing guidance to our industry.

The UKJT's questions on digital assets

The consultation for the UKJT asked eight questions, posed as matters of English law:

1. Are digital assets 'property', forming part of the estate of the insolvent company or individual for the purposes of the English insolvency legislation?
2. For international allocation of insolvency jurisdiction based upon location of centre of main interests, what rules apply to determine where digital assets are located and/or administered?
3. Is a claim to digital assets held by a company or bankrupt capable of being a claim to recover property? If so, what factors determine whether it is to be so characterised?
4. If a claim to digital assets held by a company or bankrupt is a monetary claim, is it a claim for a liquidated sum so as to be capable of founding a statutory demand/winding up petition? Is it a claim in a 'foreign currency' such that it should be converted to the currency of the insolvency on day one?
5. Are office-holders subject, generally, to any obligations in relation to holding/realisation of volatile digital assets in an English insolvency?
6. Can you perceive any difficulties in the application of the English insolvency legislation relating to avoidance of prior transactions to pre-insolvency dealings with digital assets? If so, what are they?
7. If a claim to digital assets held by a custodian company can be a proprietary claim, what mechanisms are available to deal with mixing of the property of various clients and/or a shortfall in an insolvency of an exchange or custodian?
8. What interlocutory, investigatory or enforcement procedures are available to insolvency officeholders under English law, in order to get in digital assets or their monetary equivalent for the benefit of the insolvent estate?

Creditors

The status and nature of creditors in these matters can be complex and is also worth consideration at an early stage. Insolvencies of exchanges such as Cryptopia and Celsius Network demonstrate that creditor status and accordingly creditors' positions in the order of priority, as well as the logistical complexity of a distribution, can vary. In the former example, Cryptopia was found to be holding digital assets on trust for customers, whereas in the latter, a US court determined that customer deposits in Celsius' 'earn program' constituted property of the estate, leaving those customers with general unsecured claims. Both judgments were largely based on company terms and conditions, which more generally in the sector can be poorly written and frequently changed.

In an insolvency where digital assets are retained and where an IP's costs are drawn from those assets, the complexity of attributing those costs across potentially hundreds of token types (trusts) and thereafter formulating a distribution to creditors who are likely to have claims across a number of token types, is not beyond the wit of an IP, but also shouldn't be underestimated. The FCA has recently released guidance in this regard and it is worth consulting.

The logistics of a distribution might be something else entirely. Consider a creditor group that traditionally values its privacy, and indeed anonymity, spread across an unknown number of jurisdictions. Meaningful engagement by creditors may be limited. Crypto Twitter on the other hand is extremely vocal and active, and every movement of assets from wallets attributed to a company in liquidation or, later, the liquidator can and will be dissected at length on social media. The compliance processes of a VASP pre-liquidation may not have been robust depending on the time periods in question, and so the liquidator may need to conduct a detailed, complex due diligence and know-your-customer exercise, looking at both the creditors themselves and the veracity of their claim in the estate. A distribution in specie is emerging as the most practical approach in this space but carries further risks. A closed environment utilising whitelisted address controls should be considered to minimise the risk of payments to unauthorised addresses, whether by accident or by design.

Insolvency and recovery

This is a new industry in comparison to those that IPs see on a daily basis. Bitcoin was only launched in 2009. Case law is an even newer phenomenon, with *AA v. Persons Unknown* in the English Court in 2019. Like the digital asset, blockchain and Web3 sectors themselves, case law in these areas in England and Wales is progressing at a phenomenal rate.

What has yet to be explored fully is the enforcement of the various judgments obtained. A limited number of judgments have been successfully enforced, for example *Law v. Persons Unknown*, and more have been leveraged to negotiate confidential settlements for the client. Given that the aims of civil litigation in this space are to uphold justice and to provide restitution for the claimant, much can yet be done to formalise those routes to recovery.

Insolvency has the potential to be a very powerful tool in this regard. The various interlocutory, investigatory and enforcement procedures available to an IP are well-rehearsed and provide a powerful arsenal for the gathering in of digital assets for an insolvent estate. Other provisions within the Insolvency Act such as s221 (winding-up of unregistered companies) and s135 (appointment and powers of provisional liquidator) are likely to prove instrumental in the disruption of bad actors in this space and ultimately returning illicitly obtained assets to victims and creditors.

The previous UKJT statements were comprehensive and largely welcomed as pragmatic and offering certainty to stakeholders. No doubt the anticipated legal statement on digital assets and insolvency law will follow suit. Insolvency practitioners are well advised to have a careful read when it is published.

Carmel King is a director in insolvency and asset recovery at Grant Thornton and is vice-chair of CFAAR

New insolvency procedures emerge from post-banking crisis

Non-performing loans forced Cyprus to move towards debtor-focused processes and new licensing for Cypriot IPs, say **Stephen Michaelides** and **Darren Reeds**

The insolvency and restructuring profession in Cyprus has faced many changes during the last decade, creating opportunities and challenges for both the wider economy and the profession. Some of these changes have been caused by a shift in the economic landscape while others have been driven by geopolitical events and regulatory changes.

The main legal framework covering corporate insolvency in Cyprus is the Companies Law Cap 113, supplemented by limited additional legislation.

While a voluntary liquidation procedure existed for solvent companies, the main options historically available for an insolvent entity were via an insolvent liquidation or a receivership appointment.

These historically available options were creditor-friendly contentious enforcement routes, as opposed to the broader global shift in the industry to more collaborative debtor-friendly rescue options (e.g. administrations, Chapter 11 and court-appointed chief restructuring officers).

A further available option was the lesser-used scheme of arrangement, which was more of a consensual procedure.

Receivership

A receiver can be appointed to a company (or a specific asset) by security granted to a creditor, typically a bank. It provides the creditor with powers to enforce over the company or specific asset, with control to vest in the receiver.

As with the UK, the mandate of the receiver is that of maximising value from the company or specific assets. Similarly, the receiver has a primary duty of care to the appointing creditor, but also not to act detrimentally to other stakeholders.

Creditors' voluntary winding-up

Where a company is insolvent, the company (via its directors) will convene a meeting of creditors and members to pass an extraordinary resolution for the company's winding-up. Following the appointment, the power of the directors falls away and vests in the liquidator.

The liquidator's role is to investigate the affairs of the company, to identify and take steps to realise any assets held by the company and eventually distribute the funds to creditors. Should the creditors wish, they can also require a committee of inspection to be formed (akin to a creditors' committee).

> **"The level of NPLs that were burdening the banks was suffocating the ability of the Cypriot economy to recover and subsequently take steps to grow"**

Similar to the UK, where after investigation the liquidator has identified potential antecedent transactions dating from prior to their appointment, they are legally empowered to investigate these and to take action against those who have breached fiduciary duties.

Court compulsory winding-up

Under the court compulsory winding-up route to liquidation, a petition can be filed by the company's creditors, members or an IP undertaking an insolvency procedure in another European jurisdiction.

The court may consider a winding-up under various circumstances, the most common being failure to satisfy a statutory demand or just and equitable grounds.

Under recent amendments to cap 113, it is now possible within the winding-up application to seek the direct appointment of a private IP, as opposed to the prior position where the Official Receiver would initially be appointed.

The powers and duties of the liquidator are as under a creditors' voluntary winding-up, but also include anything specified by the court within the winding-up order.

Economic backdrop and NPLs

The banking crisis that hit Cyprus in 2013 reshaped the country's economy. The high levels of non-performing loans (NPLs) highlighted how ineffective use of the processes outlined above, and time-consuming procedures in the justice system, led to banks' balance sheets being burdened with a mountain of NPLs.

Some less-complex NPL types could be resolved by liquidation or receivership, particularly where value was locked up in non-trading real estate assets. Certain other types of NPL, however, were worthy of a fresh approach and a consideration of alternative options, such as distressed trading entities that could potentially be restructured and rescued on a going concern basis, reducing bank impairments and saving jobs.

The level of NPLs that were burdening the banks was suffocating the ability of the Cypriot economy to recover and subsequently take steps to grow. Legislation was passed after the banking crisis enabling banks to take commercial action to sell NPLs, as the volume was too high for their in-house teams to resolve. Significant numbers of NPLs were packaged and sold to different investment funds. In turn, to drive value, the investment funds had their own in-house teams and debt service companies working through the portfolios. In more complex scenarios, funds instructed IPs to assist.

Insolvency practitioner licensing

The Insolvency Practitioners Law was introduced in 2015 creating a framework for licensing individuals to provide insolvency services within Cyprus. It also provided for industry supervision, setting out qualifications required for a license, professional standards and ethical considerations. There are approximately 300 Cypriot-licensed IPs.

Insolvency procedures for Cypriot companies can only be undertaken by Cypriot-licensed IPs. There is no provision for overseas practitioners to undertake Cypriot appointments without a local licence.

Legislative updates

To support the volume of NPLs that had to be worked through, it was necessary for Cyprus to overhaul its insolvency legislation. From 2015 onwards, several amendments were made to Cyprus' Company Law regime to develop a framework capable of addressing the raft of NPLs.

We have covered above creditor-friendly insolvency procedures (liquidations and receiverships). We will now consider

Cyprus' extensive cross-border trading links may mean challenges or disputes that require the skillsets of IPs.

debtor-focused rescue procedures available in Cyprus.

Schemes of arrangement

This legislative procedure was more akin to a rescue tool (compared with liquidation or receivership). Schemes had pre-existed the new legislation introduced during the post-banking crisis period, albeit not frequently used, and were employed to reach a compromise with creditors or members where the company is under financial distress but capable of being rescued.

The scheme can be initiated by creditors, members or a liquidator in the event the company is wound-up. An application to the court is made to convene creditors' and members' meetings to consider the scheme and, if passed by a vote, an application is made to the court to formally approve the scheme. A scheme does not confer protection to the company from creditors, so creditor engagement throughout is essential.

Recent legislative enactments have lowered the required threshold for the creditors' approval of a scheme of arrangement to a simple majority in value for each class of creditor voting for the arrangement.

Examinership

Examinership was a new legislative rescue procedure introduced following the banking crisis. The procedure was previously introduced in Ireland and follows similar principles to the US Chapter 11 procedure. The process attracts the protection of the court to allow the company to restructure, without the risk of creditor-instigated enforcement steps.

The procedure is conducted under the review of an examiner, who must be a Cypriot-licensed IP. Notwithstanding this opportunity, examinership has not yet been embraced within Cyprus, and this has been attributed to challenges in achieving the timelines required, which if breached puts the examinership at risk of potentially converting into a liquidation.

Other procedures and cross-border interaction

As well as traditional wind-down and economically driven creditor enforcement processes such as liquidations and receiverships, the Cypriot insolvency framework also supports international actions in relation to a Cypriot entity, particularly given the cross-border usage of Cypriot structures. Such procedures could include urgent interim relief applications to the court, including issuing a freezing order over a company's assets and potentially simultaneously appointing a receiver.

The appointment would typically be made to allow the receiver to secure the position of the company due to a potential risk of a dissipation of assets or other adverse steps. The procedure is also significant as it may confer powers for the receiver to obtain information and documentation relevant to the company, which might be helpful if the matter is part of a wider cross-border strategy.

The Cypriot system might also interface with the insolvency procedures in other jurisdictions. For example, a receiver or liquidator of a company in another jurisdiction may be empowered to exercise the voting rights of the shares of that overseas entity.

Where the overseas entity is the shareholder of a Cypriot company, the system might enable the IP to change the board of directors of the Cypriot company or commence a shareholder-driven winding-up over the Cypriot subsidiary. This might be helpful where a cross-border asset tracing investigation is underway and documentation or information is sought.

Current developments

Cyprus is an evolving sophisticated and entrepreneurial jurisdiction, interfacing with a vast number of other jurisdictions. Some are by virtue of double-tax treaties, others by virtue of historic trading patterns (e.g. the Cypriot-sandwich structure of a BVI offshore parent company, Cypriot holding company and Russian or Commonwealth of Independent States jurisdiction assets), and some by way of new incoming industries and investors.

Where development and change are prevalent, economic challenges or disputes inevitably arise that will require the skillsets of IPs and restructuring professionals. Recent geopolitical events that have brought about sanctions against a number of Russian organisations have also had an impact on Cyprus, given its historic corporate links with Russia. While some of these structures remain economically insulated and viable, there will be some which require winding-down or restructuring in a commercial and legally compliant manner. This may give rise, where sanctions apply, for directors, IPs or legal advisers to apply to the relevant authorities for licenses to allow them to act on such matters. The sanctions framework and approvals required have inevitably slowed down matters, yet at the same time can provide protection by appropriate licensing.

While Cyprus' economy has experienced both challenges and opportunities, these have enhanced the resilience to the country's people, industries and authorities. Cyprus has developed and introduced new insolvency and rescue procedures, as well as amended existing solutions so that in the event of a dispute or financial challenge, stakeholders have confidence that there is a robust and satisfactory framework in place.

Stephen Michaelides and **Darren Reeds** are partners at Grant Thornton

Social care sector needs tailored, targeted solutions for turnaround

Society's most vulnerable are potential collateral damage while providers attempt to identify and rectify failings, say **Gary Hargreaves** and **Lucy Corner**

The adult social care sector is on the precipice of a crisis if it has not crossed it already. The sector's most critical issue remains the absence of a fair cost of care being paid to providers that is commensurate with rising operational and energy costs. Staffing challenges remain and were recently intensified by the Government's ban on foreign workers bringing dependents to the UK. These challenges mean many providers are likely to be operating an unsustainable business model. This is especially true for those who solely provide adult social care, those who occupy old, converted buildings and those dependent upon local authority-placed residents, with a limited ability to increase fee income or reduce costs.

Adult social care businesses fail for a multitude of reasons and, while the main ones are outlined below, it is important to keep in mind that a high percentage of these could be rescued if more timely interventions were made. Many of the most important issues are interconnected and can reinforce each other in a negative, downward spiral. For example, poor leadership impacts oversight and culture, which impacts asset and service quality, which impacts the Care Quality Commission rating.

Many of the challenges faced are outside of a provider's control and are not easily resolved. Developing a credible turnaround plan is very difficult for providers to do and without the support of professionals and key stakeholders, it is almost impossible. Critical to establishing whether a turnaround is possible is properly diagnosing why a business is failing, but equally important is identifying the ultimate objective: rescue the business as a going concern, secure new lending, secure short-term refinancing or facilitate a short-term sale?

> **A failing business typically means reduced profits, which often results in the inexperienced leader having a knee-jerk reaction to control costs**

Understanding what time, funding and operational constraints exist helps to narrow down turnaround options but, typically, they are limited to a cash injection to facilitate improvements (assets, environmental, technology, staff), increase or decrease room density, upscale or downscale the care quality offering, or change the care provision(s). Some of these options are more easily achieved than others, some require significant operational investment that does not produce immediate returns, and others require a cultural change that the provider or their staff cannot implement quickly, if at all. While attempts are made to identify and rectify failings, society's most vulnerable remain as potential collateral damage, exposed to providers tempted to cut corners because of financial pressure.

Inevitably, some businesses are not capable of a turnaround. Ultimately, for some, an insolvency process is the only viable option to salvage an ongoing business, but early intervention and professional support are critical. Insolvency should be the last resort.

Accepting an insolvency appointment over a care home business is one of the more challenging assignments for an IP. With the lives of the most vulnerable at stake, the lender, regulator and local authority will scrutinise every decision, meaning that standard decision-making protocols rarely come into play.

For simplicity, we will consider the key issues under three main headings: leadership, staffing and compliance.

Leadership

Inexperienced leadership, coupled with a provider being physically based at a different location from the site of its business are often catalysts for failure. Many providers fail because they are not sufficiently close to operational challenges and, to compound this issue, they do not have the practical expertise to face them quickly and effectively. A failing business typically means reduced profits, which often results in the inexperienced leader having a knee-jerk reaction to control

costs. This in turn demotivates staff who are already operating beyond capacity, it reduces investment, impacts care quality, drives greater regulatory scrutiny, creates a blame culture and ultimately triggers a downward spiral.

A consistent theme in high-performing care homes is strong leadership, with a clear grasp of key performance metrics, important issues and projects that will drive incremental improvements. Failing providers often lack this performance oversight, with no visibility over key metrics and no real-time ability to identify what issues exist. Solving these can be as simple as being present, implementing standard KPIs, producing monthly management information, examining the results of internal audits to identify weaknesses, and implementing a lessons-learned programme.

Setting quality standards, creating a culture and values, and building a team ethic is critical. If owners are absent from day-to-day operations, it means that any action taken is more likely to be reactive, not proactive, and inevitably means there is a lack of local visibility among key stakeholders, which exacerbates the difficulty of any turnaround attempt.

The often-unquantifiable factor in any turnaround process is understanding the quality of the relationship a provider has with the local authority and CQC. Where a home has a legacy of underperformance and poor care, the provider/regulatory relationship is often one of entrenched distrust where regulatory scrutiny increases, exacerbating the pressure on staff and making any turnaround effort extraordinarily difficult. Regulatory bodies rightly want to witness embedded improvements before any relaxation of scrutiny is given, which often exhausts the two commodities that failing care homes do not have: time and money. Restructuring professionals can support providers and can often secure creditor forbearance.

Staffing

Critical to successfully implementing the turnaround of any care home is having the support of the people who are operating it. Understanding what motivates staff, and staff equally understanding how they contribute to and are engaged in the performance of the business, is critical. A disengaged workforce presents almost insurmountable challenges, especially where regulatory scrutiny is high and working conditions are less than perfect. Staff retention remains a colossal challenge, driven by low pay, an inability to work from home and a multitude of better-paid, lower-risk opportunities elsewhere. Teams tend to be more motivated by flexibility and working conditions than reward. A demotivated workforce often leads to high sickness rates, absenteeism and increased agency use, all of which come at a huge cost to the business. Providers therefore need to develop a staff retention strategy by focusing on meeting the needs of their employees and thus avoid high recruitment costs and turnover rates, which can help return the business to profitability.

Compliance

Providers operating homes rated ‘good’ or above by the CQC often have an ‘inspection ready’ culture. This is underpinned by a motivated workforce, strong policies and procedures, detailed audit processes, and compliance failures that are identified and addressed. Conversely, failing providers operating ‘poor’ rated homes often have no compliance strategy, no meaningful QA/audit processes, no lessons-learned programme, and do not share best practices internally. Achieving a successful turnaround in such circumstances is therefore very difficult, and is particularly challenging where staff are demotivated which, alongside the staffing issues mentioned above, inevitably creates compliance failures.

QA and independent oversight are important for providers to sense check the work that their managers and services are providing, especially if the provider is remote or the manager is new. If the manager has been in the service for a very long time, they may have become desensitised to issues or may not have kept up to date with changes in regulation or current inspection and quality themes.

Believing you are compliant, and being able to evidence compliance, are two distinctly different concepts in the care sector. Many providers offer ‘good care’, including some failing providers, but most failing providers are often unable to evidence their compliance with regulations because of poor behaviours, bad management and a lack of proper compliance processes. Changing those behaviours and processes is very difficult in a turnaround as it requires short-term operational and cultural changes, which are generally resisted.

The importance of evidencing how a home complies with regulatory requirements has never been greater following the CQC’s recently introduced single assessment framework in December 2023. This new inspection methodology assesses care providers by focusing on compliance and quality of care. New ‘quality statements’ have been introduced to replace ‘key lines of enquiry’, with new ‘we statements’ outlining what a provider’s responsibilities are. This is a significant sea-change, and providers must now realign their services to be compatible and compliant with the new 34 quality statements.

The new inspection model is focused on online assessment, which requires services to be adaptable and innovative in how they demonstrate the quality that would usually be observed in person by the CQC. For example, a provider may need to show that carers speak to someone in a kind way, demonstrate that they receive compliments, undertake a satisfaction survey, and provide supervision records and stakeholder feedback to meet the new criteria. Providers that are not agile and able to adapt quickly will fall foul of this new inspection regime.

The above issues barely scratch the surface of the challenges currently being faced by many providers in the adult social care sector. The multitude of reasons why care homes fail mean there is no one-size-fits-all solution, and achieving a successful turnaround requires tailored, targeted solutions. Changing the culture, how staff are engaged in the business, or a provider’s reputation and relationship with key stakeholders is very difficult and requires significant financial investment and time to properly embed — commodities that failing care homes do not have.

For the sector to have sustainable operators, providers need to be paid a fair price for the care they are tasked with delivering, and they need more support from the regulator and local authorities. While it is outside of the current remit of local authorities and the CQC, support could include the provision of formal training, an outline of their view of best practices, standardising documentation and the provision of specialist equipment etc. Critical to that process is that providers need to be able to seek support from these stakeholders without fear of recrimination, which is a move away from the sector’s current culture.

Without significant change, the combination of external factors such as energy costs, staff shortages, increased regulation and constrained council budgets, as well as internal factors such as disengaged owners, demotivated workforces and ageing assets, is likely to have a detrimental impact on total care sector capacity in the short-term. Value for money will deteriorate, just as the Government and society expect it to increase and improve.

Gary Hargreaves is a partner at FRP Advisory and **Lucy Corner** is a director at Cornerstone Care Solutions

A comprehensive process will make IPs more effective

Exponential growth in the amount of data produced and retained worldwide creates extra challenges and costs for insolvency investigations, says Armando Nardo

In both our personal and professional lives, the volume of data we produce continues to grow. From messaging and collaboration software to email and accounting systems, the retrieval, retention and review of data from such systems can be beneficial – but increasingly complex – for IPs. This article aims to address the challenges and considerations of effectively managing books and records while balancing quality and cost.

The Statement of Insolvency Practice 21, lays out the principles by which an IP is required to investigate the conduct of a business, its trading activities and the recovery status of assets.

The duty to report to the secretary of state or relevant agency on the conduct of those formerly in control of a company is also a consideration in the retention of electronic books and records. Equally, there may be a need to support or defend the company against third-party claims through investigation or court-mandated disclosure.

Extra consideration is given to regulated companies. It could be pertinent to retain data beyond the dissolution of a company to support future regulatory or investigatory requests.

Initially, it might not be apparent that a further investigation is required, but steps should be made to identify, preserve and collect data into a secure and usable format should an investigation or disclosure request be necessary later. Data can be incredibly volatile as time passes, and falling foul of the inadvertent or purposeful deletion or loss from malicious or business-as-usual activities is common. This can be more prevalent in an insolvency situation where employees leave a business, accounts are deleted, devices are decommissioned, service providers remove access to services and, in the worst cases, delete data for the non-payment of services.

Data volumes

The amount of data produced worldwide is growing at an exponential rate. A significant proportion of data only exists for a short period, for example, data consumed on social media. In the corporate environment, exponential data growth is also constant with data being retained for years and sometimes decades.

The data volumes present a challenge due to the size of the data that may need to be copied. This has an impact on the length of time a data collection exercise may take on both the 'human time' (specialists needed to carry out the work) and the 'machine time' needed for a computer to process a task. For example, copying data from a large server might take four hours of someone's time but, once the process has started, the computer may need hours or days depending on the volume of the data. Greater data volumes also increase the costs of storing, processing and reviewing them.

> **“Collaboration tools such as Microsoft Teams and Slack hold a wealth of data crucial to establishing facts in investigations, and it would be expected that such data sources are routinely preserved and included in any disclosure”**

A way to overcome this challenge is to scope the organisation's IT landscape, limit the scope where feasible and utilise appropriate equipment to collect data. It may also be appropriate to search the data 'at rest', which means that data is searched where it resides rather than a copy being taken if adequate technology is available.

Proliferation: new data types

In recent years we have seen many different cloud-based applications become embedded in organisations. Collaboration tools such as Microsoft Teams and Slack hold a wealth of data crucial to establishing facts in investigations where discussions took place or decisions were made over chat or video calls, and it would be expected that such data sources are routinely preserved and included in any disclosure.

> **“It is sometimes more cost-effective to collect data with what at first seems like a less efficient approach to reduce costs later down the line”**

When making decisions about which data to collect, the ways of working for that specific business can also be a factor. For example, a technology business might conduct all internal communications via a collaboration tool and use email for external communications. This might change the focus on which systems should be prioritised for collection. Sometimes it's easier to identify such a scenario by asking company employees to talk through a working process and see what systems they interact with.

Similarly, a business might have proprietary systems and applications, and it might be necessary to collect information from those systems to support ongoing activities. For example, an IP might opt to remove an expensive customer management service but require an extract of the customer data to wind down operations. Equally, it might be the case that data from such systems, or the system itself, holds some inherent value, and so it would be necessary to protect access to that system or take a proactive copy of it. Examples of this include intricate designs of popular products or a cutting-edge application in a technology business that may be able to be sold. Sometimes the value of specific items of data might not be initially apparent so it's important to consider scoping the IT landscape and feeding this back to an intellectual property team for consideration.

Scope

Over-collecting data can lead to increased costs when searching and interrogating that

A standard forensic data collection approach is to collect data onto an encrypted physical media such as a hard drive.

data later on. Indirectly it can also lead to other risks such as data privacy breaches if there was no right to collect (or retain) that data in the first place. One of the ways of balancing the data collection of books and records is to focus on the following:

a. People — whose data is required to be collected? Who was in control of the company? Who were the key individuals in charge of specific functions or making specific decisions? Who is likely to be the subject of any claim or investigation? Whose data might a regulatory body expect to be retained? Does the company have any active litigation holds in place?

b. Period — is all of the data required or only a specific timeframe? If you can only bring claims backdated to a certain timeframe, does retaining older data make sense?

c. Purpose — do we know why we need that data and how it will be used? We must establish that it is relevant to carry out our duties.

In an example where there is a suspicion of fraud, while the above will help limit collection to that necessary to carry out an administration or liquidation, it might be pertinent to also collect the company-owned mobile phones and laptops of suspected individuals. Every insolvency situation is different and there can be many factors which play into the scale of any data collection.

Data management

A crucial aspect of the process is how data is to be collected, managed, stored and tracked. Tailoring the approach is important. One way to achieve this is by anticipating the short-term and medium-term needs of any team that needs to review that data. For example, it is sometimes more cost-effective to collect data with what at first seems like a less efficient approach to reduce costs later down the line. This might be spending time understanding the information and collecting it at a departmental or individual level rather than at a whole-server level, which means one does not over-collect and will spend less time narrowing it down for investigation. Not to mention that some search technologies charge by data volume, so spending time upfront to reduce that likely future cost can be beneficial.

There are several benefits to investing in an evidence and data management system comprised of software and procedures. Firstly, data is tracked consistently across appointments and matters, with increased quality. Secondly, as data is detailed to a slightly more granular level it means that you save time and money by not having to preview large data sources to determine whether something may be relevant. Thirdly, in my experience, I have found that teams can complete tasks quicker, thereby freeing up time to focus on more valuable aspects of their work.

It is also essential to keep abreast of the latest technological advancements so that teams can scale up with technology rather than having to increase the team on the ground. Cloud-based services update frequently, which means that teams need to be aware of changes, but the nature of such technology has its advantages: tasks can be automated and performed remotely, making teams more agile and efficient.

Privacy and data protection

There are several factors that need to be considered before accessing, collecting, transferring or processing any data. First and foremost, the data protection legislation that applies and what is required to ensure that we have the technical and organisational capability to protect that data while it is in our possession. In addition, we have to strike a balance by not over-collecting and ensuring that data is well catalogued and detailed so that when it comes to processing, investigating or reviewing it, only the required data is processed and reviewed. As a reminder, there could be other obligations to support, for example, rights under GDPR such as responding to data subject access requests (DSARs) and executing the right to be forgotten.

Storage and retention

A standard forensic data collection approach is to copy data onto an encrypted physical media such as a hard drive. It's also recommended to have a second copy for redundancy and to maintain a chain-of-custody process, segregating data by case and accounting for its provenance throughout any investigative, legal or disclosure process. It's common for such data to be kept under restrictive access in secured storage.

It's important to have a process to remove data from your own systems such as Teams or network folders when it is no longer necessary to keep it online. This reduces access to data and limits the impacts of any unwanted data breach and should be applied throughout the appointment and at the end of it. A process to return or destroy data after retention following the end of a case or appointment should also be implemented. This will need to take into account an IP's organisational retention policy together with how it handles the retention of data for any company over which the IP has been appointed.

A comprehensive data scoping process that encompasses the needs of the insolvency team and the landscape of the organisation undergoing insolvency, coupled with the correct data management approach, will lead to a balanced and thorough method for handling electronic books and records and help to make IPs more effective in their work. It can also make them better equipped to handle more complex situations that might prevail further down the line, such as handling privileged material and bringing or defending claims against the entities over which they are appointed.

1 ICAEW – www.icaew.com/regulation/insolvency/sips-regulations-and-guidance/statements-of-insolvency-practice/statements-of-insolvency-practice-sips-england

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Insolvency Service launches follow-up activities team

Debuted at the Insolvency Live! event last year, a new team has been formed to manage some activities previously dealt with by official receivers, says **Rob Peck**

In the Spring 2023 edition of *Recovery*, I wrote about the important role official receivers play in supporting those in financial distress and some of the work we are doing to improve. I was also pleased to meet some R3 members at the Insolvency Service's 'Insolvency Live!' event in July.

Part of our Insolvency Live presentation was devoted to explaining the work of our new aftercare function team. The team was formed to manage follow-up activities which had, up until now, been dealt with by our network of local ORs.

The central case team (CCT) and local official receivers complete the casework, such as initial enquiries, inspections, gathering books and records, interviews, reports to creditors, establishing assets and the cause of insolvency, and any conduct matters. Assets that are identified are then transferred to our diverse asset realisation, income payment, and property teams. Any further queries received on that case are referred to as 'aftercare' and are administered by the aftercare function.

Most aftercare work will be referred to the team internally by local OR and CCT staff, but some work can be sent directly. IPs should send their notice to vacate office, interim or final reports and BPDC requests to oraftercare.ipreports@insolvency.gov.uk.

Common casework matters that the aftercare team may deal with include:

- General enquiries from debtors, third parties and creditors;
- Property matters such as historic HM Land Registry notices;
- Bankruptcy cases where a suspension of discharge is in place;
- Historic assets or those not disclosed during initial case enquiries;
- Data protection and subject access requests;
- Annulments on aged and historic cases;
- Aged company restorations and deferral of dissolution.

There will be instances where the aftercare team may engage with IPs or other external parties who would have otherwise dealt with local OR colleagues. It should be clear from our correspondence who you are dealing with and how to reply. If the aftercare function is already dealing with a matter, you can send further information to national.aftercare@insolvency.gov.uk.

> **We have also had very positive discussions with R3 leading to the agreement of a protocol that deals with best practice in areas impacting the OR**

Working together with the profession

The subject of IP handovers was raised with me at Insolvency Live, and it's clear that there is a perception from some IPs that ORs are not seeking IP appointments as frequently as in the past. The fall in case numbers in the last 15 years, from a peak of over 70,000 bankruptcies each year to the current level of around 7000 does mean far fewer cases are being handed over.

The criteria for whether the OR will remain in office and fulfil the role of liquidator or trustee has not changed and the OR will seek the appointment of an IP if:

- The majority of creditors resolve to replace the OR with an IP; or
- 25% of creditors requisition a decision making procedure; or
- The OR considers the case requires the skills of an IP.

The Insolvency Service has published statistics on IP appointments and the asset profile of bankruptcy and compulsory winding up cases. These can be found on gov.uk.

Compulsory winding-up orders represent around 10% of corporate insolvencies, and IVAs outnumber bankruptcies by over 10 to one. The OR delivers an essential public service in providing a debt relief solution for cases with little, if any, assets. Around 90% of bankruptcy and compulsory winding-up cases have insufficient assets to cover the administration and general fees, and around half have no assets.

Official Receiver Services (ORS) is keen to work alongside IPs to ensure the best overall outcome for creditors in our insolvencies. The ORs have been looking at a range of schemes to facilitate contingency planning measures that could be deployed if they had insufficient capacity to undertake their current level of trustee and liquidator work. With assistance from R3, ORS has been working with a small group of volunteer IPs to explore options. However, limitations have been identified and concerns raised regarding the lack of assets in the majority of cases that come to the OR's office. There is a real issue therefore about how IPs would be paid for work done.

ORS is looking to consider if cases where potential civil recoveries are identified, but where the OR would have normally remained as liquidator, could be passed to an IP to be dealt with. ORS is seeking to understand, for example, the minimum value of the potential recoveries needed for them to be suitable to be dealt with by an IP. The group is also considering if, and in what circumstances, cases where the OR has not identified material assets or potential recoveries could be handed over to an IP, to see if the practitioner can make recoveries for the benefit of creditors. The intention, if the discussions are successful, is that more no-asset cases would be offered to IPs that wished to take them. Please send any queries relating to the above to sor.operations@insolvency.gov.uk.

We have also had very positive discussions with R3 leading to the agreement of a protocol that deals with best practice in areas impacting the OR when an IP vacates office. The protocol covers, in particular, the handing back of assets by IPs.

I enjoy and value the regular engagement we have with R3 members, regional representatives and the smaller practices group. If you have any questions or concerns, I would encourage you to raise them with your local OR liaison representative, details of whom can be found via the R3 regional network page on the R3 website.

Rob Peck is director of official receiver services at the Insolvency Service

RECOVERY Insights

New perspectives on insolvency, restructuring and turnaround

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Firm-wide risk approach could help reduce insurance costs

IP firms do not currently build claims histories with one insurer for ATE, but this is usual with other insurances and likely to have cost benefits, says **Ed Brittain**

Purchasing after-the-event (ATE) insurance is generally viewed through the lens of insuring a risk of a specific estate/office-holder in relation to a specific claim pursued by the office-holder. This is typically introduced by the instructed legal adviser. This has led to ATE being purchased on a case-by-case basis, which (as with all insurance) is neither efficient in terms of premium nor guarantees that ATE can be purchased.

The decision to purchase ATE is made usually just before proceedings have been issued (and occasionally days before or even after). It is also typically purchased only after a settlement has been attempted and after an assessment of the possible risk of not being successful. This process does have good logic but consequently leads to a position of 'selection against' insurers and this is reflected in the pricing of premiums and ability to obtain terms. If the cost of ATE is too high to enable a case to be pursued, this in turn leads to limited options and possibly only assignment (if possible). Additionally, with ATE being purchased on a selection-against basis, the office-holder and their firm do not build a claims history with any one insurer that includes all cases pursued. A claims history is a critical piece of underwriting data for almost all classes of insurance that enables the insured to negotiate terms with insurers based on their track record. However, is rarely taken into account in the placing of ATE.

A different perspective on risk

As such, ATE insurance is almost always rated by insurers on a basic common pool theory where rates are applied by insurers' experience in underwriting ATE, hence the fairly tight ranges of premiums that can be quoted even before an insurer has seen any papers or knows which office-holder is pursuing the action. The risk has to fit the underwriter's prospects of success criteria on its own merits, as opposed to rating the risk of a specific office-holder or firm's experience. This basis of underwriting is not the future in an ever-growing sector of the insurance industry. Today, insurers rely on detailed data and algorithms to underwrite risk to generate efficient premiums and manage their own risk. In many sectors of the insurance industry, common pool theory has been severely restricted – if not eradicated – by commercial pressure. This is of course beneficial to many in terms of cost.

> **"A firm would not purchase an individual professional indemnity or directors' and officers' insurance policy for every office-holder, so why do it in respect of ATE?"**

It is now possible to view the risk of litigation from a different perspective. Investigating potential actions is a known requirement of an insolvency practitioners firm's duties. As such, pursuing litigation is part of a firm's role. The costs of ATE directly impact a firm's recoveries for creditors and the firm's ability to cover its own costs. A firm would not purchase an individual professional indemnity or directors' and officers' insurance policy for every office-holder with the risk being rated on each individual, so why do it in respect of ATE?

Costs to the office-holder

SIP 2 requires the appointee to investigate all appointments for potential claims. This will, in some cases, require the appointee to spend estate funds or fund the cost themselves where there are no funds in the estate to obtain specialist reports or valuations etc. The assignment model does require a claim to be identified, which will usually mean disbursements will already have been incurred uninsured. Where no viable claim is identified and the office-holder funds the investigation disbursements, they will not be able to recover these costs. Where the estate funds the investigation disbursements, the creditors will then receive a lower recovery. Hence each office-holder has to make a decision that may include them incurring costs from their own funds where the estate has none.

From a firm's risk management perspective, there are products available that provide a consistent and managed approach to potential adverse cost risk on a firm-wide basis. For example, we have developed one such product, called Senatus, which was created to provide a certainty and efficiency that we consider to be missing in the insolvency litigation insurance market. Certainty of cost and coverage that ensures IPs are making the optimum recoveries for creditors and protecting any funds within the estate used for disbursements when complying with the requirements of SIP 2. Senatus has pre-prescribed underwriting criteria and does not require pre-bind underwriter acceptance for each action. The idea is to help mitigate uninsured cases from a balance sheet, provide ATE cover at competitive rates and build a claims history for each firm, which in the long term may prove highly beneficial, and possibly essential. This is particularly relevant in an ever-changing insurance underwriting market that will continue to move towards the world of AI and a reliance on specific risk data.

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www.howdengroup.com/uk-en/cover/legal-expenses-insurance-and-litigation-funding

Optimal handling of WIP is key to maximising creditor returns

Outsourcing WIP recoveries across multiple firms during law firm administration can lead to an increase in value of up to 10 times, says **David Johnstone**

The legal sector is not the first sector you think of in terms of those suffering from financial distress. It may surprise you, then, that this time last year The Law Society reported that a legal business was failing or going through an insolvency process every single working day.

So, what does 2024 hold for legal businesses? Like most sectors, there are opportunities for fit and agile businesses to succeed. For other businesses, continuing legislative change has an impact on their economic models and sector consolidation is starting to gain pace.

Consider a joint appointment

The law firm insolvency process in England and Wales is incredibly complex due to heavy regulation, and the ethical and regulatory necessity to protect clients. The Solicitors Regulation Authority plays a crucial role in any law firm insolvency process — it ensures compliance with its code of conduct and the protection of client funds.

> **“Excellent client care and communication are essential to preserve the goodwill and support of ‘live’ clients to ensure that they do not move their matter elsewhere”**

The process often requires the expertise of corporate restructuring and insolvency professionals with significant experience in dealing with law firm insolvency. For those undertaking an appointment over a law firm for the first time, it is worth considering undertaking a joint appointment with an individual specialising in legal professional services businesses.

> **“The surprising frequency of legal businesses facing financial distress underscores the need for a better understanding of the intricacies involved in law firm insolvency processes”**

First and foremost, to provide ‘legally prescribed services’, you must be an entity authorised by the SRA. However, it is important to note that pre-pack sales to a single purchaser are not the only route when it comes to law firm insolvency.

The risks associated with being deemed a ‘successor practice’ (where the insurance risk of the previous firm is taken on), as well as TUPE, could result in significantly lower recoveries being achieved for creditors.

Lack of time for due diligence

When IPs handle law firm insolvencies, one of the major assets to consider is the work in progress (WIP). WIP is the unbilled work that, once completed, can offer significant returns for creditors. Realising the value of WIP is often a complex task. It is not just about selling off assets; it involves understanding the value of ongoing legal work, its potential for completion, and the ability to bill and collect for that work.

Excellent client care and communication are therefore essential to preserve the goodwill and the support of ‘live’ clients to ensure that they do not move their matters elsewhere and diminish the WIP value. There are also often matters where cost issues are not fully resolved and require negotiation and collection to maximise realisations.

Selling WIP to a single entity, for example, can significantly diminish the value that can be achieved for the process. This is often due to the lack of time for due diligence in distressed situations which, combined with the additional risks the buyer is taking on, often justifies a heavy discounting of work in progress.

Since the government introduced the Legal Aid, Sentencing and Punishment of Criminal Offenders Act in 2013 and changed the economic reality within the civil litigation arena, new methodologies, such as our model, have developed that allow IPs to outsource the realisation of WIP across multiple firms covering all legal disciplines.

A need for better understanding

Spreading the work across many firms negates the need for a single purchasing firm to discount the WIP value already created by the insolvent entity. By using this service, as opposed to selling WIP at a discount, we have seen completed projects receive as much as a tenfold increase in value following administration.

The surprising frequency of legal businesses facing financial distress underscores the need for a better understanding of the intricacies involved in law firm insolvency processes. How WIP is handled is a key aspect of maximising recoveries for creditors. The realisation of WIP value is not a simple matter of asset disposal; rather, it involves a comprehensive understanding of ongoing legal work, potential for completion and effective billing and collection processes.

The introduction of new methodologies, such as the Recovery First model, offers an alternative to traditional WIP sales and allows for the outsourcing of realisation across multiple firms. This approach has demonstrated substantial increases in value, providing a promising avenue for IPs to conduct recoveries without resorting to heavy discounts.

David Johnstone is managing director of Recovery First
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07887 796 989

SURVEY:
After-the-event insurance

Who's who – company details						
Trading name	**Contact details for IPs**	**Website**	**Address**	**Top/parent company in group, Reg country | Reg No**	**Who are you regulated by?**	**No of years providing products/ services to UK insolvency professionals**
Alternative Insurance Brokers ■	*n/s*	www.aib-ate.co.uk	St Christopher House, 217 Wellington Road, Stockport, SK2 6NG	Alternative Propositions Ltd, England & Wales | 08253536	FCA – 6620 – Activities of insurance agents and brokers.	2
AmTrust International ■	*n/s*	*https://amtrustinternational.com*	*33 St. Mary Axe, London EC3A 8AA*	*AmTrust International Limited, n/s | n/s*	*n/s*	*n/s*
Annecto Legal Ltd ■	Mark Beaumont, mark.beaumont@annectolegal.co.uk, 07730 217 643	www.annectolegal.co.uk	71 Central Street London EC1V 8AB	Annecto Legal Ltd, England & Wales | 08370254	Annecto Legal Limited is authorised and regulated by the Financial Conduct Authority FRN: 707558 as an appointed representative of 2direct Limited, authorised and regulated by the Financial Conduct Authority FRN: 306117.	11
Aon UK Limited ■	Tom Hunt, thomas.hunt@aon.co.uk, 07769 742 439	www.aon.com	Aon Centre, Leadenhall Building, 122 Leadenhall Street, London, EC3V 4AN	Aon Plc, England & Wales | 00210725	Financial Conduct Authority	5
Client Care Options Ltd ■	Mark Baker, enquiries@ccoptions.co.uk, 01242 260 388	www.ccoptions.co.uk	48 Pilley Lane, Cheltenham GL53 9ER	Straight Solutions Ltd, England & Wales | 05203285	Financial Conduct Authority - FCA registered number 315448	16
DAS UK Group ■	*n/s*	www.dasinsurance.co.uk/partners/solicitors/who-we-are	DAS (Part of the ARAG Group)	ARAG SE, Germany | Unknown	FCAPRASRA - DAS LAW	*20*
Escalate Disputes ■	*n/s*	*www.escalatedisputes.co.uk*	*5th floor, 15 Westferry Circus, London, E14 4HD*	*Escalate Law Ltd, n/s | n/s*	*Solicitors Regulation Authority (No: 650666)*	*n/s*
Factor Risk Management ■	*n/s*	www.factor-risk.com	*Dawson House, 5 Jewry Street, London EC3N 2EX*	*Factor Risk Management Ltd, UK | 12650248*	*Financial Conduct Authority (No 953402)*	*n/s*
Gallagher ■	*n/s*	www.ajg.com/uk/legal/dispute-resolution-insurance	67 Lombard Street, London, EC3V 9LJ	Gallagher Insurance Brokers, Scotland | SC108909	FCA	12
Guardian Legal Services Limited ■	*n/s*	www.ateinsurance.info / www.guardianlegal.co.uk	56 Mill Lane, Solihull B93 8NW	Guardian Legal Services Limited, England & Wales | Registration No. 5756959	Financial Conduct Authority Firm Ref No. 484841	18
Harbour Underwriting Limited ■	Rocco Pirozzolo, rocco.pirozzolo@harbourunderwriting.com, 020 3829 9400	www.harbourunderwriting.com	8 Waterloo Place, London, SW1Y 4BE	N/A, England & Wales | N/A	Financial Conduct Authority	8
Howden Insurance Brokers Limited ■	Ed Brittain, ed.brittain@howdengroup.com	www.howdengroup.com	One Creechurch Place, London EC3A 5AF	Howden Group Holdings Limited, England & Wales | 02937398	Howden Insurance Brokers Limited is authorised and regulated by the Financial Conduct Authority No. 309639.	5
Lakehouse Risk Services ■	*n/s*	*www.lakehouserisk.com*	*9th Floor the Northern & Shell Building, Lower Thames Street, London EC3R 6EN*	*Lakehouse Risk Services Ltd, UK | 10052270*	*PRA (Number 772673)*	*n/s*

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Who's who – company details

Trading name	Contact details for IPs	Website	Address	Top/parent company in group, Reg country | Reg No	Who are you regulated by?	No of years providing products/ services to UK insolvency professionals
Litica Limited ■	*n/s*	www.litica.co.uk	2nd Floor, 16 Eastcheap, London, UK EC3M 1BD	Litica Limited, England & Wales | 11864319	Litica Ltd is authorised and regulated by the Financial Conduct Authority (the 'FCA'). FCA reference number: 950 593. Litica Australia Pty Ltd (ACN 649385688) are authorised representatives of ATC Insurance Solutions Pty Ltd AFS.Litica Europe GmbH is registered at AG Köln, registration number HRB115109.	5
Markel International Insurance Company Limited ■	*n/s*	www.uk.markel.com/insurance/insurance-products/after-the-event	20 Fenchurch Street, London, EC3M 3AZ	Markel Group Inc, United States | n/a	Financial Services Association and Prudential Regulation Authority	15
Marsh Ltd ■	*n/s*	www.marsh.com/uk	Tower Place East, Tower Place, London, EC3R 5BU	Marsh McClennan, United States | 01507274	FCA	4
Maxima ■	*n/s*	www.maximagroup.org	Kingsnorth House, Blenheim Way, Birmingham B44 8LS	Maxima Litigation Solutions Limited, England & Wales | 07789604	Financial Conduct Authority	15
Miller Insurance Services LLP ■	*n/s*	*www.miller-insurance.com*	*70 Mark Lane, London, EC3R 7NQ*	*n/s, n/s | n/s*	*Financial Conduct Authority. (No 575243)*	*n/s*
Mosaic Syndicate Services Limited ■	Sarah Bowden, sarah.bowden@mosaicinsurance.com, 07521 242 707	www.mosaicinsurance.com	4th Floor, 90 Fenchurch Street, London, EC3M 4ST, United Kingdom	Mosaic Insurance Holdings Limited, Bermuda | Bermuda Monetary Authority registration number - 55561	The Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA)	2
Prosperity Insurance ■	*n/s*	*https://prosperityinsurance.co.uk*	*n/s*	*Prosperity Law LLP, UK | OC340697*	*Solicitors Regulation Authority (SRA ID 533585)*	*n/s*
QLP ■	*n/s*	*www.qlp.ltd.uk*	*124 City Road, London EC1V 2NX*	*QLP Ltd, UK | 3236030*	*Financial Conduct Authority (No. 305967)*	*n/s*
Specialist Risk Insurance Solutions Limited ■	James Jobling, jjobling@specialistrisk.com, 07918 182 248	https://srinsurancesolutions.co.uk/sris-ate-insurance-litigation-funding	6th Floor, One America Square, 17 Crosswall, London EC3N 2LB	Specialist Risk Group Limited, England & Wales | 12083334	Financial Conduct Authority (FRN: 473138)	*n/s*
Stewarts ■	Alex Jay, ajay@stewartslaw.com, 020 7903 7902	stewartslaw.com	5 New Street Square, London, EC4A 3BF	Stewarts Law LLP, England & Wales | OC329883	Solicitors Regulation Authority	2
Temple Legal Protection Ltd ■	*n/s*	*www.temple-legal.co.uk*	*One Bell Court, Leapale Lane, Guildford, Surrey GU1 4LY*	*Temple Legal Protection Ltd, UK | 03698194*	*Financial Conduct Authority (No. 3698194)*	*n/s*
TheJudge ■	Emily Thomas, emily.thomas@thejudgeglobal.com, 0845 257 6058	www.thejudgeglobal.com	90 Fenchurch Street, London EC3M 4ST	TheJudge Group Holdings Limited, England & Wales | 06757896	FCA	19

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Insurers (table 1)						
Trading name	**Jurisdictions you provide cover for**	**Premium calculations & payment options typically offered (standard categories)**	**Available limits for adverse costs and disbursements**	**Other forms of cover insured**	**Typical sizes of claim**	**Can you provide security for defendants' costs in insolvency-related claims? If so, typically in what form?**
AmTrust International ■	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
DAS UK Group ■	*England and Wales, Scotland, Northern Ireland.*	Premium paid up front; deferred premium; fully deferred and contingent premium; insured premium; staged premium; top-up cover.	*n/s*	*n/s*	*n/s*	*n/s*
Harbour Underwriting Limited ■	We insure cases in a number of jurisdictions around the world including the UK, the Channel Islands, the Isle of Man, various Caribbean islands, Australia, Hong Kong, Canada, the USA and the UAE.	Premium paid up front; deferred premium; staged premium; top up cover.	We can consider limits from £150,000 to £20 million.	We can insure: a) the insured's solicitor's fees; b) appeals; c) cross undertaking in damages (eg if an injunction is applied for to freeze the defendant's assets).	<£10m	Yes. This can be by way of an anti-avoidance endorsement or a deed of indemnity.
Lakehouse Risk Services ■	*United Kingdom*	*n/s*	*We will insure risks from £100k up to £2m and can, with the agreement of our insurers, insure risks up to £5m.*	*n/s*	*n/s*	*n/s*
Litica Limited ■	Worldwide	Premium paid up front; deferred premium; fully deferred and contingent premium; staged premium; top up cover; other.	Maximum of £35m	Contingent risk, DBA/CFA own side's insurance. Capital protection wrappers.	£100k->£500m	Yes – anti avoidance endorsement
Markel International Insurance Company Limited ■	England and Wales	Premium paid up front; deferred premium; fully deferred and contingent premium; insured premium; premium as a percentage of damages; staged premium; top up cover.	We have no set limits. We consider all limit requests from £25k to several million.	Sometimes own solicitor costs or the costs incurred by the IP/ liquidator.	<£2m	Yes, anti-avoidance policy
Mosaic Syndicate Services Limited ■	UK, USA, Africa, Asia and Pacific, Australia, Canada, Caribbean, Channel Islands, Gibraltar, Middle East, Central and South America, Europe, New Zealand, Hong Kong SAR, Singapore, Israel, South Africa.	Premium paid up front; deferred premium; fully deferred and contingent premium; other.	USD/CAD/ EUR/AUD/GBP 5,000,000	N/A	<£50m	Yes, typically in the form of an anti-avoidance endorsement attached to the policy, but we can also provide a deed of indemnity if required.
Temple Legal Protection Ltd ■	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*

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Insurers (table 2)						
Trading name	**Do you charge assessment fees? If so, in what circumstances?**	**Approx number of insolvency-related claims you wrote ATE cover for in 2023**	**Number of FTE underwriters who deal exclusively with ATE**	**If applicable, which insurance companies underwrite your ATE policies, and what are their current credit ratings?**	**If applicable, what is/are your current credit ratings?**	**How are you different?**
AmTrust International ■	*n/s*	*n/s*	*n/s*	*n/s*	*N/A*	*We focus on developing a long-term, two-way relationship with those we insure. Instead of imposing a one-size-fits-all approach, we look for ways to develop plans that meet each client's unique needs. AmTrust International's innovative approach to legal expenses insurance coverage has made us a recognised thought leader in the industry.*
DAS UK Group ■	*n/s*	*n/s*	*n/s*	*N/A*	*Civil / commercial litigation ATE is insured and underwritten by DAS and we hold an 'A-' rating with Standard and Poor's.*	*Our products can cover your clients for the full range of claim types including insolvency.*
Harbour Underwriting Limited ■	No	*n/s*	4	Our capacity is from A-rated insurers such as Accredited Insurance (Europe) Limited – UK Branch.	*N/A*	Our underwriting team, which includes three practising solicitors, has over 50 years' experience insuring a wide variety of disputes. We are renowned for our expertise and have an appetite to consider complex cases other underwriters may decline.
Lakehouse Risk Services ■	*n/s*	*n/s*	*n/s*	*Policies are backed by an A+ rated insurer.*	*N/A*	*We insure a wide range of claims on behalf of IPs against former directors/shareholders or against other individuals or businesses that have caused the insolvency.*
Litica Limited	No	15	8	AXA, Axis, Fortegra, IGI, Markel, various Underwriters at Lloyd's. All are at least A rated.	*N/A*	Largest team in the UK. Dedicated case management team. Large limits of cover available.
Markel International Insurance Company Limited ■	No	50	6	N/A	AAA	All cases are assessed by a qualified solicitor. Tailor-made solutions as opposed to off-the-shelf products. One of very few insurance agencies which provide full deferred premiums for cases with higher indemnities. We have the ability to underwrite portfolio of cases and not just individual cases.
Mosaic Syndicate Services Limited ■	No	10	2	100% Lloyds' syndicates. AA- Very Strong (Standard & Poor's); AA- Very Strong (Fitch Ratings); and A Excellent (AM Best).	*N/A*	We back our underwriting capabilities by providing lead-line capacity through our Syndicate 1609 as well as writing on behalf of third party capacity (100% Lloyds). Being independently owned allows us to adopt a flexible and innovative approach to risk and to consider each case on its own merits.
Temple Legal Protection Ltd ■	*n/s*	*n/s*	*n/s*	*'A' rated policies underwritten by Royal & Sun Alliance*	*N/A*	*As one of the country's leading underwriters of after the event (ATE) legal expenses insurance, our products are widely used by a broad cross-section of leading law firms and brokers.*

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Brokers					
Trading name	**Approx % of turnover related to ATE for insolvency-related claims**	**Approx number of insolvency-related ATE claims arranged/ facilitated in 2023**	**How are you typically paid?**	**Services**	**How are you different?**
Alternative Insurance Brokers ■	10	20	Commission/flat fees.	We offer a range of litigation support services including: 1) litigation funding; and 2) arranging bespoke ATE insurance cover.	We offer a detailed case review service and bespoke placement of ATE risk and negotiate required terms.
Annecto Legal Ltd ■	50	50	Brokers are paid a commission on ATE premiums.	Helping solicitors and insolvency practitioners secure best value via ATE insurance, litigation funding, disbursement funding or the assignment of claims. We assist on all sizes of cases.	Almost all insolvency claims are insured on a fully deferred and contingent basis, with no upfront costs. We offer guidance around retainers, funding and insurance to ensure the best value is achieved.
Aon UK Limited ■	*n/s*	*n/s*	Commission paid from insurance premium or fee arrangement.	Aon Litigation Risk Group provides advisory and placement services in relation to ATE and contingent risk insurance products. Aon also has a leading insolvency and restructuring insurance practice.	Aon's diverse team of specialists includes former litigators, funders and ATE underwriters and with the support of its insolvency and restructuring practice, provides unmatched insight to its IP clients.
Client Care Options Ltd ■	15	10	We receive commission directly from the insurers at a pre-agreed level upon successful conclusion of the claim.	We are a fully independent consultancy and brokerage that can source competitive solutions for insolvency related claims including full assignment of claims, litigation funding or ATE insurance.	We specialise in helping solicitors inform clients about financing litigation and financial loss protection. Our experience and knowledge enables us to offer high quality advice and obtain competitive ATE cover.
Factor Risk Management ■	*n/s*	*n/s*	*n/s*	*Factor Risk Management is a leading independent global advisor and broker of litigation finance and after-the-event legal expenses insurance.*	*As a privately-owned company with no affiliation or connection with any market or capacity provider, we are free to provide totally impartial advice and introductions.*
Gallagher ■	40	40	Brokerage as part of premium.	Insurance solutions to enable insolvency professionals to mitigate the financial risks (to themselves and the creditors) inherent in bringing and conducting large scale litigation.	We are the largest and highest ranked (by independent rankings authority Chambers and Partners) in this space. The deals we work on are the largest and most profile in insolvency litigation.
Guardian Legal Services Limited ■	20	23	Our remunerations are paid by the insurer. We render no charges to the client. We are remunerated if the claim succeeds. Premiums are deferred until the end of the case and payable only if successful.	We conduct preliminary assessment of ATE Applications prior to submission to major UK regulated A rated insurers we use, and seek disbursement funding if required. Premiums payable only if successful.	We have agencies with almost every insurer but are not tied to any insurer. We conduct preliminary assessment and provide analysis of quotes and assist with the preparation of the ATE application.
Howden Insurance Brokers Limited ■	35	253	Commission paid by insurers for ATE insurance placements. This will usually match the premium if deferred and contingent. We do not charge a review or broking fee up front. We disclose all earnings.	ATE, funding introductions, cross undertakings for relevant injunctions, judgment preservation insurance, insolvency practitioners ATE scheme, open cover, bonding, contingent risk and tax risk.	An exclusive ATE scheme specifically for insolvency practitioners that does not require insurer approval for each action and also insures investigation disbursements. We are able to introduce funding.
Marsh Ltd ■	*n/s*	*n/s*	We are paid a brokerage by the insurer, so at no cost to the IP.	We provide a full range of advisory services on all matters to do with managing the risk of disputes. We advise on ATE and the full range of funding options beyond litigation funding.	Our full advisory services on all aspects of risk management set us apart.
Maxima ■	60	*n/s*	We are paid brokerage via the insurers.	We procure ATE insurance for insolvency solicitors or insolvency practitioners whether acting on a conditional fee basis or not. We also provide ATE for third party funded cases or assigned claims.	We deal with one of cases, however, we also specialise in placing schemes for insolvency firms. We build bespoke schemes based on the requirements of our clients.

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Brokers

Trading name	Approx % of turnover related to ATE for insolvency-related claims	Approx number of insolvency-related ATE claims arranged/ facilitated in 2023	How are you typically paid?	Services	How are you different?
Miller Insurance Services LLP	*n/s*	*n/s*	*n/s*	*Working closely with claimants, law firms and litigation funders, we deliver innovative broking solutions to assist those involved in high value commercial litigation and international arbitration matters.*	*n/s*
QLP	*n/s*	*n/s*	*n/s*	QLP work with solicitors and insolvency practitioners providing after the event insurance and third party funding to support recoveries resulting from an insolvency.	The financial risks of insolvency disputes can be managed and contained with up to £10 million of after the event cover to insure against opponent's costs and own sides disbursements, as well as court and arbitration fees.
Specialist Risk Insurance Solutions Limited	*n/s*	*n/s*	*n/s*	Our team works in collaboration with law firms, barristers, and insolvency practitioners, offering advice and making recommendations on the suitability of ATE insurance.	*n/s*
TheJudge	20	50	We do not charge an application fee. TheJudge receives payment of a commission from the insurer upon receipt of their premium. Premiums are usually deferred and contingent on a successful outcome.	A leading independent broker for legal risk insurances including ATE insurance, cross undertaking in damages insurance and contingency fee insurance. We are ranked Tier 1 in Chambers & Partners.	A product called Accelerate which provides indications of terms from A-rated insurers for ATE insurance up to £250K within 24 hours of completing a short online form for fully deferred premiums.

Other ATE providers

Trading name	Services
Escalate Disputes	*We are transforming how SMEs resolve business disputes, are helping to unblock cases that lawyers and insolvency practitioners had previously been unable to conclude, and are unlocking new opportunities for the accounting and legal community. We offer like-minded, forward-thinking legal firms the opportunity to join the Escalate platform – either by becoming a panel member, or by partnering with us on an ad hoc basis.*
Prosperity Insurance	*All our ATE policies offer fully deferred premiums and are only payable if the case is successful. We also offer delegated authority products, have no minimum volume requirements, minimal in-life case reporting, and policies are accessed via an easy-to-use on-line portal. We are also able to offer a staged approach to our premium structure which will be in line with the relevant stages of the cases legal process.*
Stewarts	Stewarts Litigate is a groundbreaking ATE insurance facility for Stewarts commercial disputes clients. The facility has been developed by Arthur J Gallagher Insurance Brokers Limited to work alongside Stewarts' alternative funding agreements, provides a solution that balances the risk, cost and impact of commercial disputes and enables our clients to litigate, arbitrate or negotiate their disputes from a position of financial strength. Benefits include: 1) rapid process to incept high level indemnities of up to £4m in three business days and up to £18m within 10 business days at pre-agreed market leading rates: giving more certainty when structuring case finance; 2) underwritten by a panel of A / A- rated insurers reducing the scope for conflict or aggregation issues; 3) Low or no cost at inception – paid premiums are lower than typical ATE market premiums and for insolvency cases requiring cover of up to £2m the premiums can be fully deferred and contingent.

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Projects and papers provide an engagement opportunity

A strategically released personal insolvency policy paper and research on the evolution of the profession aim to support insolvency on all fronts, says **Amelia Franklin**

Once a year, R3's external affairs team hosts its flagship event in March — the President's Lunch, which provides a valuable opportunity to connect with parliamentarians from all sides of the political spectrum.

This year, R3 president Nicky Fisher and senior R3 members will join MPs and peers in an event that aims to improve understanding of the insolvency profession and its work, and provide an opportunity for discussion on key policy issues, such as the Government's proposals to reform insolvency regulation, personal insolvency and fraud.

Planning for the event is currently in full swing, and with the 2024 budget fast approaching and a general election imminent, we hope the lunch will be an opportunity for guests to share their thoughts on the current economic landscape and discuss how government policy can best support the profession.

Past keynote speakers, including journalists such as Ben Chu, Ian King, and Dharshini David, have set the bar high. This year's speakers promise no less, and we're pleased to announce that Ben Chu has confirmed to join us again. We look forward to seeing all the members who will be attending.

Reshaping personal insolvency

Since the last edition of *Recovery*, our team has been working hard on a new policy paper that peels back the layers of personal insolvency and dives into the financial challenges faced by individuals in the wake of the pandemic and cost-of-living crisis.

Personal insolvency numbers may have fallen in 2023, but demand for debt advice is constantly rising. It is becoming increasingly apparent that a bottleneck is forming and numbers are likely to rise throughout 2024. With a consultation on the personal insolvency framework expected early this year, our paper zooms in on issues with the existing framework — unclear objectives, hurdles to entry, and a lack of focus on prevention.

We are hoping to align the release of the paper strategically with the upcoming consultation, adding our perspectives to the mix and sparking discussions with the Government to ensure that the personal insolvency regime strikes the right balance between helping individuals in financial distress and protecting the rights of creditors.

> **"The new research also aims to understand how R3 must further adapt to thrive in the ever-changing insolvency landscape"**

Survey says...

In a challenging business landscape marked by inflation peaking at over 11% and insolvency appointments surging to levels not seen since 2009, businesses and the insolvency profession grappled with heightened pressures last year.

Recognising the significance of these challenges, R3 is undertaking a major new research project that delves into the profession's evolution since the implementation of the Insolvency Act in 1986. This project will aim to address the needs of the wider economy, demands of ministers and changes in Government policy.

With new rescue procedures, regulatory changes and economic challenges to contend with in the last few years, the research also aims to understand how R3 must further adapt to thrive in the ever-changing insolvency landscape.

As part of this project, in January we sent out a survey to capture insights from our members about the past, present and future of the profession and its work. The survey explored a variety of topics including government regulation, trends in insolvency, recruitment and what opportunities and challenges face the profession in the next five years.

Thank you to all members that completed the survey — your insights will be valuable in helping us to establish a clear picture of trends and drivers across the profession and to enable us to better support the profession, and you — our members in 2024 and beyond.

Making the news in 2023

Last year was hugely successful for R3 in the media, with our comments on key topics including insolvency statistics, policy updates and business trends receiving widespread media attention.

Always aiming high, we were pleased to end the year with appearances in 140 national news stories, including regular mentions in *The Guardian*, *The Times*, *The Independent*, and more.

Our success didn't end there — we also appeared on four television broadcasts throughout last year including the BBC's *News at Six* and *News at Ten*, BBC Radio 5's *Wake Up to Money* and an appearance on BBC *South East Today* in October.

As we stepped into a new year, we hit the ground running, with our comments on the December 2023 insolvency statistics featured in national publications including the *Daily Express*, *The Telegraph*, and *iNews*, to name a few, as well as a range of trade and regional titles.

Election countdown

With a general election on the horizon, our policy and public affairs team is gearing up for a new exciting project working on a manifesto: a wish list of key insolvency and restructuring policy priorities that we hope to see from a new Government.

We'll be organising a host of member roundtables to gain insights from the profession and to help shape our lobbying activity. Keep a look out for further details on how you can get involved with the project and make your mark on the future political landscape.

Amelia Franklin is campaigns and communications executive at R3

R3 Training Academy

The R3 Training Academy is designed to suit a range of learning styles and preferences, which enable professionals to grow and develop throughout their career in the insolvency and restructuring profession.

Upcoming Training Academy eLearning

Directors' Duties Series

This eLearning series will provide a comprehensive understanding of directors' duties for those looking to expand their existing knowledge of the subject. Delivered in the format of 5 technical sessions, short form tests at the end of each chapter and a relevant overarching case study to illustrate the topics being covered.

The series will equip attendees with an in-depth knowledge of directors' duties from pre-insolvency procedures to the roles and responsibilities of charitable trustees. The course is delivered in a format which is accessible to all, and at the attendee's own pace.

CPD Hours: 5

Creditors' Voluntary Liquidations (CVL) Refresher Series

This eLearning training is aimed at insolvency professionals who have basic experience of insolvency, but have not administered CVLs previously and as a refresher for staff and IPs who are returning to deal with CVLs.

Creditors' Voluntary Liquidations (CVL) represent the vast majority of corporate insolvencies, though the nature of these voluntary liquidations is often misunderstood. Join Julia McKay on this eLearning series as we explore CVLs from initial consultation to completion.

CPD Hours: 3

Introduction to Insolvency Certification

Consisting of 21 sessions, short tests and case studies, this course equips attendees with practical knowledge and an understanding of all insolvency procedures.

On completion of this certification, you will be R3 recognised as having a Principles level of understanding in the insolvency profession. If you have New Professionals in your staff cohort, book now, or speak to our team regarding a group booking of 5 or more staff to get a discounted rate.

CPD Hours: 16

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