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RECOVERY

Regulation

Due vigilance: anti-money laundering A guide for IPs following the introduction of new money laundering regulations in June 2017

In safe hands A look at the health and safety regulations that can catch IPs unawares and how to prepare

Regulation special: what does good regulation look like? Representatives from the RPBs, R3 and the Insolvency Service put forward their views on regulation across the profession and how it might develop in future

No expense spared Reflecting on the Nortel Networks UK bar date on administration expenses and what it might mean for IPs

Data protection detail: the GDPR Find out how the reform of data protection law is going to change how data is handled and what new obligations are imposed to meet those changes

Property insolvency: striking the balance What do landlords and administrators clash on in an insolvency situation and what might be done to find a balance?

An interview with… Michael Howe HMRC's director of business tax operations details his interactions with the insolvency profession and the changes that have resulted

The final call for Aviator UK The story behind the insolvency of a ground handling operator that served some of the UK's largest airports

SPG: insolvency – an over-regulated profession? Can small firms really keep up with the rapid pace of regulation?

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From the editor

Regulation, for the purpose of the theme of this issue of *RECOVERY*, encompasses not only insolvency regulation, but a plethora of red tape affecting commercial activity in which IPs and restructuring professionals are inevitably involved.

We begin on page 15 with Annabel Gillham and Mercedes Samavi discussing the General Data Protection Regulation, an EU regulation that has direct effect in the UK from 25 May 2018. The government is clearly embracing this European law, using a proposed data protection bill to ensure that UK law is EU compliant. IPs will have a number of responsibilities as data controllers or processors, both personally and as agents of insolvent entities.

The Money Laundering Regulations 2017 came into force on 26 June and gave effect to the EU's Fourth Anti-Money Laundering Directive. On page 19 Jeffrey Davidson not only gives these UK regulations their full and rather lengthy title, but explains the requirements (among others) for relevant persons, including IPs, to document written risk assessments, policies and procedures.

On page 20 Andrew McIntosh and Sadie Easdown discuss a variety of cybersecurity regulation, including the UK's implementation, on or before 9 May 2018, of the EU's Network and Information Security Directive.

It is worth making the point that the great repeal bill will ensure that all the EU law mentioned above (regulation and directives) is imported into UK law on the UK leaving the EU.

Finally on non-insolvency regulation, Duncan Reed explores on page 22 the potential impact of health and safety regulation on IPs. Rather like employment regulation such as TUPE (which we chose not to cover in this regulatory round-up), health and safety regulation sits uneasily alongside our insolvency regime, given the conflicting objectives of deterring corporate non-compliance by means of fines on the one hand and maximising returns to creditors on the other.

I will not dwell on insolvency regulation as R3, ICAEW, IPA, ICAS and the Insolvency Service express their views from page 24. I was, however, interested to read an apparent emphasis on consumers rather than stakeholders in Nick Howard's piece on page 29.

Those who feel over-regulated might like to turn instead to the lucid analysis of the conflicting interests of insolvent entities and commercial landlords by Chris Stevenson and Robert Munn on page 32. Alternatively, on page 36 Tyson Gunderson, Simon Kirkhope and Neil Riley tell the Aviator UK story, many of the issues in which are not unique to ground handling services insolvencies.

C. Laughton

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Liverpool 'celebrity' fashion brand bust

A Liverpool-based fashion brand that frequently featured reality television stars modelling its products has ceased trading, with all 56 staff members made redundant. Joint administrators from Duff & Phelps were appointed to Rare London, also known as Rare Fashion, on 26 July and took the decision to cease trading with immediate effect.

The brand had been backed by celebrities from television shows such as *Love Island* and *The Only Way is Essex*, with cast members frequently appearing in publicity photos wearing the brand's clothing. Rare had sold clothing through a concession agreement with Topshop, as well as online retailers ASOS and TK Maxx. Customers have been told to attempt to claim refunds through their bank or credit card issuer, or they will need to make an unsecured claim against the insolvent estate.

Rare announced the decision to cease trading through its Facebook page and has since been contacted by angry customers who posted on the page seeking refunds. Trading ceased shortly after a half-price sale and many pending refunds had not been addressed.

A recent Moore Stephens report suggests that 5,500 clothing retailers in the UK are at risk of insolvency as business rates and Brexit negotiations put pressure on an already competitive industry.

Source: Liverpool Echo

Fast-draft rescue for printers

A digital printing company has been rescued from administration less than 24 hours after administrators from Quantuma were appointed. NXP Europe, based in Tunbridge Wells, was sold almost immediately to VR Print in neighbouring Tonbridge. NXP was founded in 2002 and undertook work for Knight Frank, The Perfume Shop and other major retailers. Around 30 jobs have been saved.

The company fell into financial difficulties after accruing £131,000 in bad debts to major creditors. According to a statement by the company, the debts halted its ability to obtain funding and limited its cashflow.

The number of printers in the UK has been shrinking over the last five years, along with the demand for paper products and publications.

Source: Kent Online

Chief bankruptcy registrar retires

Chief bankruptcy registrar Dr Stephen Baister retired at the end of the last term. Dr Baister was admitted as a solicitor in 1981 and was appointed as bankruptcy registrar in 1996, becoming chief registrar in 2004. He will become a consultant at Moon Beever and senior adviser at Manolete this autumn. Registrar Nicholas Briggs has taken up the position of chief bankruptcy registrar as of 14 August 2017.

Source: Business Wire

Ex-premier league hero bankrupt

Veteran footballer Dean Windass, who scored more than 200 goals in his 19-year career, was declared bankrupt with tax debts amounting to around £160,000. Windass was not present in court when chief bankruptcy registrar Stephen Baister made the bankruptcy order on an application by HMRC.

Source: The Sun

Roltech manages to roll on

A Newcastle engineering firm has been sold out of administration, saving all 60 jobs at the firm. Roltech Engineering Ltd experienced cashflow difficulties as a result of two disputed debts, leading to the appointment of administrators from RSM Restructuring Advisory. The business was sold on to a newly incorporated company, Roltech Mechanical Ltd, which is owned by the existing management of the engineering firm.

Source: Insider Media

Disqualification looms for disgraced charity directors

The Insolvency Service has confirmed that the former directors of Keeping Kids Company have been notified of the intention to bring disqualification proceedings against them. A statement from the Service stated that proceedings have begun and, if successful, all nine of the former board directors may be disqualified from holding the position of director of a company for up to six years.

Keeping Kids Company announced that it had gone into financial distress in 2015 shortly after receiving a £3m grant from the government. The company blamed an ongoing police investigation into allegations of sexual abuse as one of the causes. In August 2015 the charity placed itself into compulsory liquidation.

A subsequent investigation by the National Audit Office discovered that over 15 years Keeping Kids Company had received more than £40m in government grants and had never been able to operate without government assistance. There were also a number of accounting concerns linked to spending without receipts.

Source: The Guardian

Tuckered out engineering firm fell facing £3m debt

A statement of affairs document filed with Companies House shows that engineering firm Morgan Tucker, which went into administration in May, owed more than £3m to creditors, as well as £220,000 in back pay, pensions contributions and holiday pay to staff. Morgan Tucker called in FRP Advisory to find a buyer for the business after suffering significant losses on a Middle East expansion project.

Despite interest from a number of parties, administrators were unable to find a buyer for the business, and unsustainable cash-flow issues meant that they had no other option but to cease trading immediately. All 65 of the staff were made redundant.

Source: Building

Stratford Town FC faces financial woes

Stratford Town Football Club may be at risk of insolvency if new repayment terms are not considered on a £250,000 loan. The club was loaned the money, as well as a £500,000 grant, from Stratford District Council, on top of £1m from the Football Foundation. The money was used to move the club to its current base in Tiddington.

Currently the club has stated that it is only able to repay £200 per month and has so far cleared just £10,000 of the debt. At the current repayment rate it would take 100 years to settle the loan and no repayments have been made for more than eight years due to its financial status. At the time of writing, Stratford District Council was to convene to discuss whether the £200 is an acceptable payment plan or if it would push for a higher sum. At a higher repayment rate, the club would need to be wound down in order to settle the debt.

Source: Stratford Observer

Assets pharmed out to the US

A Cheshire-based drug development company that was put into administration after failing to pay back debts to the local council has agreed to sell off assets to pay off all creditor debts. RedX Pharma was put into administration in May after failing to repay a £2m council loan made to subsidiary company Redx Oncology five years ago.

Administrators from FRP Advisory managed an agreement to sell £30m of the company's assets so that creditors could be paid back in full. Under the deal, American firm Loxo Oncology will buy patents, intellectual property and manufacturing contracts connected to cancer treatment drugs.

Administrators and staff at RedX anticipate that the agreed sale will remove the company from insolvency and allow it to trade its shares again on the stock exchange. The company was originally founded in Liverpool but is now based in Macclesfield.

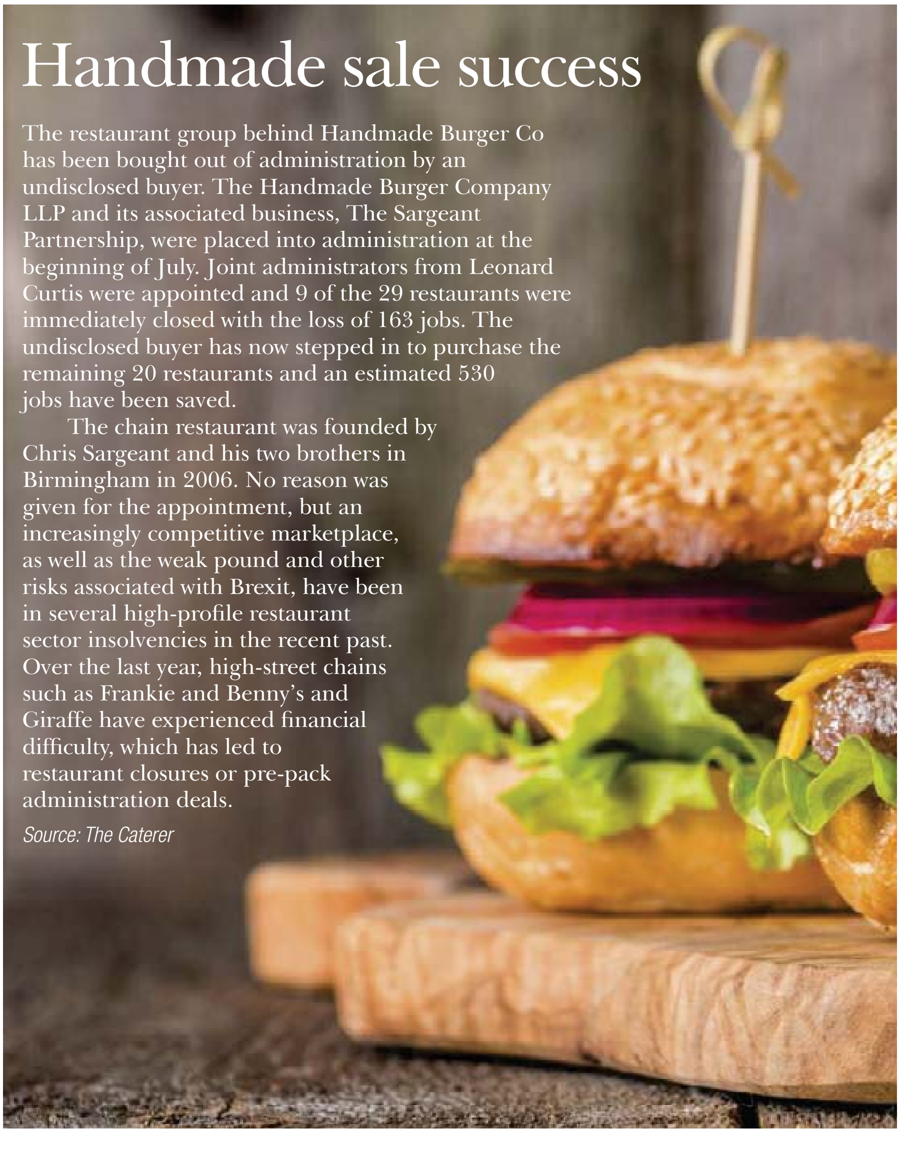
Source: Manchester Evening News

Fast finish for fintech start-up

DueCourse, a fintech start-up based in Manchester, has been placed into administration. The company was founded in 2014 and provided online accounting software for small businesses. The software allowed small businesses to access money within hours of sending out invoices, rather than waiting for longer periods of up to 90 days. An administrator has been appointed from Leonard Curtis.

The company raised more than £6m in funding last year and attracted backing from investors in Zoopla, LinkedIn and other online service providers. The money was to be used to fund development and expansion.

Source: Manchester Evening News



Handmade sale success

The restaurant group behind Handmade Burger Co has been bought out of administration by an undisclosed buyer. The Handmade Burger Company LLP and its associated business, The Sargeant Partnership, were placed into administration at the beginning of July. Joint administrators from Leonard Curtis were appointed and 9 of the 29 restaurants were immediately closed with the loss of 163 jobs. The undisclosed buyer has now stepped in to purchase the remaining 20 restaurants and an estimated 530 jobs have been saved.

The chain restaurant was founded by Chris Sargeant and his two brothers in Birmingham in 2006. No reason was given for the appointment, but an increasingly competitive marketplace, as well as the weak pound and other risks associated with Brexit, have been in several high-profile restaurant sector insolvencies in the recent past. Over the last year, high-street chains such as Frankie and Benny's and Giraffe have experienced financial difficulty, which has led to restaurant closures or pre-pack administration deals.

Source: The Caterer

President's column

Adrian Hyde explains R3's work with the Insolvency Service and Parliament.

Since their surprise publication last year, the 2016 changes to the Official Receiver fees and guidance on insolvency practitioner appointments have been a recurring topic in this column. It's a frequently discussed subject for me and my colleagues when we attend events, both by R3 members and, increasingly, creditor representatives; and it's a topic we have, in turn, consistently brought up with the government over the last year.

There has been a lot going on behind the scenes and, recently, we have started to see some welcome answers to the questions R3 has been asking. Notably, Dear IPs 75 & 77 provided useful clarifications of how the changes will work in practice – and in the case of Dear IP 77, how the 'changes' won't actually mean a change. While the 2016 guidance stated that it would take 25 per cent of *all* creditors to seek an insolvency practitioner appointment, Dear IP 77 states that the pre-2016 'operational' policy of requiring only 25 per cent of *unsecured* creditors will now be re-adopted. As the Insolvency Service itself points out, the 2016 guidance made it harder for creditors to seek an insolvency practitioner's appointment.

We're really pleased that the Service has listened to R3 on these issues and that our members' concerns have been taken on board. It was also good to hear the Insolvency Service's chief executive, Sarah Albon, acknowledges the cooperation between R3 and the Service on this issue at July's InsolvencyLive! event. This is not the end of the story though, and there's still plenty for us to keep pushing the government on. The internal guidance documents need to be updated to take the clarifications into account, for example, while the government will need to review how the guidance is working alongside the new rules.

If R3 members keep raising problems with creditor or debtor choice or the application of Official Receiver guidance, we'll keep making sure the government hears those concerns. The progress we've made so far has been supported by members passing us details of their own experiences, so do please continue to get in touch with R3.

R3 in Parliament

Of all the government's ongoing insolvency policy projects facing an uncertain future after the election result (and with room on the legislative agenda already squeezed by Brexit), plans for indebted individuals to be given a pre-insolvency 'breathing space' from creditor enforcement seemed most likely to maintain their momentum. The 'breathing space' plans, supported by R3, had featured in the manifestos of both the Conservative and Labour parties, so even with a minority government there should be enough backing in Parliament to get them onto the statute books. However, plans for introducing 'breathing space' were one of several noticeable absences from June's Queen's Speech. With cross-party support available for the concept, this absence was puzzling.

> "The 'breathing space' plans, supported by R3, had featured in the manifestos of both the Conservative and Labour parties."

R3 and others have continued to make the case for 'breathing space', so we were pleased to see the government's failure to move forward with the proposal brought up in the House of Lords in July. Indeed, R3 and our support for a pre-insolvency break from creditor enforcement were mentioned during the debate by influential Lib Dem peer Lord Sharkey. While an opposition amendment to introduce 'breathing space' was defeated by the government, the minister in the debate, Baroness Buscombe, did promise that proposals would be outlined 'in due course'. We think 'breathing space' would really help indebted individuals get the advice they need to resolve problem debts in a timely and orderly fashion, so we'll make sure the government lives up to that promise. With the dark predictions for the future of ever increasing levels of consumer debt, we will press for it sooner rather than later.

Moving the debate forward

This November will be the second anniversary of the introduction of the Graham pre-pack reforms; and with government powers to ban sales from connected party administrations expiring in 2020, it's likely the government will review the reforms before the end of the year as it decides whether or not to use these powers. To make sure the debate is positive and well-informed, R3 will be hosting a roundtable in October (sponsored by Squire Patton Boggs) to allow the insolvency profession, government, and creditor groups to discuss ways to improve the reforms and avoid the need for further regulation. I'm looking forward to an enlightening and frank discussion which will lead to a better understanding among key stakeholders of each other's perspective.

Similarly, the government will soon undertake a review of the impact of the 2012 Legal Aid Sentencing and Punishment of Offenders (LASPO) Act, from which insolvency litigation was exempt until April 2016. To review the impact of the end of the exemption and to make sure the government hears directly from the insolvency profession, we'll be carrying out a member survey later this year on the issue and will host another roundtable next year, bringing together the insolvency profession, funders, government and creditors. As a fraud specialist, I've had first-hand experience of how the end of the exemption has had a significant impact on our profession's approach to pursuing rogue directors and others, and I am determined that the government will take our profession's experiences on board.

Building on our work with HMRC over the past eighteen months – where we have been seeking to address some of the concerns raised by members in our 2016 survey – we will be holding a roundtable for insolvency practitioners and tax professionals with the tax minister in October.

Next steps

Finally, it may not have escaped the notice of some of the readers of this column that there are still a number of outstanding government responses to various insolvency-related consultations. Announcements on corporate insolvency reform (which could be a crucial step in making sure the UK's status as an international insolvency and restructuring hub isn't diminished by Brexit and improving frameworks elsewhere), collective redundancies and, particularly importantly for our smaller practice members, insolvency practitioner bonding are all overdue. In some cases, we've already been waiting years for the government to set out its next steps.

Although Brexit and a missing majority mean the government's legislative agenda is tight, progress in these three areas has been delayed long enough. We'll be putting the pressure on government to get things moving by the end of the year; and once announcements are made, rest assured, we'll be putting pressure on government to listen to what R3 members have to say. ◻

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

Legal Q&A

Rebecca Walker answers your insolvency queries.

Q The administrators of a company have received an offer for the company's business and assets of £1, plus the assumption of certain liabilities. Are there any issues with this?

A The administrators need to remember that they have a duty to act in the interests of creditors as a whole (which includes unsecured creditors). In discharging their duties, they should consider whether the prescribed part applies in order to ensure that the interests of unsecured creditors are not prejudiced by a no-cash deal.

What is the prescribed part?

The prescribed part is a fund set aside for unsecured creditors out of floating charge realisations. Broadly, it applies where a company created a floating charge over its assets on or after 15 September 2003.

> It is important to establish whether each of the company's assets are subject to fixed or floating charges.

The prescribed part is calculated on a sliding scale, depending on the value of floating charge realisations, and is capped at £600,000. As it is not necessary to carve out a prescribed part from fixed charge realisations, it is important to establish whether each of the company's assets are subject to fixed or floating charges.

Fixed or floating charge?

There is a two-step process in analysing this question:

1. *What are the terms of the debenture?* Debentures typically purport to create a fixed charge over a list of assets; include a 'catch all' provision, such that, if any of the listed assets are not caught by the fixed charge, they will instead be caught by a floating charge; and allow disposals of some or all charged assets in the ordinary course of business (known as a 'permitted disposals' clause).
2. *What does the law say?* Case law has developed the following list of characteristics of a floating charge:
   - the charge is over a class of assets, present and future;
   - the charged assets change from time to time; and
   - the company is free to deal with the charged assets in the ordinary course of its business (ie they are not under the charge holder's control) (see *National Westminster Bank PLC* v. *Spectrum Plus Ltd* [2005] UKHL 41). In this regard, an unprecedented or exceptional transaction can be regarded as being in the ordinary course of business even if it is not part of the company's day-to-day operations, but a transaction that is intended to bring an end to the company's business cannot (see *Ashborder BV* v. *Green Gas Power Ltd* [2004] EWHC 1517 (Ch)).

So where a debenture purports to create a fixed charge over an asset that has the characteristics of a floating charge, the charge will instead take effect as a floating charge (under the 'catch all' provision in the debenture). And the 'permitted disposals' clause is key to determining whether an asset is secured by a fixed or floating charge: while the debenture might state that the asset is subject to a fixed charge, if the debenture permits the company to dispose of it without the charge holder's consent, it must be a floating charge asset.

Conclusion

A review of the debenture and applicable case law will be required in every case. In the event that the prescribed part would apply to a cash offer, unsecured creditors may be prejudiced by a no-cash deal unless the purchaser increases the cash element of its offer to cover the prescribed part liability.

Q My client is looking to acquire a (solvent) business. The parties have agreed that a proportion of completion monies will be paid into escrow to collateralise certain warranties in the sale agreement provided by the seller. Are there any risks if either the seller or the buyer goes insolvent while the monies are still held in escrow?

A Naturally, the answer will depend on how the escrow arrangement has been set up and the escrow agreement has been drafted.

Typically, the buyer will hold back a proportion of the completion monies and place these into escrow. Whether or not the escrow arrangement expressly deals with this, it is usually the case that the monies remain the property of the depositor (buyer) until the end of the warranty period, at which point any balance will be paid to the seller. The result of this is that the seller (or an insolvency practitioner appointed in respect of the seller) has no title in, or claim to, the monies until the end of the warranty period.

> It is usually the case that the monies remain the property of the depositor (buyer) until the end of the warranty period, at which point any balance will be paid to the seller.

The escrow monies are, however, not safe in the event of the depositor's insolvency. In *Re A/Wear UK Ltd (In Administration)* [2013] EWCA Civ 1626 it was noted that, as title in the escrow monies remained with the depositor until the trigger condition occurred requiring the monies to be paid out to the other party, any insolvency practitioner appointed to the depositor would normally have the right to claim the escrow monies as forming part of the depositor's insolvent estate. In *Re A/Wear*, it was only because the trigger condition had occurred prior to the date of administration that the administrators failed in their attempts to claim the monies for the benefit of creditors. ◻

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No expense spared

Ken Baird and **Katharina Crinson** examine the Nortel Networks UK bar date on administration expenses and what it means for insolvency professionals.

In 2009, the English court placed 19 companies in the Europe, Middle East and Asia Nortel group (the Nortel companies) into administration. The administrators were keen to avoid the opening of secondary proceedings as they would disrupt a global reorganisation or sale and erode value. To achieve this, they drew on a practice developed in England with *Collins & Aikman* and followed in *MG Rover*. The administrators provided assurances to local creditors that they would respect local priority and distribution rights. This aimed to ensure creditors in places where a company had an establishment were comfortable that secondary proceedings were unnecessary.[1]

The lockbox proceeds

In 2010, Nortel's global business was sold, but there were disputes in relation to the allocation of the proceeds among the group's companies. Pending resolution of these disputes, the proceeds were held in an account in the US (the lockbox proceeds). In 2016, the disputes were finally settled and the administrators of the Nortel companies were in a position to distribute the monies received to creditors. For the majority of companies, the administrators decided that the most appropriate process to determine the liabilities and achieve a distribution of assets was by way of company voluntary arrangement (CVA). All CVAs have now been approved, enabling a distribution to creditors in the autumn of 2017.

> “It was vital that the Nortel administrators determined the final amount of any claims that would rank as an expense, before being able to make distributions to unsecured creditors.”

Administration expenses

Schedule B1 to the Insolvency Act 1986 (the Act) sets out that an administrator's remuneration and expenses are to be charged on, and payable out of, the property of which the former administrator had custody or control before ceasing to be the administrator. Such amounts are payable in priority to any floating charge and any unsecured debts. Therefore, it was vital that the Nortel » administrators determined the final amount of any claims that would rank as an expense, before being able to make distributions to unsecured creditors.

The administrators identified five categories of claim that could have expense status, albeit that some were either not asserted or putative only.

- Alleged breach of contract – the counterparty had not made an express claim that the amount owed was an administration expense, but had reserved its rights to do so.
- Fees owed for use of software and intellectual property – the counterparty had not yet brought a claim but the administrators considered that there was at least a possibility that such a claim could be brought. If so, this might be, at least in part, an expense claim.

> Neither the Insolvency Rules nor the Act provide for a mechanism by which an administrator can require an administration expense to be asserted by a particular date or refuse to deal with a late claim.

- Alleged omission to deal with a power failure at the premises of an insured party – an insurance company had issued a pre-action letter but had not identified the ranking of any possible claim. The administrators considered that there was a chance that, if pursued, the claims would be advanced as expense claims.
- Employee claims in France – these claims were advanced in France by employees for damages over alleged unfair dismissal from the French Nortel entity and alleged tortious acts by the English Nortel entity. Certain employees bringing the claims had written to the administrators and the court. They asserted that their claims 'may give rise to claims having a rank and privilege that will be enforceable against administration expenses'.
- Local tax – this category of claim arises as the administrators expect that some or all of the local tax authorities will bring claims against each of the Nortel companies for corporation tax (payable as a result of the receipt of the respective share of the lockbox proceeds). It could take a number of years following receipt of the lockbox proceeds or until the respective tax limitation period had expired for such claims to be finally determined. As the claims would have their basis in actions (the global settlement) that took place during the administration there is a risk that any such claim would rank as an administration expense.

The administrators were also keen to deal with any unknown claims that could rank as an administration expense. For all possible claims (save for the unknown ones) the administrators had contacted the claimants to obtain further information on whether the claim ranked as administration expense and, ultimately, to notify the claimants of the court application. None of the claimants made any submissions or appeared at the hearing.

Mechanisms for proving and paying distributions

In relation to unsecured debts, the Act establishes a clear mechanism to make distributions to creditors who have submitted a proof of debt. Creditors who do not prove before the last date for proving are unable to disturb any distributions made earlier (see in particular rule 14.40 of the Insolvency Rules 2016[2]). This mechanism does however not apply to administration expenses. Neither the Insolvency Rules (both the 1986 and the 2016 versions) nor the Act provide for a mechanism by which an administrator can require an administration expense to be asserted by a particular date or refuse to deal with a late claim. This can be conceptually justified: administration expenses will arise during the course of the administration and therefore the administrator can be expected to know about, and adequately provide for, them. In practice, this is of course not half as easy as it sounds!

The court's authority to set a bar date

In the absence of a mechanism to deal with administration expenses, the administrators applied to court under paragraph 63 of schedule B1 to the Act (the general power to seek directions from the court). They asked the court to set a bar date after which any administration expense claim assertions would not be able to disturb distributions made to unsecured creditors.

The administrators cited a line of cases where the court had, in effect, set bar dates, both in cases of liquidation (*Re Armstrong Whiteworth Securities Co Ltd* [1947] Ch 673 and *Re R-R Realisations Ltd* [1980] 1 WLR 805) and administration (*Re WW Realisations 1 Ltd* [2011] BCC 382). In the latter case David Richards J stated that he saw no reason why the court's power to give directions to liquidators and administrators under s168(3) of the Act and paragraph 63 of schedule B1 respectively, should not be exercisable in relation to expense claims as well as provable claims. The court concluded that it was permissible to use its power to give directions under paragraph 63 of schedule B1 to the Act to assist administrators in the way they sought. In particular, the court could authorise administrators to distribute property of the company to unsecured creditors without regard to claims for administration expenses that have not been made by a specified date.

Readers could be forgiven for thinking this was the end of the matter. However, the court had to grapple with three further questions:

(1) whether the setting of a bar date would illegitimately extinguish creditors' rights or vary the statutory waterfall of priorities; and
(2) whether a bar date would amount to judicial legislation; and
(3) whether the court should exercise its discretion to make the order.

Extinction of claims?

This concern arose as a result of relatively recent cases such as *Bloom* v. *Pensions Regulator* [2013] UKSC 52 and *Re Lehman Brothers International (Europe) (No. 4)* [2017] UKSC 38. In *Bloom*, the Supreme Court made clear that the court does not have a residual discretion to change the priority rules set out in insolvency legislation.

Here, the judge concluded that the setting of a bar date would not be tantamount to extinguishing any legal rights that administration expense claimants may have or altering the statutory waterfall of priorities. While late claimants would not be entitled to disturb existing distributions, they would still be entitled to assert their claims and catch up – to the extent that there are any subsequent distributions.

> It is accepted practice that expenses are instead paid on an ongoing basis during the administration.

As mentioned above, the Act uses the fiction that expenses are charged on, and payable out of, property that the administrator had custody or control of immediately before he or she ceased to be the administrator, ie, claimants are only paid at the end of the administration. Therefore, prior to the termination of the administration, expense creditors have no statutory right to payment. This statutory fiction has attracted much criticism as it is accepted practice that expenses are instead paid on an ongoing basis during the administration (see *Paramount Airways Ltd* [1994] BCC 172 per Dillon LJ at 180G). Indeed, in *Re Sports Betting Media Limited* [2008] BCC 177 Briggs J held that if there were insufficient funds to pay expense creditors at the end of the administration, expense creditors who had received

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payments on an ongoing basis were not required to tip those payments back in for *pari passu* distribution.

Judicial legislation?

Would the court providing for a mechanism that is absent from the insolvency legislation amount to illegitimate judicial law-making?

In the *Lehman Brothers* judgment, Lord Neuberger commented that despite their length, neither the rules nor the Act provide a complete insolvency code:

> *'Certain long-established, judge-made rules, albeit developed at a time when the insolvency legislation was far less detailed, indeed by modern standards sometimes positively exiguous, none the less survive.'*

The setting of bar dates is far more common than might be known, as often no full judgment will be handed down but the court will simply grant the order sought.

As Snowden J noted, directions such as the setting of a bar date provide a pragmatic solution to a practical problem to ensure a timely conclusion of an insolvency case – it did not amount to unlawful judicial law making.

Discretion

The remaining question was whether in this particular case it was just for the court to set a bar date and what conditions the order should include. The court considered the following factors:

- The administration of the Nortel companies had been ongoing since 2009 and had attracted considerable publicity. The administrators had kept creditors regularly informed of progress. It was difficult to see how any person with a legitimate claim could still be unaware of the need to make a claim.
- Each of the potential claimants had a very long time to advance and formulate their claim – with the minor exception of the tax authorities (but even then, the sale of the assets giving rise to the potential claim took place in 2010).
- Each of the potential claimants (apart from the unknown expense claimants) had specific notice of the court application. None of them made any submissions or appeared in court.
- The court order included specific provisions to safeguard the position of possible expense claimants (see below).

Taking everything together, the court concluded that there were adequate safeguards to protect the interests of possible administration expense claimants, and that it was just to make the order setting a bar date to protect the interests of unsecured creditors.

The order

What did the court order look like? The court ordered the administrators (among others) to:

- notify all possible expense claimants of the bar date and request that they complete a 'demand form' prior to the bar date – approximately four months after the letters were to be sent out;
- advertise the same in one leading newspaper in each of the Nortel companies' home jurisdictions;
- pay any expense claim notified and agreed by the bar date;
- reserve for any disputed expense claim and seek resolution of this;
- agree or reserve any expense claim received after the bar date but before any distribution to unsecured creditors has taken place – provided that the late claim did not disturb any reserves already established or payments made in relation to accepted expense claims;
- distribute the balance to unsecured creditors – notwithstanding the existence of unresolved expense claims;
- provide a disturb resolution mechanism to any expense claims received after the bar date and after any distribution to unsecured creditors has been made. Any late claims could be paid provided that they did not disturb any reserves already established, payments made in relation to accepted expense claims or payments made to unsecured creditors.

Comment

The judgment deals with the practical problem of expense claims in a pragmatic and common sense manner. The court clearly sees the dilemma facing administrators wishing to conclude an already lengthy administration where expense claims have been alleged. Where assertions of a claim having expense status are substantiated, and the party asserting the expense status engages with the administrators, the issues can be resolved and the administrators can get on with making payments (where there are funds) to unsecured creditors. However, where a party simply asserts a claim or reserves its rights to later claim as an expense, it puts administrators in a very difficult position when the time has come to make distributions to unsecured creditors. This is exactly a point that Megarry J acknowledged in *Re R-R Realisations*, when he stated that a creditor cannot

> *'keep a voluntary liquidator on tenterhooks for an indefinite period by deciding not to prove nor issue proceedings nor abandon his claim.'*

Where assertions of a claim having expense status are substantiated, and the party asserting the expense status engages with the administrators, the issues can be resolved.

It is a shame that the Insolvency Rules 2016 did not address this issue and provide for a suitable mechanism – thus requiring practitioners to seek court orders (at the expense of the general unsecured creditors) in each case. Indeed, the setting of bar dates is far more common than might be known, as often no full judgment will be handed down but the court will simply grant the order sought. This was for example the case in the Clinton Cards administration. ◻

1 Readers may recall that the Recast EU Regulation on Insolvency Proceedings now formally provides for a similar mechanism. This allows the officeholder in the main proceedings to provide a unilateral undertaking (to be approved by a qualified majority of known local creditors) that he or she will respect local priority rights. Where such an undertaking is given, any courts requested to open secondary proceedings are asked not to open them.

2 The court application was brought a few days before the Insolvency Rules 2016 came into force and therefore proceeded under the Insolvency Rules 1986. However, as regards the subject matter of the application, very little would have turned had the Insolvency Rules 2016 applied.

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Recent case summaries

Latest insolvency update from **James Hannant**.

PERSONAL INSOLVENCY

***Armstrong* v. *Onyearu* [2017] EWCA Civ 268**

Armstrong v. *Onyearu* [2017] EWCA Civ 268 was a second appeal that concerned the circumstances in which the equity of exoneration will or will not be available to a co-owner. It was the first occasion on which any issue on the equity of exoneration has arisen for decision by the Court of Appeal since *Paget* v. *Paget* [1898] 1 Ch 470.

The bankrupt had obtained a loan, secured against the family home, that was used to discharge liabilities arising out of his business. Payment of the mortgage had been the bankrupt's sole responsibility and the court proceeded on the basis that the wife of the bankrupt had received an indirect benefit from the loan as it had meant that the bankrupt was able to continue to make payment against the mortgage. Upon the trustee applying for an order for possession and sale, the wife had successfully argued (at an earlier hearing) that she was entitled to a 50 per cent beneficial interest in the property. Subsequently, she argued that she was entitled to rely upon the equity of exoneration with the result her husband's interest in the property was extinguished in its entirety.

The central question for the Court of Appeal was whether an indirect benefit is sufficient to displace the right to exoneration. The Court of Appeal undertook an authoritative analysis of a number of decisions starting with *Paget* v. *Paget*. In an important passage at paragraph 43 of the decision, David Richards LJ summarised the position in English law in eight propositions.

Following that summary, the court addressed the substantive point in issue. It held that the recent decisions do not provide support for the view that the existence of some indirect benefit, or the prospect of some indirect benefit, to the co-owner who is not the debtor will necessarily prevent the equity arising in his or her favour.

David Richards LJ was not persuaded that the law in this area should be changed to accommodate what was said to be the relationship between cohabiting couples in their family affairs in current times, still less what that relationship ought to be. The clear trend in the law had been to provide financial emancipation to women and to enable couples to keep their property and financial affairs separate to such extent as they desire. Further, it was consistent with this trend that the law should continue to treat couples separately where one stands surety for the debt of the other, unless the circumstances or the evidence show otherwise.

The court dismissed the trustee's appeal and held that English law does not regard an indirect benefit as sufficient to deny a right of exoneration. What was required was that the relevant benefit must be directly or closely connected to the secured indebtedness.

The decision is significant for two reasons. First it provides authoritative guidance on the law applicable to the equity of exoneration and second, it establishes that an indirect benefit will not, in and of itself, displace the right to assert the equity of exoneration.

CORPORATE INSOLVENCY

***Stevensdrake Limited* v. *Hunt* [2017] EWCA Civ 1173**

The Court of Appeal has recently handed down its decision in *Stevensdrake Limited* v. *Hunt* [2017] EWCA Civ 1173. The case concerned the recoverability by a firm of solicitors (SL) of its costs from its insolvency professional client (SH). The parties had a long working relationship with SL providing legal support and assistance in SH's claim against the former administrators of Sunbow Limited. The work had been provided under the terms of a CFA and the action had been successful in that the claim had settled. However, one of the former administrators failed to make payment of the settlement sum and there were insufficient recoveries to pay SL's costs of approximately £1m.

At first instance, HHJ Barker QC (sitting as a judge of the High Court) held that the full terms of the agreement between SH and SL could not be ascertained from the CFA alone and that the full terms incorporated a term that SL's fees would only be paid out of realisations and that SH has no personal liability for those fees. The trial judge also held that the prior communications between SL and SH provided a more than sufficient platform on which to found a submission of a common understanding from which it would be unconscionable for SL to resile.

The Court of Appeal rejected the first of these conclusions. Applying the familiar criteria set out by the Supreme Court in *Marks and Spencer PLC* v. *BNP Paribas Securities Services Trust co (Jersey) LTD* [2015] UKSC 72, [2016] AC 742, Hamblin LJ concluded that the implied term identified contradicted the express terms of the CFA. The contradiction also meant that term was neither obvious nor necessary for the CFA to have business efficacy.

Counsel for SH argued that, on a proper analysis, what the trial judge had held was that the entire agreement between the parties was not contained in the CFA alone but also included the agreement recorded in a previous exchange between SL and SH. This submission was rejected by Hamblin LJ who analysed a number of features of the contractual relationship before concluding that there was no contractual justification for going outside the terms of the CFA and making it subject to contrary terms founded in other agreements. In those circumstances, the first ground of appeal was allowed.

The second conclusion reached by the trial judge was that there had been an estoppel by convention with SL and SH having a shared common understanding that SL's fees would be paid from recoveries and SH would not be personally liable for any shortfall. The Court of Appeal stressed that what mattered was the overall effect of the conduct and communications rather than the finer points of interpretation of any particular document. Hamblin LJ's conclusion was that there was ample evidential material to support the finding made by the trial judge.

The Court of Appeal further held that the injustice or unconscionability requirement of estoppel by convention focuses on the reliance placed on the convention by the party asserting the estoppel. This will typically be because that party has been 'materially influenced' by it. On the judge's findings, this was a case not merely of material influence but of seriously detrimental reliance. In those circumstances, the Court of Appeal rejected the second ground and dismissed the appeal.

As was the case here, CFAs are frequently relied upon in circumstances where there is an established working relationship between the professionals involved. *Stevensdrake Limited* v. *Hunt* provides a timely reminder of the importance of a properly drafted CFA in recording the parties' intentions even where the professional relationship is well established. ◻

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Data protection detail: the GDPR

Annabel Gillham and Mercedes Samavi explain how insolvency practitioners can build a roadmap for the incoming General Data Protection Regulation.

With the General Data Protection Regulation (GDPR) right around the corner, insolvency practitioners (IPs) in the UK should start to think about how the new legislation will affect their approach to company and practitioner data during insolvency processes, and in what ways IPs should re-configure their approach to data protection.

> The UK government has now signalled that, Brexit notwithstanding, it intends to incorporate the GDPR into domestic legislation, as part of the new UK Data Protection Bill.

What is the GDPR?

The GDPR, it is hoped, will update and harmonise data protection principles across all EU member states, and coordinate how each country's data protection authorities interact with each other. In the UK, the GDPR will override the existing Data Protection Act 1998 (the DPA) with immediate effect from 25 May 2018. The good news is that many of the concepts in the GDPR are familiar territory and reflect existing obligations under the DPA; however, there are also a whole host of new obligations, which will almost inevitably require a change to policies and practices. Organisations should make sure that such changes are put in place in good time before May 2018, as the consequences of failing to comply are steep (indeed, the potential sanctions are 4 per cent of global annual turnover or €20m). This affects IPs in two ways: first, they will need to be aware of their GDPR obligations so that they can identify any compliance issues (and consequent financial risk) for the companies or individuals in respect of which they are appointed; second, IPs will need to comply with the GDPR in respect of personal information they hold or generate in their personal capacity as part of their appointment.

Setting the scene

It is helpful to clarify what types of data an IP might hold in an insolvency process and in what capacity.

In any given insolvency arrangement, there will be two types of personal information for IPs to consider:

1. Personal information that is attributable to the activities of the insolvent company (or individual) for whom they act; for example, this could be personal information on the company's customers or employees (company data).

> The good news is that many of the concepts in the GDPR are familiar territory and reflect existing obligations under the DPA.

2. Personal information which they generate as a result of their responsibilities as practitioners; for example, this could be information regarding the company's creditors, debtors (to the extent these are natural persons) and directors (practitioner data).

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> IPs will be pleased to hear that the GDPR removes the obligation to register as a data controller with the Information Commissioner's Office (the ICO) in the UK.

The GDPR retains the concept of 'data controllers' and 'data processors'.

A *data controller* is an entity or individual that is responsible for personal information, and is able to control the purpose and manner in which personal information is processed.

A *data processor* is an entity or individual that processes personal information on behalf of the data controller.

Under the GDPR, these two roles each carry obligations and, in particular, data processors will have new obligations that are not currently in place under the DPA.

More often than not, an IP will seek to operate as the agent for the company during insolvency proceedings. This means that, while the IP will carry out duties on behalf of the company, ultimately the liability still lies with the company. In this situation, the company will likely be considered the data controller of company data and the IP will be the agent of the data

> The GDPR introduces a new 'accountability principle', whereby data controllers will have to document how they comply with the GDPR.

controller. Nevertheless, an agent IP will still have to be vigilant of the data controller-specific obligations, given that the IP will have an ongoing duty to ensure that the company complies with all applicable laws (and, therefore, the GDPR).

Where an IP is not considered an agent of the company, they will be the data controller in respect of company data. IPs will also likely be data controllers in respect of practitioner data (to the extent such data pertains to natural persons).

GDPR requirements

Whether an IP is deemed to represent the company as data controller or whether the IP qualifies as data controller in his or her own right, there are some important requirements under the GDPR, which (i) as an agent, the IP would want to ensure that the company follows, or (ii) without being an agent, the IP should personally follow.

New obligations for data controllers

More paperwork

IPs will be pleased to hear that the GDPR removes the obligation to register as a data controller with the Information Commissioner's Office (the ICO) in the UK.

However, it is not expected that the overall paperwork load will ease up with the introduction of the GDPR. IPs already have an obligation to keep records of their appointments, including a duty to keep records relating to the directors of the companies in respect of which they are appointed. Under the GDPR, data controllers will also be required to maintain a record of how they use, process and manage personal information. It is a good idea for the IP to start making (or ensure that the company will have made) an inventory about (1) what company data is collected, and has been collected, by the company, and (2) what practitioner data is collected by the IP. The inventory should also track other pertinent details for these two types of personal information, such as the legal basis for which the personal information is collected (eg, an individual's consent, a business need, a legal requirement), the duration for which it is kept, and if the personal information is shared or transferred outside of the EU.

> The GDPR will require data controllers to be mindful of the level of risk involved with collecting personal information .

In addition, the GDPR introduces a new 'accountability principle', whereby data controllers will have to document how they comply with the GDPR. At this stage, the level of detail required by regulators to satisfy this requirement is unclear, as is the regulators' appetite to keep track of data controllers' compliance. Nevertheless, as a start, it will be good for IPs (whether acting as a company agent or otherwise) to list (or create if not yet existent) the appropriate policies and procedures they have implemented to support them in their efforts to ensure compliance with the GDPR.

A focus on individuals' rights

It is no secret that the GDPR is designed to empower individuals to have greater control over their data and what companies do with this data. As such, the GDPR provides individuals with an arsenal of rights, including the right to be informed about the collection and use of their personal information; the right to object at any time to the data controller's use of personal information; the right to rectification; the right of deletion (most commonly referred to as the right to be forgotten); and the right of access. Most of these rights will be an issue for the company, not the IP, because it will be unlikely that the IP will have a significant amount of personal information relevant to an individual (other than practitioner data as explained below).

However, the last right – the right of access – may ring alarm bells for IPs. Access rights already exist under the DPA, and any data controller, upon receiving a subject access request by an individual, must provide the individual with the individual's

personal information, as well as supplementary information (eg, the purpose for collecting the personal information, the retention period, etc). In an insolvency setting, it is certainly not unreasonable to expect subject access requests from individuals such as disgruntled directors who want to find out what company data the company

> **In an insolvency setting, it is certainly not unreasonable to expect subject access requests from individuals such as disgruntled directors.**

holds about them or what practitioner data is held by the IP, particularly where they have been accused of not meeting their statutory duties, or carrying out wrongful trading in the run up to insolvency. The GDPR requires data controllers to handle such demands 'without undue delay', so IPs should make sure that the company's access request procedure is streamlined and responsive, so that the company is able to effectively cope with these requests (and requests regarding the other rights mentioned above). Where the subject access request involves practitioner data, the IP should brush up on its firm's procedures for handling such requests.

Reporting data breaches

Reporting breaches to the ICO is no longer voluntary, and is a specific GDPR requirement for data controllers. To that end, IPs should check that their principal company has updated its data security breach response procedures, so that the company (or the IP on the company's behalf) is able to report any breaches to the ICO within 72 hours. Where the data breach involves practitioner data, IPs will also have an obligation to report the breach to the ICO, and should additionally check their firm's policies to see if they also have a contractual duty to inform their firm about the breach.

Data protection impact assessments

The GDPR will require data controllers to be mindful of the level of risk involved with collecting personal information. In particular, where the collection and processing is likely to present a high risk, data controllers will have to first carry out a data protection impact assessment. In an insolvency setting, this is going to be most relevant to companies that predominantly trade with personal information (think: big data companies, or financial businesses), especially where such companies seek to offload or sell their data assets during an administration or liquidation.

New obligations for data processors

We've already explained why IPs should track their compliance with data controller obligations under the GDPR, even if the company or individual is considered the data controller in respect of the company data in question. But the GDPR also spells out specific obligations for data processors; the IP will need to be aware of these obligations for data processed by the company or individual in which they are acting only as data processors.

Prior authorisation

If the company, as a data processor, wishes to engage a third party to process company data, it will need the prior written authorisation of the data controller.

Contracting – and working – with the data controller

The GDPR requires data processors to enter into a written contract with the data controller, which will set out the subject matter and duration of the processing, nature and purpose of the processing, as well as the type of personal information, categories of individuals and the obligations and rights of the data controller. The IP, on behalf of the company, will therefore need to make sure that this is included as part of any contracts it enters into in which it has the role of data processor.

Notably, the written contract should also stipulate that the data processor will assist the data controller with its controller-specific obligations, namely: (i) implementing appropriate technical and organisational measures to ensure data security, (ii) notifying a personal data breach to the ICO, (iii) communicating a personal data breach to the relevant individual, and (iv) carrying out a data protection impact assessment.

How does this work post-Brexit?

As it is a regulation, the GDPR takes immediate effect in May 2018 and will remain in place until Brexit is finalised (presumably, in March 2019). The UK government has now signalled that, Brexit notwithstanding, it intends to incorporate the GDPR into domestic legislation, as part of the new UK Data Protection Bill. The ICO has also made similar overtures, setting out the GDPR as a key priority of its inaugural international strategy.

Evidently, the GDPR is here to stay for the long haul, so IPs should be ready to put in place permanent procedures that will comply with the requirements of the GDPR, as well as any subsequent UK data protection laws that are introduced later down the line. ◻

Read more about data protection and cyber security on page 20–21 of this issue.

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Due vigilance: anti-money laundering

Jeffrey Davidson explains the latest money laundering and terrorist financing regulations and how IPs can do due diligence effectively.

Effective due diligence is of paramount importance for every insolvency practitioner: they must keep abreast of new regulations and their impact. This applies to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations (MLR) 2017, which came into force on 26 June 2017, implementing the EU's Fourth Anti-Money Laundering Directive in UK law.

MLR 2017 replaces and updates the Money Laundering Regulations 2007 (MLR07), providing a revised structure that removes deficiencies in the existing arrangements. The new regulations focus on three key areas: amending the approach to customer due diligence; trying to prevent new methods of terrorist financing, such as via e-money and prepaid cards; and increasing transparency relating to the beneficial ownership of companies and trusts.

What's required of IPs

Those affected by MLR 2017, known as 'relevant persons', include insolvency practitioners. Whereas MLR07 required having policies, controls and procedures in place to prevent activities related to money laundering and terrorist financing, MLR2017 is more proactive, directing relevant persons to document these policies, controls and procedures and requiring that they are approved by senior management.

Under the new regulations, relevant persons have to deploy a more risk-based approach in their due diligence with respect to money-laundering. Calibrating the right due diligence level requires close analysis of the risk factors set out in MLR 2017. Further guidance on specific sectors has yet to be published, but the rules do not apply to those engaging in financial activity with a turnover of less than £100,000, up from £64,000 under the previous regulations.

Changes this year

So what specific changes have been announced? Previously, firms had to keep policies relating to risk assessment and due diligence. But MLR 2017 goes further, notably in risk mitigation, setting out the required procedures to be undertaken by a relevant person in analysing the potential exposure of a business to money laundering or terrorist financing.

A relevant person has to produce written anti-money laundering (AML) risk reports. These record the size and nature of a business, its customers, countries of operation, products and services, transactions and delivery channels. Detailed findings then have to be translated into written policies.

Risk mitigation policies must be proportionate to any risks that are identified and include internal controls over money laundering and terrorist financing risks (eg designating a board member to be responsible for MLR 2017). In addition to reporting, record keeping and monitoring requirements, they must also include revised customer due diligence procedures.

Due diligence

Due diligence has increased under MLR 2017. In line with the new risk-based approach, the circumstances where simplified customer due diligence is permissible are more restricted, while automatic simplified requirements have ceased. In their place, a relevant person has to evaluate customer and geographical risk factors when determining the appropriateness of simplified due diligence.

The regulations require that client due diligence is performed before any business relationship is established and when any relevant risk factors for assessment have changed, such as a client's change of identity, or the services provided to the client have changed.

Further new regulations cover enhanced due diligence (EDD) with a defined list of situations where it must be applied, including where a high risk of money laundering or terrorist financing is perceived to exist, or where a client has provided false or stolen identification documentation or information. A business relationship with a client based in a high-risk country is another key consideration. MLR 2017 has introduced a blacklist of high-risk jurisdictions: if a transaction involves any of them, EDD and additional risk assessment become compulsory.

Critically, EDD also covers circumstances where a client has entered into complex or abnormally large transactions, or when there is an unusual transaction pattern without any apparent economic or legal purpose. There is an additional issue of Politically Exposed Persons (PEPs), which previously applied only to foreign PEPs, but now also applies to local PEPs. In practice, this enhanced EDD covers a wider spectrum of individuals entrusted with prominent public functions in the UK and overseas.

If a risk assessment identifies that an EDD should be undertaken, this requires an understanding of the background and purpose of the relevant transaction, as far as is practicable, and an increase in the overall level of monitoring of the business relationship to determine whether anything is suspicious.

Common sense

Much of the new regulations is manifestly based on common sense: if something looks unusual, out of the ordinary or suspicious, then it is your duty to find out more and ask relevant questions. But beyond the monitoring and reporting elements, it also makes good sense to seek independent evidence to verify any information that the client has provided, and to understand comprehensively the client's business structure and financial position.

Alongside the increased duties of relevant persons arising from MLR 2017, the potential penalties for failure to comply have also been ramped up. A new criminal offence has been introduced whereby any individual who recklessly makes a false or misleading statement in the context of money laundering has committed an offence punishable by a fine and/or up to two years' imprisonment.

It is therefore recommended that relevant persons fully familiarise themselves with MLR 2017, review and revise all pertinent AML written risk assessments, policies and procedures, and ensure that all staff conducting AML are trained in what to do and what to look out for. ◻

JEFFREY DAVIDSON is managing director of Honeycomb Forensic Accounting.

Putting up defences: cyber security under regulation

Andrew McIntosh and **Sadie Easdown** look at cyber risk and how, in the context of the new insolvency rules and new cyber security legislation, this may affect the restructuring industry.

Companies rely on technology and outsourcing for critical activities, including storing sensitive client data and intellectual property, communicating and conducting transactions. This leaves them vulnerable to cyber-attacks. Whether from company insiders or outside hackers, these attacks can interrupt business operations, result in the theft of proprietary information, or cause the loss of customers' data – with devastating effects on a company's reputation and bottom line. The threat of litigation and increased regulatory scrutiny have broadened this risk and escalated potential losses.

The cyber risk to insolvency practitioners (IPs) and turnaround professionals, much like any other practice, is real. Email is now the usual form of communication, transmitting an array of confidential data relating to all aspects of a formal appointment/turnaround project. This of course was before the new insolvency rules, which place an even greater emphasis on electronic communication with creditors.

Under the new rules, all kinds of confidential data including statutory reports, details of dividend payments and creditor claims will be communicated by email, together with creditor meetings being held via video conferencing and even creditor voting online. This means an IP is holding a significant amount of confidential data electronically on servers, employees' PCs, laptops, tablets and phones. Not only this, IP firms make dividend payments to creditors, which are increasingly made by electronic transfer. The rise in phishing emails purporting to be from a company to their customers asking them to confirm their bank account details has been well publicised.

> **How easy would it be for a phishing email to be sent to an IP purporting to be from a creditor advising of new account details which are not actually connected to the creditor in any way?**

Phishing for details

One such scam was aimed at law firms. Fraudsters hacked firms' systems and sent emails to clients requesting them to confirm their bank details. How easy would it be for a phishing email to be sent to an IP purporting to be from a creditor advising of new account details that are not actually connected to the creditor in any way? Outsourcing the hosting of data (such as using a third-party data services provider or cloud services provider) also brings with it risks that an IP ought to be aware of. You could be at risk if your data host suffers a breach and confidential data is compromised and released into the public domain. Not only is there a possibility of losing clients but the reputational damage can be significant and take a long time to rebuild.

Another significant aspect to cyber risk in the insolvency context is the responsibility transferred to the IP upon their appointment. If the office-holder assumes the role of the data controller, this in turn means that they become liable under the Data Protection Act to handle the data within their control in the correct manner. This responsibility opens the IP firm up to E&O risk and the individual office-holder to elements of executive risk. The UK's new Digital Economy Act (the Act), which came into law on 27 April 2017, is one under which executives may become personally liable for payment of some fines. While data protection is not the main focus for the Act, it is clear that a number of the provisions could have a significant impact on data protection compliance obligations for businesses and executives. Currently, the Information Commissioner's Office (ICO) can impose fines of up to £500,000 on companies, with its largest-ever fine to date being a £400,000 fine imposed in October 2016 on a well-known UK mobile network.

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Liability for IPs

We have no information yet as to how the Act will attach personal liability to executives, assuming the ICO evidence to the select committee is acted upon. But this is a space that we need to watch closely – not least because, when the General Data Protection Regulation (GDPR – see page 15 for more details) becomes law in the UK on 25 May 2018 (assuming no Brexit surprises), the ICO will have the power to impose fines of up to €20m or 4 per cent of worldwide turnover. Another factor to consider is whether there is any extension of the means by which these penalties aimed at companies arising from a pre-appointment breach can be passed onto company directors in the case of insolvency.

> **When the General Data Protection Regulation becomes law in the UK on 25 May 2018, the ICO will have the power to impose fines of up to €20m or 4 per cent of worldwide turnover.**

Along with the Act and GDPR the UK government has also confirmed in its cyber security regulation and incentives review, published in December, that the EU's Network and Information Security (NIS) Directive will be implemented in the UK. In light of the UK's vote to leave the EU, there was speculation about the government's intention to implement the NIS; however, the review provides clarity on the matter. The NIS Directive will have to be implemented into national law by 9 May 2018. The directive will impose obligations on the providers of 'essential services' and 'digital service providers' (DSPs) to take appropriate measures to ensure the security of their network and information systems and manage the impact of cyber 'incidents' so as to minimise any interruption to services.

Such organisations will, moreover, be required to notify such incidents (not merely personal data breaches, as in the case of the General Data Protection Regulation (GDPR)) to the national competent authority or computer security incident response teams without undue delay – in the case of DSPs if the incident is likely to have a 'substantial' impact on the provision of the digital services in question (and in the case of essential services if it is likely to significantly impact the continuity of the essential services). When an essential service provider relies upon a DSP for the provision of its services, the obligation to notify of cyber incidents will remain with the former (so it will be important to ensure DSP contracts require the DSP to inform the essential service provider).

Each member state will have to identify, by list, the providers of services it considers to be 'essential' but the categories will include digital infrastructure providers such as those providing 'internet exchange points' (network facilities enabling exchanges of internet traffic between several autonomous systems), domain name system providers and top-level domain registries.

DSPs are not subject to national flexibility in identification; they will include 'online marketplaces', online search engines and cloud service providers. App stores will be considered to be DSPs, whereas price-comparison sites, computer hardware manufacturers and software developers will not. A crucial distinction between the NIS and the GDPR – touched on above – is that the directive's notification obligations extend beyond personal data breaches to cover cyber incidents, including outages affecting the provision or continuity of services.

In the same way as the GDPR is understandably expected to increase demand for data protection insurance, so the NIS Directive is likely to drive telecommunications, media and technology companies' appetite for other cyber insurance covers. All of these various pieces of legislation ratchet up the regulatory exposure that companies and executives will operate under and, in the case of the executive risk element, it appears that IPs will assume some exposure, especially if there is any continuance in the company's activities post their appointment.

Risk management tips

Awareness of the risks is the first step towards risk mitigation. There are many ways you can manage cyber risk and below are some key suggestions but this is by no means an exhaustive list.

- As a minimum check that the firm's operating systems, firewalls and anti-virus software are up-to-date.
- Understand what data you have within your own network or off-site with third parties, cloud providers or data centres. Conduct due diligence to ensure they have robust procedures in place to handle any breach. Review your contract with them as they may limit their liability in the event of a breach.
- Implement good password policies including for portable devices.
- Train staff in security awareness and what to do in the event of a breach – it is very easy to click on a link which appears to be from a trusted source.
- Make it a senior management issue – create a working group to set and review policies.

> **As we become ever more dependent on the internet and electronic communication in every aspect of business and our daily lives, the associated risks are increasing for everyone.**

- There is a duty on directors to act with reasonable skill and care, and ignorance is dangerous.
- Consider an external review to ensure you have appropriate policies in place.
- Finally, ensure your company purchases adequate cyber liability protection. Typically policies will provide some level of first-party and third-party losses but cover does vary.

Conclusion

As we become ever more dependent on the internet and electronic communication in every aspect of business and our daily lives, the associated risks are increasing for everyone. In respect of the restructuring industry, cyber risk is a real threat and with the new insolvency rules requiring increased online communication with creditors it can only increase. IPs needs to be aware of the risks and, importantly, implement good risk management. □

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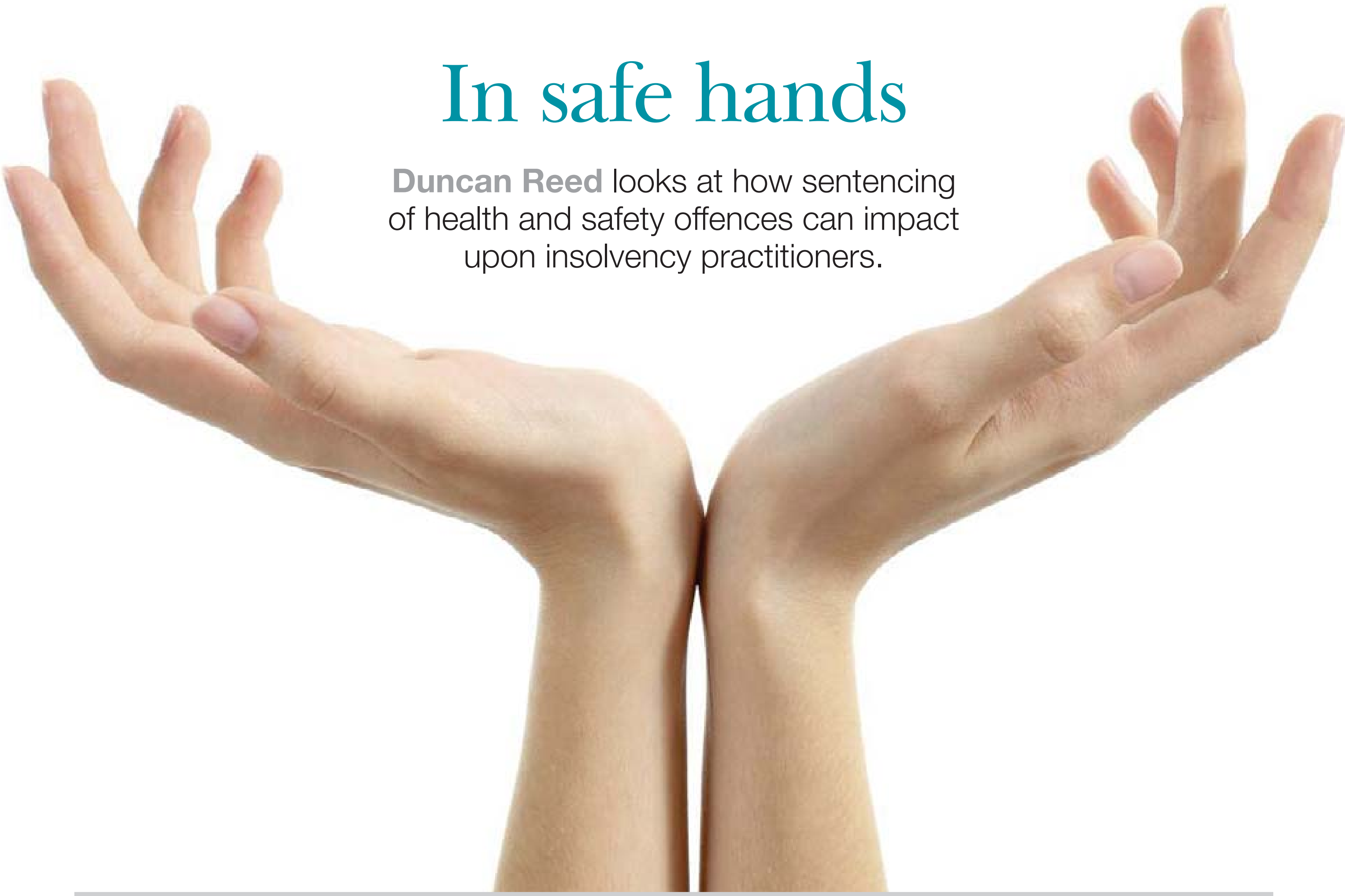
In safe hands

Duncan Reed looks at how sentencing of health and safety offences can impact upon insolvency practitioners.



The landscape of regulatory prosecutions has undergone a significant period of change over the last 18 months. The main change has been a shift in the level of fines that are levied on companies following a successful prosecution by the Health and Safety Executive (HSE). The current sentencing guidelines now take into account the level of culpability of a company, the harm that has been caused and, most importantly from a commercial standpoint, the turnover of the organisation when determining the size of a fine to impose. This new approach to sentencing has led to increased fines across the board.

Health and safety investigations, and their subsequent prosecutions, are of interest to insolvency practitioners (IPs) for two reasons. Firstly, if an administrator is carrying on a business as a going concern during the administration process, they could be held liable for health and safety failings that take place on their watch. Secondly, insolvency practitioners also need to be aware of the impact that fines could have on their duty to provide the best outcome for creditors. It is therefore essential to have a strong working knowledge of the process of health and safety investigations and prosecutions in order to secure the best results for creditors, and for an IP to protect their own position in terms of fines levied.

> “The new sentencing guidelines came into effect on 1 February 2016 and in the months since they were brought into force there have been a number of high profile fines that demonstrate the impact that they can have.”

The current health and safety landscape

As mentioned above, the last 18 months have seen a significant increase in the amount of fines that are applied. The new sentencing guidelines came into effect on 1 February 2016 and in the months since they were brought into force there have been a number of high profile fines that demonstrate the impact that they can have.

Before the guidelines came into effect, there had been little guidance for the courts to consider when they came to hand down a sentence for health and safety offences, apart from a broad direction that the appropriate fine was seldom less than £100,000 for offences shown to have caused death. This led to a lack of consistency and predictability about the size of penalty that a defendant could expect. The new sentencing guidelines were designed to address this and drive home to businesses, through increased financial penalties, that health and safety breaches should be treated as seriously as other regulatory breaches such as environmental, data protection and competition law infringements.

The sentencing guidelines are also intended to quantify, in the minds of businesses and the public, the impact workplace injury has on individuals and, therefore, the economy. In the relatively short time since their introduction, it is clear to see that the new approach to fines has led to increased incidences of fines exceeding £1m, with 19 fines of this level or higher handed down in 2016, compared to just three in 2015.

Although the new approach to sentencing and fines has brought change to the landscape, it is also arguable that the regulators are becoming more tenacious in the way that they bring prosecutions. They are looking more closely at the potential for individual liability to arise for directors and senior management, and also the level of control over health and safety for parent companies in group organisations.

Recently, there has also been an increased trend of prosecutions being 'joined up' and brought by multiple investigatory agencies, with the most common combination being a joint investigation by the Environment Agency (EA) and the HSE. A recent example of this approach was the joint prosecution by the EA and HSE against Tesco for a pollution incident, which resulted in fines and costs of £8m. This new approach is again designed to make the landscape less desirable for businesses that are inclined to cut corners or not fully honour their regulatory commitments.

How does this affect insolvency practitioners?

At first glance, it may appear unclear to those working in insolvency what relevance health and safety law may have to them. However, an administrator who acts as an agent and fiduciary of a company must comply with all laws and regulations that apply to that company.

The most common way in which health and safety offences are committed is by failing to comply with either section 2 or section 3 of the Health and Safety at Work Act 1974. These legislative provisions place duties on a company to ensure, as far as is reasonably practicable, that employees and third parties (eg contractors and members of the public) are not exposed to risks to their health or safety. This duty extends to IPs when they have been formally appointed, although it is important to remember that IPs are generally only at risk of personal criminal liability if it can be shown that any offence was committed with their consent, connivance or neglect.

Typically IPs will need to carefully consider the health and safety risks presented by property, land and any plant and machinery in order to ensure that adequate protection is put in place to ensure the health and safety of any employees, contractors and the public.

A company in administration is not automatically absolved of committing a health and safety offence due to the fact that it is in administration. As the average financial penalty that a company can receive continues to rise IPs will need to be mindful as it is not always the case that the company will have sufficient liquidity to honour any fine imposed. This has been reflected in judgements handed down both before and after the introduction of the new sentencing guidelines with, on some occasions, nominal fines of between £1 and £10,000 awarded to reflect the fact that the company was in administration. These types of fines are usually awarded with explicit reference to the fact that if the company had not been in administration, the fine would have been substantially higher.

> “It is important that IPs are aware of their health and safety obligations from an early stage, so that they can put in place appropriate processes to deal with such obligations.”

Increasingly the courts will require detailed financial information prior to sentencing, whether the defendant company is in administration or not. The sentencing guidelines do not specifically deal with an approach for insolvent organisations, but there is the broad premise that, when finalising the sentence imposed, the courts should consider whether the fine will have the effect of putting the offender out of business, and acknowledge that in some bad cases it may be an acceptable consequence.

How can IPs be best prepared?

There are a number of steps that insolvency practitioners can take in order to navigate the issues arising out of representing a company that is in administration. In terms of health and safety offences, a two-stage approach should be employed. The first stage aims to remove any risk of liabilities occurring, and the second involves minimising any liability that an administrator could have in the event that an offence does occur.

It is important that IPs are aware of their health and safety obligations from an early stage, so that they can put in place appropriate processes to deal with such obligations. At the time of appointment, an extensive review of all available documentation should be conducted to highlight any issues that could occur or have occurred. If any high risk areas are discovered, an IP should consider instructing a consultant to further investigate these concerns and report back. If concerns are confirmed, it is important to put a process into place as soon as practicable to minimise any risk occurring. For example, if it becomes clear through a survey that there is a risk arising out of mechanical lifts in a warehouse, it is important to share this information across the business and look to improve the way in which they are used to bring the company back into compliance.

Case study

A company in administration received a £10,000 nominal fine following the death of a worker who was electrocuted while carrying out asbestos removal work.

Judge Brown, who presided over the case, indicated that he would ordinarily have recommended a fine of between £170,000 and £1m, had the company not been in administration. However, the £10,000 was applied to reflect the fact that the company was in administration and therefore had no profit from which the court could extract punishment.

This shows the difference in level of fine that can be expected when a company is in administration. However there is no guarantee that any fine levied would be nominal.

Perhaps most crucial to minimising the risk that the IP carries in situations such as this, is to have a firm understanding of health and safety matters and to deal with any existing or new issues in a quick and efficient way. By doing this, it becomes extremely unlikely that an IP will be at risk of personal liability.

Alongside this is the need for the IP to have regard for the company's creditors. Any fine in relation to a health and safety offence will have the same rights as an unsecured creditor when the time comes to pay company debts. Although it is possible that the courts will impose a nominal fine to reflect the fact that a company is in administration, even a nominal amount could have a detrimental effect on the amount that other unsecured creditors can recover.

Take away points

Both insolvency and health and safety prosecutions share a common ground in that they are sometimes long and often complex processes, which require a large amount of diligence and attention. IPs can sometimes find themselves in the challenging situation of being the 'bridge' between the two areas. In this situation the IP has a number of duties with the most important being to the company, its creditors and to the legal process itself.

There is no doubt that the role of the IP in relation to health and safety offences has become more challenging in the last 18 months. The rise in fines has exacerbated the pressures on IPs and, although nominal fines can be imposed, even these can be large enough to have a detrimental impact on creditors. ◻

DUNCAN REED is legal director at TLT LLP.

Regulation special

For this regulation-themed issue of Recovery, R3 asked the Recognised Professional Bodies and the Insolvency Service for their thoughts on why an effective regulatory framework is needed, what such a framework would look like, how complaints and disciplinary procedures should be handled and what this means for IPs, creditors and the general public. Over the next five pages, five representatives from different pillars of the insolvency profession give their thoughts on what good regulation looks like, and explain how past legislation and current practices can shape future decisions.

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What does good regulation look like?

By **Emma Lovell**, chief operating officer (interim) of R3.

An effective regulatory framework is as important to the insolvency and restructuring profession as it is to debtors, creditors and other stakeholders. Wrongdoing by one insolvency practitioner or firm can easily affect the reputation of their colleagues across the profession and potentially lead to disproportionate or unnecessary new regulation or legislation. It is in all our interests to make sure our regulatory framework is robust and effective and that wrongdoing is prevented in the first place or picked up swiftly when it does happen. High standards need to be upheld across the profession and those who fall short should face the consequences of doing so in order to protect and improve confidence in our profession and framework.

> A fair and proportionate regulatory framework is important not just for those who have a reason to make a complaint, but for those subject to the regulatory process too.

It's also important that, as well as being effective in practice, a regulatory framework is seen to be effective too. Unlike other countries, in the UK we benefit from well-established regulators keeping the profession's work under close scrutiny, a point we make consistently to legislators, journalists and other stakeholders.

R3 believes there are a number of criteria that any successful regulatory framework should look to achieve if it is to deliver for its key stakeholders, in this case, insolvency practitioners, debtors, creditors and the public. Insolvency regulation needs to be fair and proportionate, transparent, effective, efficient, flexible, and consistent.

Finding a balance

A fair and proportionate regulatory framework is important not just for those who have a reason to make a complaint, but for those subject to the regulatory process too. Regulation should not be an excessive burden on its users and subjects, and it should not unduly hold back the growth and success of businesses in the profession.

While monitoring needs to be reasonable in terms of the burden placed on those being monitored, it must, of course, remain effective. Routine oversight should be regular and provide as complete a picture of the insolvency profession's work as possible, while regulators should always have the necessary powers to do their work and should be given any government support necessary to develop innovative approaches to regulation.

Flexible

Following on from this, it's also vital that a regulatory framework is flexible and able to keep up with innovations in the market it is regulating. We know, for example, that the profession's regulators have been taking steps to ensure regulatory coverage of firms with non-traditional management or ownership structures – including volume IVA providers – is as comprehensive as possible.

Transparent

Transparency means it must be clear how to bring a problem to the regulators' attention, and it must be clear what steps are involved in the regulatory process. It must also be clear what action is being taken by the regulators – whether this is dealing with a complaint or undertaking routine monitoring – and what the outcomes of any regulatory actions have been. The last time R3 sought its members' views on our regulatory framework, transparency stood out as a particular positive, while the 2013 introduction of a single insolvency complaints gateway is a good example of our regulatory framework adapting to improve transparency.

Transparency extends to the speed of regulation: regulation should be efficient and the process predictable. Regulatory processes should have clear timetables and any delays or extensions to a process should be effectively communicated. Complaints should be dealt with quickly – for the benefit of both those making complaints and those subject to them – while extended gaps between monitoring visits should not be allowed to develop.

It should also be clear how insolvency practitioners are supposed to comply with regulation. The code of ethics (currently under review) is an important part of this and helps make sure the profession can live up to regulations in practice.

Consistent

Perhaps above all, there needs to be a consistent approach to regulation between the regulators. This means consistency in terms of the powers available to different regulators, the regulatory requirements that those being regulated are expected to meet, the approach taken to complaints and the consequences of breaching regulatory requirements. The recent introductions of the Common Sanctions Guidance and the regulatory changes in the Small Business, Enterprise, and Employment Act have helped improve consistency.

> Transparency means it must be clear how to bring a problem to the regulators' attention, and it must be clear what steps are involved in the regulatory process.

Meeting these criteria is a constant process of improvement and adaptation – and this list is not an exhaustive one either. In the UK, there is innovation, wrongdoing is picked up and there is support that helps the profession to get on with the job. Indeed, the fact the UK has any kind of established regulatory framework gives the UK an advantage over some frameworks overseas.

In a constantly evolving market though, there will always be room for improvement and it is in the profession's interests that we work with the regulators to make sure the regulatory framework meets the criteria set about above. Within the next 12 to 18 months, the government is likely to start a review of the profession's regulatory landscape as it considers whether or not to use its power to introduce a 'single regulator' for the profession. If the profession wants to remain self-regulating, it's important our regulatory framework meets the criteria set out above. We're looking forward to that review and would encourage R3's members to speak to their local R3 representatives so that we can make sure the profession's views are heard. □

What does good regulation look like?

By **Bob Pinder**, regional director of ICAEW.

Changes in the law are seldom welcomed by its users, but at ICAEW we have positively embraced the introduction of regulatory objectives into the Insolvency Act. That's because the introduction of the objectives has given the Recognised Professional Bodies greater freedom and flexibility in the way they approach regulation, as long as we act in a way that is compatible with the regulatory objectives. Here at ICAEW we see that flexibility as an opportunity, not a threat.

> "The introduction of the objectives has given the recognised professional bodies greater freedom and flexibility in the way they approach regulation."

The regulatory objectives also embed the better regulation principles into the oversight of IPs: that regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. We welcome the fact that these principles should be at the heart of what every regulator does, as they are in our case. There's a reference to the public interest too, which reflects our own Royal Charter and again is key to how we see our role as a regulator.

Agile regulation

We're a mature and wide-ranging regulator. A read of the Royal Charter or a trace of our history back to Queen Victoria's time certainly shows that we've been around a while.

People are probably tired of hearing the ICAEW say 'we were founded by insolvency practitioners', but we were. Our roots may be in the insolvency profession but that's not our sole focus – we're a regulator for audit, financial services (including consumer credit) and legal services, as well as being an AML supervisor and carrying out practice reviews of our own firms and the licensed practice scheme for firms that do work for the Civil Aviation Authority (CAA). We have extensive experience as a regulator and can learn lessons in one regulated area that may benefit another; we're not operating in a vacuum. All those who work for ICAEW in our insolvency monitoring and investigation teams are insolvency specialists, obviously. But that breadth of reach as a regulator means that if we need a tax specialist or someone who can audit systems and processes, there's someone nearby who we can call on.

Oversight

Mature doesn't mean staid. We recently implemented the findings of an independent review of our regulatory governance chaired by Sir Christopher Kelly. We wanted to be sure that our governance arrangements remained robust and in line with best practice in this area. So we now have lay parity and in some cases lay majority throughout our regulatory and disciplinary processes. This gives greater independence and the appearance of independence, and so greater assurance that the public interest is being put before self-interest. We've also a relatively recently established (last year) ICAEW Regulatory Board (IRB) with a lay chair and lay parity again, operating with a primary consideration of the public interest, which links back to

> "We were the first RPB to run events for our newly licensed IPs, recognising that if you set people on the right road early on they're more likely to do the right thing."

our charter. The IRB oversees the regulatory functions of ICAEW and our Professional Standards department. Members of ICAEW's council and board cannot sit on the IRB, neither can members of the regulatory or disciplinary committees. All of these changes reinforce the independence of ICAEW's role as a regulator from its membership. Our funding model also ensures that the regulated areas are self-funding – there's no cross subsidy from our membership function, which also demonstrates the independence of our regulatory arrangements.

The public interest

How does all this translate into the way we regulate IPs? We work in the public interest to raise and maintain standards. We take a risk-based approach following the better regulation principles. From the questions in the annual returns our IPs complete to

> "As well as external training and software organisations, we have been able to share our experience of areas of recommended good practice and common failings."

the frequency of visits, there's an assessment of risk behind all that we do so we can target our attention where it's needed. We have developed new and innovative ways to increase our contact with those we regulate. We were the first RPB to run events for our newly licensed IPs, recognising that if you set people on the right road early on they're more likely to do the right thing.

This educational approach is at the heart of ICAEW's approach to regulation. Over recent years we have introduced a raft of improvement strategies aimed at finding ways to prevent and proactively minimise the more common and serious causes of reportable quality failures. In a world where change is the only constant, helping our insolvency practitioners and their firms to adjust and keep up to date with the plethora of new laws, regulations and standards has been a major challenge.

Our regulatory role demands that we remain impartial and we must avoid the threat of self-review. By developing strong links with our 700 colleagues across ICAEW, other regulatory and oversight bodies, as well as external training and software organisations, we have been able to share our experience of areas of recommended good practice and common failings. This has led to fewer referrals to our regulatory and disciplinary committees, which has to be a good thing. ◻

Editor recovery@r3.org.uk

What does good regulation look like?

By **David Kerr**, chief executive of the Insolvency Practitioners Association.

> *'Good, better, best. Never let it rest; 'til your good is better and your better best.'*

The above quote, attributed to St Jerome (347–420 AD), suggests that we should constantly strive to be the best in our field. In regulation, as in insolvency practice and everything we do, it is a lesson in combatting complacency.

Competing demands

Do we already have a good regulation system in insolvency? Arguably, we do. The UK regime is one that many professionals regard as a model with the potential to be replicated elsewhere in the world.

It has maturity and, with that, the experience of what works well. But before we give ourselves a pat on the back, we have to recognise that some of those who engage with regulators will go away with a less favourable feeling about how well the system served them. Sometimes those people will be complainants whose concerns about insolvency processes and/or outcomes may have caused them to direct their disgruntlement towards practitioners, and they will be disappointed if the IP's acts or deeds are found not to have met the misconduct threshold. IPs also may sometimes feel let down by a process that puts them to the trouble of responding to investigation, takes up time and sometimes results in adverse findings. Perhaps the overseers of the process and other stakeholders may have something to say about the effectiveness of the system as well.

> "The UK regime is one that many professionals regard as a model with the potential to be replicated elsewhere in the world."

At the IPA, we pride ourselves on trying to satisfy these sometimes-competing demands on the regulation processes. The one certainty is that we know we cannot achieve 100 per cent success; one party or another may be disappointed, for example, in relation to the outcome of a complaint. That must not discourage us from striving to be better, and to build respect for the values that underpin the processes. At the IPA, as the only specialist insolvency regulator in the UK, our aims are simple – to continue to raise standards in an insolvency profession that is recognised in its own right as one based on ethical principles, and one in which others trust for its reputation to provide essential professional services, generating and recycling value in the economy. That may seem a tall order, but we know (and to a large extent published reports support the contention) that most practitioners, most of the time, often undertake difficult assignments to a very high standard. Regulation is still a necessity, but what does good regulation look like?

> "To be better still will require smarter techniques and a willingness to recognise that while we may be behind the curve in curbing some innovations, we have to catch up fast to maintain pubic confidence."

A good jurisdiction

We are in the fortunate position of operating against a backdrop of a stable economic environment with a sound court system and a wealth of established law and practice, within which (to a very large degree) professional people offer valuable services and seek to make an honest living. That makes the regulator's job easier than it might be in some jurisdictions. Our focus has to be on proportionate, targeted use of limited resources that minimise the regulatory burden on the majority while maximising our likelihood of identifying wrong-doing where it is perpetrated by a minority – and then dealing with those matters as efficiently and effectively as possible in the public interest. Linked to that is the need to keep a keen eye on the bigger picture – to concentrate on value and meaningful outcomes, not on the minutiae of compliance.

Those attributes happen to be the ones that lie at the heart of the government's better regulation principles, which the IPA has embraced.

Towards better

We are well on the way to what we might regard as better regulation. To be better still will require smarter techniques and a willingness to recognise that while we may be behind the curve in curbing some innovations, we have to catch up fast to maintain pubic confidence. That involves a constant awareness of the developments in the profession and the flexibility and preparedness to respond positively to a changing landscape. We believe the IPA is well-equipped to do just that, and our ambition is to be the best at what we do. That is not about competition with other regulators, but about demonstrating that the IPA has the best interests of the insolvency profession at its core, and that hand in hand with that belief is a deep-lying commitment to making the present delegated statutory regulation system remain fit for purpose. ◻

> "We are in the fortunate position of operating against a backdrop of a stable economic environment with a sound court system and a wealth of established law and practice."

REGULATION:
View from ICAS

What does good regulation look like?

By **David Menzies**, director of practice and professional standards at ICAS.

At the heart of every profession is public trust. If those who aim to be protected by a system of regulation don't have trust in it, then the regulatory system will fail.

One of the four objectives that ICAS operates against is 'be trusted'. Through this we ensure that our members operate to the highest standards of professional practice and ensure that we influence the future of the profession in the public interest.

> As a regulator, our role is not just to police the system but to educate and assist our regulated professionals to operate to the highest professional standard.

Checks and balances

ICAS is respected for delivering gold standard regulation. That means being fair but robust, ensuring that there are appropriate checks and balances in place within our policies and procedures and, importantly, ensuring that there is independent decision making and scrutiny at all levels of the organisation. This especially includes the investigation and disciplinary functions that rely heavily on the input of public interest members, who are not accountants.

The Insolvency Service, as oversight regulator, plays an important role in the independent scrutiny of our regulatory system operations (policies and procedures that we apply to all of our regulatory areas, including audit and insolvency). Its last report on ICAS's regulation of insolvency provided an 'all green' report indicating strong controls and robust procedures across insolvency regulation.

We consider that regulation should be developmental. As a regulator, our role is not just to police the system but to educate and assist our regulated professionals to operate to the highest professional standard. Using this approach, we not only provide generic support to our IPs but also increase or target the offer of support where monitoring visits may have identified some weaknesses.

We would also advocate that good regulatory monitoring takes a proportionate risk-based approach, and focuses on where and how harm or detriment may be happening. Perhaps cyclical monitoring, and basing those visits largely on individual case reviews, is not the only way of operating. A move to a combination of thematic, cyclical and targeted monitoring may provide more effective oversight of our regulated community's activities, and high standards shouldn't be rewarded with a uniform monitoring approach.

Regulating in a commercial environment

Related to this is the scope of the regulatory system. Regulating only individual IPs without recognising that firm structures and the wider commercial landscape have changed since the regulatory system was introduced over 30 years ago hinders the effectiveness of regulation. IPs function within commercial professional firms. Even at a practical level,

> Regulating only individual IPs without recognising that firm structures and the wider commercial landscape have changed since the regulatory system was introduced over 30 years ago hinders the effectiveness of regulation.

the monitoring of an individual's work is only part of the regulatory jigsaw, and whole firm procedures also have an important role to play. A dual approach of firm and individual accountability would be beneficial.

In the future, regulation needs to be more dynamic. We regulate commercial activities and commercialism results in practitioners and their firms developing new ways of operating from time to time. In much the same way as anti-doping analysis in sport will always lag behind the cheats, regulating commercial activity will lag behind commercial developments.

> In much the same way as anti-doping analysis in sport will always lag behind the cheats, regulating commercial activity will lag behind commercial developments.

That time lag must however be as short as possible. At the same time, we will work with other bodies to prevent legitimate business activities being abused in the first place.

The full story

One of the many frustrations that I hear regularly is that there is no point in complaining about IP behaviour as nothing ever seems to happen as a result. At a basic level, this appears to have some truth when you look at the Complaints Gateway statistics and compare them against disciplinary outcomes. That, however, does not tell the full story and ignores that disciplinary action takes place within a context of having sufficient evidence, providing a fair hearing and not being penal in nature. ICAS has, and will continue to, take firm disciplinary action against IPs where it can demonstrate that the required standards of conduct or competence have not been met.

The push within government generally for compensation schemes is not one which we support. It is fraught with difficulties, particularly in an insolvency context. There is perhaps a stronger case for ensuring that fines for misconduct better reflect the principle that commercial gain should not be achieved through misconduct.

What does good regulation look like?

By **Nick Howard**, head of insolvency practitioner regulation and external relations at the Insolvency Service.

Much has been written about the aims of regulation generally and many of the principles that tend to be expounded, such as proportionality and accountability, are applicable no matter which profession or industry sector is being regulated. For the Insolvency Service, the regulatory objectives introduced in 2015 effectively represent our view on what regulation in the insolvency field should be seeking to achieve.

Fair treatment

In most professions, it is immediately obvious who the customer is and where the professional's prime duty of care lies. It is less obvious in an insolvency context, but regulation should seek to ensure that all those impacted by decisions made by IPs are treated fairly.

> "All regulatory regimes are there to inspire confidence in the users of the services of those who are being regulated."

Those impacted can include debtors, directors and the full range of creditors. They will often have limited understanding of the insolvency process, and are in the position of having suffered some loss as a result of the insolvency, responsibility for which can be unfairly laid at the door of the insolvency practitioner. Regulators can help inspire confidence in the regulatory regime they apply, if their prime focus is to ensure that the range of consumers impacted by IP decision making are protected and treated fairly.

Much of the monitoring work of the Recognised Professional Bodies (RPBs) takes place behind the scenes, and will only come to public attention when a sanction is applied. RPBs can help by ensuring that their complaints processes are accessible, transparent and operate in a way that will provide assurance to those lodging a complaint that they will be taken seriously. This can be achieved through regular communications with the complainant so that they understand the process and the likely timing of any eventual outcome.

Fair and reasonable cost

RPBs now have a duty to take account of the cost of the services provided when arriving at an assessment of an IP's practices, but the concept of fair and reasonable cost in an insolvency context is not always easy to assess. The RPB should not be expected to second guess commercial decisions taken by a practice on issues such as charge-out rates.

It is feasible however to form an overall view of the reasonableness of fees charged by looking at the work done and the outcomes obtained. In cases for example where the cost of the services provided outweighed the benefits received by debtor or creditors, the IP should expect a regulatory eyebrow to be raised. There may well be good reason as to why this result was arrived at, but some assessment of how this came about should be expected.

At a time when creditors are being given ever more information and rights over the fees charged by IPs, it may be asked what additional value RPBs can add. But I would argue it is perfectly reasonable for the RPB to raise queries about seemingly unreasonable costs being charged, even where creditor agreement has been obtained. The question to be asked is *why* creditors agreed, and whether for example the information they were given that brought about that agreement was the best that could have been given in the circumstances. It may well be that the regulator is in a better position than creditors to assess whether an action is 'fair and reasonable' in an insolvency context.

Transparency

At the Insolvency Service, we have been at the forefront of efforts to improve the transparency of regulatory processes, both through the publication of the annual review of insolvency practitioner regulation, and through the publication of our own monitoring reports into the activities of the RPBs. With a regulatory regime that involves the regulated being able to choose their own regulator comes a degree of suspicion from those impacted by IP decisions about how effective that system is going to be. The best way to combat this is by being as open as possible about the work that goes on to monitor the activities of IPs.

We are doing more and more to highlight the regulatory sanctions that are applied to IPs. In an ideal world, this would help consumers make informed choices about which IPs to use, and at the very least should serve to demonstrate that such sanctions are applied. Often it will be the publication of the sanction rather than the sanction itself that operates as the most effective deterrent to poor practices.

> "Regulators can help inspire confidence in the regulatory regime they apply, if their prime focus is to ensure that the range of consumers impacted by IP decision making are protected and treated fairly."

Transparency is difficult in the regulatory field. Often, RPB activities will necessarily take some time, and much takes place in private, but the more we can shine a spotlight on the work that does go on, the more confidence there will be in the regime.

Each of the regulatory objectives I have touched on helps us work towards creating a regulatory regime which inspires confidence. We can't expect regulators to prevent all bad behaviour – this would require a disproportionate amount of monitoring activity. But all regulatory regimes are there to inspire confidence in the users of the services of those who are being regulated. They will wish to know that the professionals they are dealing with operate to high standards, have proper complaints procedures and are subject to some form of monitoring. Unless we can provide that assurance, we will remain under pressure to change our system of regulation. ◻

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What s going on in the wo of insolvency litigatio funding?

Mark Beaumont provides an update on funding for insolvency cases.

> Major regulatory changes are bound to impact heavily, and often in ways that weren't predicted or intended.

Insolvency practitioners are used to speculating with their time and resources to investigate potential claims. This is often done for little or no reward and they may have drawn the conclusion that:

- a claim needs further investigation but funds are lacking to do so;

> Over thirty funders are now actively financing disputes in all corners of the globe.

- the factual complexity, costs *or* expertise required to pursue the claim are too onerous;
- the relevant claim may be expected to crystallise after the office-holder vacates their post.

This is exacerbated by the April 2016 changes relating to the recoverability of conditional fee agreement (CFA) success fees and after-the-event (ATE) legal expenses insurance premiums (the LASPO reforms). Claims that may have been pursued in the past may no longer be viable on a CFA/ATE basis.

When success fees and premiums must be deducted from damages, cases that were proportionate and economic to run may no longer be economically viable.

There is a solution for cases that fit this profile, resulting from the Small Business, Enterprise and Employment Act (SBEEA) 2015. One of the interesting aspects of these reforms is the freedom provided for the assignment of certain claims, including assignment to litigation funders and similar entities.

There are now several specialist funders that acquire lower-value insolvency claims for either an upfront fee, a share of recoveries or a combination of the two. By lower-value we typically mean that expected recoveries will be under £100,000.

Change creates opportunities

With multiple players in the market, it's possible to create competition between funders and to secure the best possible price – although in many instances it seems IPs just approach one funder and take whatever offer is put on the table. The funders obviously benefit from this approach, hence actively encouraging firms to approach them directly, rather than exploring the full market. I expect this to evolve; after all, you wouldn't expect an IP to take such a casual approach to valuing and selling other assets in the administration.

Aside from price, and the timing of payments (upfront or deferred to conclusion), funders also vary their approach in others ways too. Variations in

> Long gone are the days of funders taking x3 and 30% of damages.

approach include whether to stick with the present legal team, whether to add in other charges (such as their own adverse costs protection), and the ability to manage distributions if an insolvency closes before litigation concludes. The last point can be important, particularly so if the IP is keen to end an administration, and is the reason that the claim(s) are being assigned over to the funder.

For cases over £100,000 it is usually more attractive to creditors and the IP to seek funding and insurance, rather than letting the funder take assignment, although that does depend on several factors.

There was a time when funding was only available for the largest and simplest of claims, but that's far from the case these

MARK BEAUMONT is co-founder of Annecto Legal Ltd, an FSA regulated, full market broker accessing litigation funding and ATE insurance for a wide range of insolvency-related disputes.

Property insolvency: striking the balance

Chris Stevenson and **Robert Munn** weigh up the needs and rights of landlords and administrators in an insolvency situation.

Identifying the real estate requirements of a company on the brink of insolvency and, if required, taking steps to ensure that it can continue to trade from its premises uninterrupted thereafter, is one of the principal challenges facing an insolvency practitioner (IP) on his or her appointment. Indeed, correspondence from landlords wanting to know whether, when and for how long rent will be paid is likely to be one of the first major issues that a newly appointed administrator (or other IP) will have to address.

While one of the key issues in this area, the priority status of rent accruing due during administration, has now been settled – with rent being payable as an administration expense referable to the period of use (see *Re Games Station* [2014] EWCA Civ. 180) – there remain a number of issues regarding the extent of that payment obligation and the balance to be struck between the rights of the landlord and the insolvent company that merit consideration. The focus of this article is the latter point: considering whether the current approach of the courts adequately reflects the balance between a landlord's right to bring the lease to an end and the interests of the wider administration.

Why is it an issue?

In recent years, there have been a number of developments in law and practice concerning the treatment of distressed real estate. One reason (of many) for this is that the retail sector, one of the sectors worst (or at least most publicly) affected since the global financial crisis, has historically carried a substantial real estate exposure, the quarterly rents on leasehold stores being one of a retailer's major liabilities. To take a few examples, according to press reports, when Woolworths entered administration in 2008 it had over 800 stores carrying a quarterly rent of circa £40m, Game had over 600 stores and £20m, HMV had nearly 250 stores and circa £37.5m, and so the list goes on.

> "Correspondence from landlords wanting to know whether, when and for how long rent will be paid is likely to be one of the first major issues that a newly appointed administrator will have to address."

In the absence of statutory protection for landlords (like that available to essential suppliers), administrators have variously sought to mitigate rental liability and liability for other property holdings costs so as to run the administration as efficiently as possible. That approach, coupled with the fact that only a fraction of the relevant store portfolio is likely to survive following an administration sale (with the rump wound down and vacated), makes it unsurprising that landlords and administrators come into conflict.

Right of forfeiture

Under most commercial leases, the appointment of an administrator triggers the right of a landlord, following service of notice under section 146 of the Law of Property Act 1925, to forfeit a lease. This is done either by re-entering the property in question or by bringing proceedings with permission of the court. The effect of forfeiture is immediately to end the lease and all interests (such as licences and sub-leases) that derive from it. Notwithstanding the position under the lease, the right to forfeit by re-entry is barred from immediate exercise by the statutory moratorium (paragraph 43(4) of schedule B1 to the Insolvency Act 1986 (IA86)) with forfeiture by proceedings caught by paragraph 43(6). Accordingly, a landlord wishing to end a lease without consent will

> "The threat of such proceedings leaves the administrator in potential difficulty: he either agrees to forfeiture or resists it and ends up in court."

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usually apply for permission to lift the moratorium and then seek leave to forfeit. If forfeiture is sought on the basis of the administration then, absent a return to solvency, it may be difficult to challenge the landlord's right.

The threat of such proceedings leaves the administrator in potential difficulty: he or she either agrees to forfeiture (and risks losing the right to trade from – and market – potentially valuable premises) or resists it and ends up in court.

Balancing the parties' interests

If proceedings are brought, then the court will apply the test for deciding whether or not permission to lift the moratorium should be given as in *Re Atlantic Computer Systems PLC* [1992] Ch 505. In short:

- if giving permission to lift the moratorium and forfeit the lease will not impede the purpose of the administration, then leave will be given;
- if it would cause an impediment then the court will balance the interests of the landlord as against those of the company's other creditors. In carrying out that balancing exercise, the landlord's proprietary rights will be given substantial weight on the basis that an administration should not be carried out for unsecured creditors at the expense of those with proprietary rights.

Continuing benefit

In circumstances where the administrator continues to trade from the premises or receives some form of ongoing benefit from them following an administration sale, then permission to lift the moratorium may well be refused – subject to appropriate conditions. For example, in *Innovate Logistics Ltd (in administration)* v. *Sunberry Properties Ltd* [2008] EWCA Civ 1261 the Court of Appeal found that where use of the property in issue (a chilled distribution facility) was required to enable the occupier (the purchaser following a pre-pack) to fulfil orders and collect book debts for the benefit of creditors, it would be inappropriate to allow a landlord to restrict the ability to generate those returns by granting leave to injunct the activities of the unlawful licensee. Leave to bring proceedings was therefore refused on condition that the licence fee being paid by the occupier was directed straight to the landlord. Usually, this is only a short-term protection while the administrator has a continuing benefit. It provides limited assistance in procuring either the assignment of the lease to a purchaser of the business or the grant of a new lease on similar terms.

> "The effect of forfeiture is immediately to end the lease and all interests (such as licences and sub-leases) that derive from it."

No clear benefit

The position in *Sunberry* (ie the company in administration continuing to take a benefit from a premises following an administration sale) is a relatively unusual one. In most cases, following the sale of those parts of the company's business that the purchaser wants to take on, the company in administration will have no ongoing interest in the property.

The approach of the court in these circumstances is clear: there can be no impediment to the conduct of the administration by lifting the moratorium where there is no continuing benefit being derived from the property. Accordingly, leave to lift the moratorium will be granted (see for example *Metro Nominees (Wandsworth) (No 1)* v. *Rayment* 2008 BCC 40 and *Lazari GP Ltd* v. *Jervis* [2012] EWHC 1466 (Ch)). Attempts to get around this through allocating a proportion of the purchase price to the lease in question (so as to demonstrate that there was a benefit to be achieved through its assignment) have also failed to tip the balance in the administrators' favour (see *Re SSRL Realisations Limited* [2015] EWHC 2590 (Ch)). The judge's conclusion in that case, however, was clearly influenced by concerns as to whether the £1.3m premium ascribed to the lease in the sale documentation was reflective of its value and the nine months that had been taken to engage with the landlord in relation to the assignment.

The approach of the court

While these cases undoubtedly reflect the correct application of *Re Atlantic*, and serve as a sage warning to administrators not to » fetter their duties and act as 'front men' for purchasers (per HHJ Norris QC in *Metro Nominees*), it remains debatable whether the prominence given to a landlord's proprietary rights in this context is consistent with a regime focused on the rescue of businesses and the realisation of best value for creditors as a whole.

By way of illustration in both *Lazari* v. *Jervis* (the GAME administration) and *Re SSRL Realisations* (Strada), the properties in question were high value West End London stores: the GAME store in Oxford Street and Strada in Bloomsbury. While these stores were clearly valuable to the landlord, it is probably also fair to assume that they were also highly prized by the tenant – if they were not, it is difficult to see why the cases ran to court: forfeiture would instead have been agreed at an earlier juncture with the associated costs saved.

> An alternative solution would be to consider applying similar rights and restrictions to landlords as those conferred on essential suppliers.

Despite the value of those stores, the landlord's right to forfeit on tenant insolvency coupled with the approach in *Re Atlantic* means there is no way that an administrator can guarantee that, post-sale, the lease will continue on the same terms previously enjoyed by the insolvent entity. While loss of the lease can usually be avoided (especially if the assignee puts forward a credible covenant in good time), the right to forfeit on the basis of the administration is technically available even if a good replacement covenant is available. This means that either the purchaser takes the risk of forfeiture, or the cost is borne by the administration – with purchasers increasingly seeking to defer payment of part of the purchase price or adding conditionality to the price linked to the assignment of key premises.

Scope for abuse?

This position leaves open the theoretical risk of a landlord seeking to deploy his or her rights tactically – for example in a rising market or for properties where there is constant demand – allowing him or her to end the current lease following tenant insolvency and to re-let the property to a new tenant at an uplifted rent earlier than would otherwise have been be the case. In one sense, this would appear inconsistent with the current legislative approach – for example in the context of supply contracts where termination rights and price ratchets linked to insolvency are now heavily restricted. In another sense, it has some consistency with the rights enjoyed by other creditors that retain proprietary interests. For example, subject to paragraph 72 of schedule B1 IA86 and the moratorium, the holder of valid retention of title (ROT) may take back his or her goods on insolvency and resell them at a profit (although it will usually remain open for the administrators to acquire the ROT assets by paying the contract price, if that is in the interests of creditors generally).

Are there alternative options?

One option to address any perceived unfairness would be to afford the purchaser (as a licensee) the same rights of relief from forfeiture as those enjoyed by a subtenant or mortgagee. This would allow them to apply, post-forfeiture (and despite the tenant's insolvency), to have the lease vested in them on the same terms that the tenant in administration enjoyed (subject to any conditions the court considers fair to ensure that the landlord is left in the same economic position as it was in pre-insolvency). Such a change seems unlikely given that it would require an amendment to the Law of Property Act 1925 and would understandably be resisted by property owners given that it would expand (potentially quite broadly) the range of people able to challenge the exercise of the former's proprietary rights in order to address what is a relatively minor issue in the market.

An alternative solution would be to consider applying similar rights and restrictions to landlords as those conferred on essential suppliers. While the devil would be in the detail, doing so could override the landlord's right to forfeit based on insolvency alone and, in return, they would receive some comfort in relation to the actions of any purchaser occupying under licence, in the form of a limited personal guarantee from the relevant administrator for rent and other liabilities that might accrue due.

This suggestion would likely receive push back from the insolvency community as most would refuse to be 'on risk' for the actions of the purchaser. However, it may not represent much of a shift in the law given that landlords may already be classified as a supplier of essential services in certain circumstances (most likely as part of the service charge), although it has yet to be seen how that obligation interacts with the landlord's right to forfeit. It is also not a far cry from the recent government consultation that considered allowing the distressed entity the right to nominate those suppliers it considered essential – potentially including landlords.

Concluding remarks

The reality is that this issue only arises rarely and, in the majority of cases, a dispute can be avoided by prompt engagement with the landlord and by putting forward a credible assignee. Following an administration sale, those discussions tend to be purchaser led.

> The reality is that this issue only arises rarely and, in the majority of cases, a dispute can be avoided by prompt engagement with the landlord and by putting forward a credible assignee.

Therefore, while the law remains as it currently stands, it is very important for administrators to consider and fully prescribe in the sale documentation the actions that the purchaser must take to engage in constructive assignment discussions post-sale. If nothing else, an administrator needs to try to avoid getting caught up in (and potentially criticised for) forfeiture proceedings that run to court because of a purchaser's intransigence or because they are being used as a means of exerting undue pressure on the landlord – potentially contrary to the administrator's duties.

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The final call for Aviator UK

Tyson Gundersen, **Simon Kirkhope** and **Neil Riley** explain how a major airport baggage handling company was wound down in an orderly fashion.

The aviation industry is a network business, relying upon strict regulation, rigorous safety standards and operations planned to minute detail. Unexpected financial or operating changes, particularly to 'ground handling' services (the aggregation of services that manage customer check-in through to loading and unloading the aircraft) can have an impact on the lives of thousands of employees and hundreds of thousands of air travellers. When Aviator UK, the company that supplied ground handling services to four major UK airports, ran into immediate financial trouble it was clear that action would be needed – and fast.

> "The UK business provided ground handling services to most major airlines at Gatwick, Birmingham, Newcastle and Manchester airports, and employed approximately 1,700 people in the UK."

The Aviator Group is a large European ground handling operator, headquartered in Sweden. The Group operates in Europe with a focus on the Nordic region and, until recently, included UK operations (acquired from Servisair in 2015). The UK business provided ground handling services to most major airlines at Gatwick, Birmingham, Newcastle and Manchester airports, and employed approximately 1,700 people in the UK. In mid-2016, while the group was in the process of negotiating refinancing of its debt facilities, its lender group advised that it was no longer supportive of the Group's UK operations.

Following the unexpected (and immediate) loss of financial support for UK operations, and incurring a £3m+ wage bill, the directors of Aviator UK faced the risk that the business was cash-flow insolvent, with potentially no other option but to cease operations immediately.

The directors were cognisant that the potential disruption resulting from ceasing UK operations would have been reminiscent of other major aviation incidents, such as the Icelandic ash cloud in 2010, which cost the economy over €1bn. As a result, FTI Consulting and DLA Piper were engaged to advise the board and management of Aviator UK on alternative options to avoid the need to immediately cease operations.

Over the 48 hours following the insolvency, a plan was developed to avoid the need for an immediate shutdown of operations. The plan involved securing sufficient cash-flow support from key stakeholders (primarily airports and airline customers) to manage the transition of customer contracts and employees to alternative ground handling suppliers in a controlled manner over a 12-week period.

This article focuses on the specific legal and operational issues involved in managing this situation. Below are the key considerations that needed to be accounted for:

Cash-flow shortfall

Given the immediate and medium-term funding need of the UK business, a working group was established (comprised of the board, management and legal advisors) to plan an orderly wind down of the business. This required the business to obtain committed finance within 24 to 48 hours to enable the company to meet immediate supplier payments and payroll obligations.

Over 24 hours, advisers worked with the finance team and senior management to build a cash-flow forecast for the transition period, as well as to ensure all non-critical payments were put on hold to preserve liquidity in the business. The business' key stakeholders were approached to discuss funding arrangements with a clear and quantifiable plan that they could fund. The anticipated key concerns for the funding stakeholders were:

> "The directors needed to be confident that the business had the liquidity it needed in order to achieve the transition without this aim being jeopardised by further cash-flow issues or creditor action."

- business continuity
- maintenance of operational standards
- robust budgeting.

The directors needed to be confident that the business had the liquidity it needed in order to achieve the transition without this aim being jeopardised by further cash-flow issues or creditor action. Given the circumstances fell well outside of the ordinary course of business for the industry, these arrangements were necessarily bespoke and required an innovative approach, in order to develop and document them within a timescale of hours, not days or weeks.

The group ultimately secured sufficient funding to allow the business sufficient time to execute its orderly transition. As part of the funding package, the company agreed to provide weekly cash-flow forecasts for the transition period and operational updates, and gave a commitment to meet minimum service standards.

Wrongful trading risk

In light of the imminent insolvency of the company at the end of the transition period, the directors were keenly aware of their responsibilities to minimise losses to suppliers and other creditors of the business. Ensuring that they could not be criticised personally, by reason of having continued to trade for a period, was critical to the implementation of the transition objective.

The directors wanted to be sure that:

- creditor positions would not be worsened during the course of the transition; or
- if creditor positions were worsened (through the ordinary course of trading), there was sufficient funding to allow a pre-closure payment to bring individual creditor positions back to their pre-crisis levels.

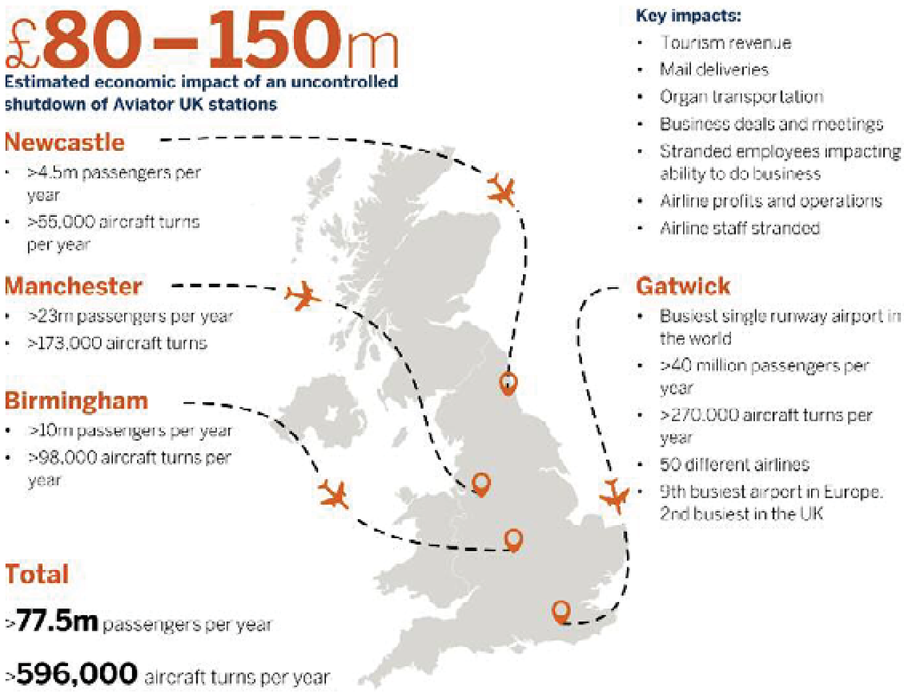
On the basis of the advice provided (including weekly analysis of individual creditor positions), the directors of the Group were satisfied that they had taken every step with a view to minimising the potential loss to creditors that they ought to have taken and therefore had mitigated as far as possible the risk of criticism of their decision to trade on during the transition period.

TUPE issues and process

The directors were keen to protect employees and limit job losses where possible. This was essential to achieve the overarching objective of securing a continued delivery of services. At the same time, it was recognised that redundancies would be the inevitable result of a shutdown if services were not transitioned to new suppliers.

In order to avoid potential liabilities to employees, which would hit funds available to creditors, consultation about both potential transfers of staff and redundancies was commenced immediately. All employees were placed at risk of redundancy and informed that the aim was to avoid redundancies through securing a transfer of their employment where possible.

The directors were keen to ensure that every step was taken to comply with the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) to protect jobs where possible. However, TUPE requires an organised grouping of employees who are assigned to the business or contract in question. As a result, it was recognised that there would be a group of head office staff who were unlikely to be protected by TUPE and, due to the way in which staff were



organised, there was a risk that some operational staff would be insufficiently assigned to individual contracts.

In practice, there was a fine balance to be achieved (through active dialogue with trade unions and alternative suppliers) in the application of assignment requirements under TUPE, maximising jobs secured and ensuring that some new suppliers had sufficient staff to continue operations, while others did not inherit excessive employee liabilities. The result did not always fully

> “Resource pressures limited the amount of direct consultation that could take place, so regular updates and alternative communication paths were essential.”

reflect a strict application of TUPE or meet employees' individual aspirations to transfer to perceived 'preferred suppliers', resulting in some interesting individual challenges that had to be addressed.

Throughout this process, while tempting to solely focus on securing transfers of staff, it was also important not to forget those staff who remained at risk of redundancy yet were essential to maintain operational delivery throughout the transition period. Resource pressures limited the amount of direct consultation that could take place, so regular updates and alternative communication paths were essential to achieve effective consultation and support for these staff during the transition process.

Operational wind down process

Once funding had been secured, the work commenced on transitioning the operations to alternative service providers. Given the operational complexities of the business – the Group provided services under 55 separate contracts, averaging 1,600 'turns' per day – this process was far from simple, and involved complex discussions/negotiations between:

- 43 airlines
- 4 airport authorities
- 6 incoming ground handling providers
- unions and employee representatives
- trade creditors
- equipment lessors
- the government.

As the funding provided to the business was contingent on maintaining service at pre-agreed levels, it was critical to the overall success of the wind down that operations remained uninterrupted, and that employees (who faced considerable uncertainty) continued to turn up for work. Employee and union communications were therefore key.

Ultimately, in order to ensure a manageable migration process, operations (and their associated customer contracts) were transferred to new operators in three blocks during the final month of trading. Any remaining head office staff that were not covered by TUPE, or required to assist in the final closure of the corporate legal entities, were made redundant on the final transfer date.

The logistics of managing this process were, to say the least, highly challenging and required close coordination and cooperation between the management team, their advisers, the airlines and airports (and their advisers), the new operators (approximately six in total) and various sets of legal advisers, in addition to » the numerous bilateral negotiations that were required with stakeholders.

Employee communications and HR processes

Stabilising the workforce was critical to implementing an orderly wind down of operations and ensuring business continuity to prevent travel disruptions. Aviator employees were needed to report for their shifts and continue to service aircraft. To achieve this outcome, the company, advisers and legal team's efforts were focused on:

- addressing the initial concerns from the workforce who were aware of Aviator's financial challenges
- conducting productive dialogues with unions and employee representatives
- adhering to the legal requirements governing TUPE and potential redundancy consultations that were running in parallel

> Given the close working proximity between Aviator's staff, the airlines and other ground handling operations at each airport, they were aware of the business' funding challenges and had threatened a work stoppage.

- formulating and documenting staff retention incentives to avoid the loss of certain key employees during the transition
- mitigating efforts by the media to sensationalise the situation with storylines about potential travel chaos across the UK and Europe; and, most importantly
- being respectful in our communications and being as transparent as possible given the uncertainties for employees.

In the highly charged time period before a plan had been agreed and funded, managing the workforce was challenging. Given the close working proximity between Aviator's staff, the airlines and other ground handling operations at each airport, they were aware of the business' funding challenges and had threatened a work stoppage if there were no immediate assurances on payroll. Unfortunately, while financial solutions were being developed, Aviator wasn't in a position to give the assurances demanded by employees for several days, which initially heightened tensions with the workforce.

Upon confirmation of the wind-down funding, Aviator's CEO immediately updated employees of the planned withdrawal from UK operations, as well as Aviator's commitment to seek TUPE transfer for as many employees as possible. We then led, in concert with Aviator's human resources and internal communications team, an ongoing communications and HR rhythm that entailed:

- twice weekly updates to all staff from Aviator's CEO, detailing progress of the TUPE efforts with each airline at all airports
- weekly updates to the extended leadership team about efforts under way and guidance for managing questions from their teams
- an overview of the consultation process, including the process for electing representatives, and a weekly cycle of consultation meetings at each airport for those employees not represented by unions
- weekly meetings with union representatives
- weekly Q&As to address questions raised in works council and union meetings.

From a media perspective, FTI's communications team managed all incoming inquiries and ensured that the media understood that the process was under way to deliver a controlled wind down. We also ensured that the media offices of airlines and airports were fully aligned so that there was consistency in the messaging about the process to mitigate travel disruption and protect as many jobs as possible. As a result, there was little negative media coverage of this situation, and the coverage that did result reflected the coordinated plans under way to execute a controlled wind down of operations.

Outcome

Although the Aviator UK corporate entities were ultimately placed into liquidation, the operations were successfully transferred to new providers, with more than 95 per cent of all employees transferring with the contracts. The transfer of employees and the protection of entitlements, as well as the completion of the transition with no travel disruption to the general public (against many expectations) meant that the project was a resounding success.

Some of the key learning points from this case study are summarised in the following text:

- A new management team had been brought into the business and a turnaround plan had been commenced however contingency plans had not yet been fully worked up at the point that lender support for the UK business was withdrawn. Consequently, the business was not prepared to deal with the liquidity shortfall that occurred.
- Relations with employees were challenging in the early stages of the wind down. The threat of a work stoppage escalated tensions. Early engagement and provision of open, transparent communication (to the extent legally possible) is key.

> Although the Aviator UK corporate entities were ultimately placed into liquidation, the operations were successfully transferred to new providers, with more than 95 per cent of all employees transferring with the contracts.

- Rapid and proactive engagement with the media, combined with an orderly process to ensure that all stakeholders (airlines, airports and Aviator) were communicating the same objectives, prevented sensationalist headlines, which could have derailed an otherwise controlled process.
- Mitigating wrongful trading risks for directors during a wind down process in a business with very tight margins and bespoke, specifically allocated funding arrangements requires robust, accurate and real-time reporting on creditor positions and forecasts, as well as coordination with key suppliers.

Alternative funding sources for a turnaround should be fully investigated, especially in network businesses where a collapse will have a major impact on other stakeholders.

Continuous, clear and open communication to employees ensures lower absenteeism and is vital to the operation of outsourcing businesses, especially ones with strict penalties for poor operational performance.

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Save the date
SPG Forum
2–3 November
Chesford Grange Hotel, Warwick

R3 events, courses and conferences

R3 Southern Conference 2017
21–22 September
Hilton Hotel, Bournemouth

We are pleased to announce the inaugural R3 Southern Conference hosted by the Southern & South West and Wales & South East regions. The conference will commence with drinks and canapés on Thursday 21 September, followed by a technical programme on Friday 22 September. Sessions will include: a discussion on fraud in the UK economy; the use of directors' loan accounts and HMRC's perspective; a discussion on the Insolvency Rules 2016 – five months on; how to maximise the potential of your people and their ambitions; an R3 Update; and, what is next for the insolvency profession.

For more information or to book please email **events@r3.org.uk**

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the 2017 Autumn–Winter programme.

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

Month	Date	Event	Venue
September	5	Practical Introduction to Insolvency Work – Personal Insolvency	London
	11	North West Regional Meeting	Manchester
	12	London and South East Quiz Night	London
	12	South West & Wales Regional Meeting	Bristol
	13	North East Regional Meeting	Newcastle
	14	Restructuring Solicitors' Firms (half day – am)	London
	14	CVAs (half day – pm)	London
	14	Scotland Annual Dinner	Glasgow
	14	Women's Group Learn to Play Casino Evening	Manchester
	20	Practical Introduction to Insolvency Work – Rescue, including Administrations and CVAs	London
	20	Yorkshire Women's Group John Lewis Beauty/Shopping Experience	
	21	West Midlands Women's Group Afternoon Tea	
	21	Eastern Golf Day	St Ives
	21–22	Southern Conference	Bournemouth
	25	Joint R3 and ICAEW Eastern Regional Meeting	Bury St Edmunds
	25	London & South East Regional Meeting	
	26	Employment Tribunals (breakfast briefing)	Leeds
	26	Midlands Golf Day	Birmingham
	27	Yorkshire Reginal Meeting	Leeds
	28	Northern Ireland Golf Day	Belfast
	28	Core Tax Issues for Insolvency Professionals (half day)	London
October	5	Yorkshire New Professionals Oktoberfest Event	Leeds
	5	East Midlands Women's Group Autumn Soirée	Nottingham
	10	Pensions Restructuring – Trends and Market Update	Manchester
	11	Insolvency Litigation (full day)	London
	12	Practical Introduction to Insolvency Work – Liquidations I	London
	13	London & South East Ladies' Lunch	London
	17	Construction Issues (twilight briefing)	London
November	2–3	SPG Forum	Warwick
	7	South West & Wales Regional Meeting	Bristol
	7	Personal Insolvency (full day)	London
	9	Practical Introduction to Insolvency Work – Liquidations II	London
	9	Southern Annual Black Tie Dinner	
	9	North West New Professionals Group Winter Ball	
	15	Pensions Restructuring – Trends and Market Update (breakfast briefing)	London
	16	Construction Issues (breakfast briefing)	Manchester
	21	Insolvency Litigation (full day)	Leeds
	22	Maximising Returns: Insurance Recoveries in Insolvency (breakfast briefing)	London
	28	Complex Restructuring (full day)	London
	28	Core Tax Issues for Insolvency Professionals (half day)	London
	29	Technical Update (lunch briefing)	Bristol
	30	Practical Introduction to Insolvency Work – Tax Compliance and Planning, TUPE & Employee/RPO Claims	London
	30	Technical Update (breakfast briefing)	Birmingham

Regional events R3 events

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Insolvency – an over-regulated profession?

Gareth Limb asks whether IPs in smaller practices can really keep up with the pace of regulation.

When we think of regulation affecting insolvency practitioners (IPs), we automatically think of the insolvency legislation and Statements of Insolvency Practice (SIPs), but there is a lot more to it than that. There are broader regulations that impact on all professionals, such as those relating to money laundering and data protection, and those of the Recognised Professional Bodies (RPBs), as well as regulations that affect all businesses operating in whatever area, such as health and safety and the provision of real-time information to HMRC etc.

I think that, given the ever increasing demands in respect of compliance with regulation, many IPs, particularly those in smaller practices, will share the sentiments expressed in the *Hitchhiker's Guide to the Galaxy* by Marvin the paranoid android: 'Life, don't talk to me about life.' Even though ensuring that clients are 'compliant' is my day job, there are times when I despair about the increasing amount and complexity of regulation impacting on the insolvency profession.

Mostly harmless?

There are two particular aspects to my concern. First, much of the non-insolvency regulation is written in general terms without regard for the particular nature of insolvency. R3, the RPBs and the Joint Insolvency Committee (JIC) work hard to try to address this. Secondly, there is a disproportionately high burden that falls on smaller practices in implementing any regulations, which are enforced in the same way regardless of the size of the practice.

I only deal with insolvency compliance, but even I am struggling to keep up to date. It seems an almost impossible task for IPs in practice, particularly those in smaller practices, and I am afraid that I cannot see it getting any better. Regulation is with us to stay and complying with it is a hidden cost of being in business, but it would still be helpful if we could have a period of stability. So far in 2017 we have already had the updated Insolvency Rules, with last-minute amendments, the recast EC Regulations, revised Money Laundering Regulations 2017 (MLR) and the General Data Protection Regulation, although that last one will not actually come into force until May 2018.

We also still have a revised code of ethics and a finalised SIP 6 to look forward to, among others. Unfortunately, a lot of the regulatory changes are beyond the direct control of the insolvency profession, but it would be helpful if those that we do have some control over, namely the insolvency legislation and SIPs, are left alone for a period of time. Maybe, before changing a SIP, the JIC could ask whether there is any significant regulatory risk arising from the current version of a SIP? If the answer is no, then the SIP should be left unchanged. If the answer is yes, then any changes should be limited to the affected areas, avoiding the temptation to impose root and branch reform of the kind seen in the last few years in SIPs 3, 6 and 13, for example.

> "Regulation is with us to stay and complying with it is a hidden cost of being in business, but it would still be helpful if we could have a period of stability."

Money laundering regulations in practice

I have already mentioned the MLR 2017 in passing. Since the regulations came into force on 26 June with very little fanfare (they did not even get a mention in the Dear IP 77 issued on 28 June) it seems appropriate to discuss some of the major changes made as they affect insolvency practices.

The MLR 2017 require a firm or practice to appoint someone at board level or in a senior management position to analyse a practice's potential exposure to money laundering or terrorist financing. In some practices, the existing MLRO might have sufficient authority, but in practices where the MLRO is not a board member or able to take decisions about the practice's risk strategy, a more senior responsible officer will also be needed. Within a small insolvency-only practice I think that it is likely that the IP will take on this role themselves rather than delegating it. They must produce a written anti-money laundering risk report for the practice based on factors such as the type and nature of the practice's customers, services offered by the practice, types of transactions undertaken, and the size and nature of the practice's business. That report must then be translated into written risk mitigation policies for staff to implement, including a policy for internal controls over the practice's risk of exposure to money laundering and terrorist financing. Those controls could include ensuring adequate and appropriate training for staff. The practice will also need to develop and implement revised customer due diligence procedures to comply with the MLR 2017, as well as revised reporting, record keeping and monitoring procedures.

On a day-to-day basis as regards customer due diligence, the MLR 2017 introduces the concept of a 'black list' of high risk jurisdictions which, if involved in the insolvency procedure, makes enhanced due diligence and additional risk assessment compulsory. It also expands the definition of politically exposed persons (PEPs) to include 'local' PEPs as well as foreign PEPs, so PEPs will now include, among others: members of parliament, members of similar legislative bodies, and high-ranking officers in the armed forces. A practice will need to undertake enhanced due diligence requirements whenever a PEP is involved, and also whenever a person whose identity needs to be verified is a family member or known close associate of a PEP.

Finally, the MLR 2017 are written in general terms covering numerous professions and business sectors and do not easily fit with insolvency. To assist IPs, particularly those in smaller practices, it will be extremely useful if the RPBs, working through the Consultative Committee of Accountancy Bodies, provide some sector specific guidance on the 2017 regulations in the same way that they did for the 2007 regulations. ◻

GARETH LIMB is a director of Compliance on Call and an R3 council member.

A look back at the SPG Technical Review

Caitlin Powell reports back on the SPG Technical Review and R3's upcoming SPG Forum.

This year saw another successful SPG Technical Review, held in London, Leeds and Bristol, with a programme curated by Chris Herron (Herron Fisher) and Maxine Reid (Kreston Reeves). The review provided information and advice on areas of particular relevance to professionals working in smaller firms, covering a mixture of recent developments, refreshers of key technical areas and practical guidance.

Tax, APNs and rules

Kathryn Hiddleston (Grant Thornton LLP and chair of R3's Tax Group) and Caroline Sumner (R3's technical director) kicked things off – with Margaret Corbally (Grant Thornton LLP) taking over from Kathryn in Leeds and Bristol – with an update of the most topical tax issues, including accelerated payment notices and follower notices. The update also covered prospective changes to legislation and the impact that these may have on rescue procedures, such as changes to corporation tax loss relief (eg from 1 April 2017 there is no longer an insolvency or corporate rescue exemption).

Next, Michelle Butler (The Compliance Alliance) considered how putting the Insolvency Rules 2016 into practice was actually going for the profession. The conclusion? Too early to tell, but Michelle still provided an excellent overview and some much needed detail on the practical consequences of some of the key changes, including what exact process needs to be followed to hold a physical creditors meeting (hint: the amendment rules refer to the value of a creditor's debt being calculated by reference to r15.31).

Advice and advocacy

Graham McPhie (Moon Beever) then flew through all the important court decisions of the last few months and their implications, such as when complete actually means complete for IVAs following *Green* v. *Wright*. Despite covering 14 cases in just 45 minutes, Graham provided practical advice on the impact of those judgments and what the insolvency and restructuring profession needs to be aware of on a day-to-day basis. Joanne Harris (The Compliance Alliance) and Joanne Quinn and Colin Raeside (Nova Consultants), then took up where Michelle left off, covering the rest of the top points that the profession should be aware of when it comes to the new rules.

Next, Ken Marland (Payplan) delved into the personal insolvency side of things to consider what actually constitutes 'best advice' and how this needs to be adapted to meet the needs of different types of indebted individuals. Alison Timperley (ICAEW) then went with a more regulatory theme and provided her top tips for avoiding the most common regulatory pitfalls, particularly in relation to SIP 9 (fee estimates) and SIP 16 (pre-packs). Alison stressed the importance of getting the basics right: have lead schedules, use standard documents and ensure the web links to guides work in your fee estimates.

> "The update covered prospective changes to legislation and the impact that these may have on rescue procedures, such as changes to corporation tax loss relief."

Finally, Simeon Gilchrist (Edwin Coe LLP and chair of R3's SPG) and Simon Passfield (Guildhall Chambers) finished things off with a discussion about giving evidence in court, including some practical advice on how to make your time in the witness box as effective as possible. Their top tip? Join us for a webinar (available on the R3 website from Friday, 8 September) to find out.

SPG Forum

I can't quite believe it, but there's now less than three months to go until the SPG Forum is again upon us. This year's forum is kindly sponsored by Manolete Partners PLC and will be at Chesford Grange in Warwickshire from 2–3 November, with an inaugural welcome drinks reception on the night of 1 November courtesy of Compliance on Call. This year's course directors, Ian Defty (CVR Global LLP) and Trevor Binyon (Opus Restructuring LLP) have been working hard to source the most interesting speakers to fill the programme, which promises to build on the success of 2016.

While the programme is always subject to change, already we have bankers, bond providers and regulators willing to share their expertise. They will cover everything you need to know about insolvency processes at the banks, the best ways to ensure that you comply with all your bond requirements and the latest tips and tricks for fulfilling your SIP 9 obligations.

Legal and professional updates

Both the Insolvency Service and HMRC will be making an appearance, while the Bank of England will be giving us the latest UK economic forecast. There'll be legal updates, both corporate and personal, as well as the latest on the new rules and recent changes to pension obligations. We'll also be finding out how to avoid a successful personal liability claim and, on the flipside, how to investigate and bring claims where there are limited funds in an estate.

Finally, this year we will be welcoming Tracy Edwards MBE, trailblazing British sailor, as our keynote speaker. Tracy will be providing us with an inspirational session on how battling perilous seas around Cape Horn was easy compared to fighting off creditors and a massive dispute with the Qatar officialdom, which forced her into bankruptcy.

The forum always receives excellent feedback and will again provide the networking opportunities and 'community feel' that we know our SPG members value. Places are selling fast, so if you're interested, head to the R3 website for the full brochure and to book. I look forward to seeing you all in Warwick in November.

CAITLIN POWELL is policy and committee manager at R3.

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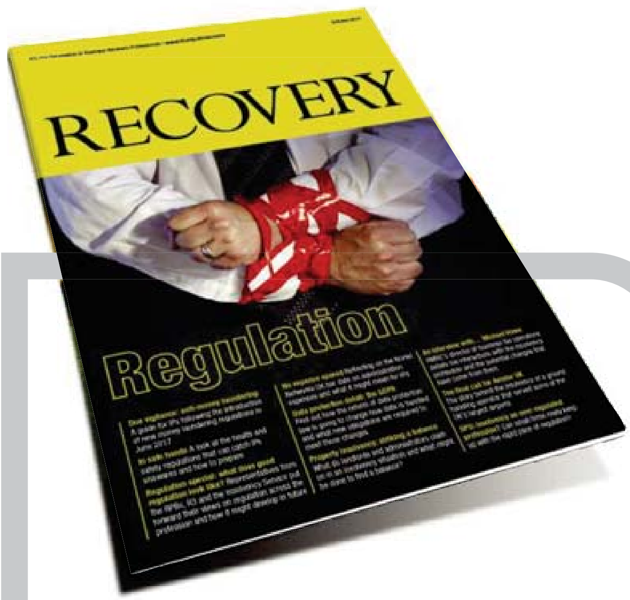

Tell them where you saw it…

Autumn edition 2017

An interview with...

Michael Howe

Following up on our tax issue, Matt Jukes speaks to **HMRC's director of business tax operations**.

Q Could you tell us what your role is at HMRC at the moment?

A I'm the director of business tax operations, which sits within the Customer Services Group at HMRC. I have operational responsibility for a number of teams providing front-line services in relation to customer compliance on a wide range of taxes and processes, including corporation tax, VAT, stamp tax and inheritance tax.

While some of this involves working with individuals, to a significant degree it's focused across corporate entities, including a significant customs operations responsibility too. We are quite often dealing with agencies working on behalf of individuals, with stamp duty land tax for example, as well as trust pension funds and charities.

> We ask businesses to contact us early and present realistic proposals of, for example, how they can restructure their debts.

Q We spoke to Kathryn Hiddleston last issue, who talked about the discussions between HMRC and R3. What is your perception of the insolvency profession and has this changed with the meetings with R3?

A We go out and meet customer groups and representative bodies regularly. Insolvency, particularly in our area in relation to corporation tax responsibilities, is quite a significant aspect of the customer work we do. Specifically though, it's a relatively new area for me. I've worked extensively across my career with agents in many different roles and what I say at the outset is that we are clear about the importance and value of establishing collaboration and partnerships with different professional groups and continuing to build on those relationships. What comes across strongly to me is our shared objective of helping customers to comply in what can inevitably be quite challenging circumstances. The view that I hold is that there is a lot of expertise in the profession and a willingness to improve the way that we work together.

There has been really good engagement between HMRC and R3 and we're continuing to build on that. I welcome the constructive challenges that R3 and indeed the insolvency profession have been able to make.

Q What sort of issues have cropped up in the discussions about insolvency?

A The topics that have come up have been about how we manage contact between the profession and HMRC, and about developing a streamlined service as far as possible. We are looking at the ways that some of the administrative procedures work and at taking some of the grit out of the machine. We are looking at digital channels, for example, and the forms that we use. It's very much focused on that side of things and making sure that HMRC is acting in an effective and joined-up way. »

Michael Howe biography

How did you join HMRC?
I joined the Inland Revenue in 1988 upon leaving university. It was a Civil Service entry job, but it was directed at the Inland Revenue before its merger with Customs and Excise. I was drawn to a career in public service and one that I knew was going to be varied and involve lots of collaboration. Now I am working for HMRC (as it is known now) 28 years later and I'm still enjoying that type of work.

Q So what is the first contact with HMRC in an insolvency scenario?

A It's important to note that we need to take account of tax payer confidentiality, which is crucial to these situations. It's more straightforward for HMRC to talk to an insolvency practitioner (IP) if they've been formally appointed. If not, our ability to discuss any affairs will be limited unless the tax payer has given their authority to an IP. Once that authority has been given, the usual channels are open and they are through our customer helpline.

> "We are about to appoint a new service manager who will be looking at developing a 'once and done' sort of service across all customer services for the insolvency profession."

That said, we are about to appoint a new service manager who will be looking at developing a 'once and done' sort of service across all customer services for the insolvency profession. This will aim to get the earliest resolution possible from the initial point of contact, and the appointment of a service manager is a big step towards helping us do that and build on what we've already been doing. We want to make sure that we have the right channels in place when we link insolvency professionals up with HMRC. In some cases that doesn't always happen first time and that's where we want to get feedback and continue to improve and streamline contact as much as possible.

Q Is this the dedicated resource for insolvency that R3 has been pushing for?

A This point of contact will effectively become, on a one-to-many basis, someone within HMRC who can act for bodies like R3 where there are particular problems or opportunities for improvement that arise. It is not, however, somebody who is a contact for each and every person as they go through HMRC. IPs will still go through the usual channels, but this is a way of helping us join up our services across the department.

My impression is that the current engagement we're having is regular and impactful and it feels like we're on strong footing for the future. Part of it is that we've taken time to understand, and are continuing to understand, our customers. There are lots of things going on, as you might imagine, and we have to work through upcoming economic and regulatory issues that the sector faces.

We need to be honest about the progress and say that insolvency is complex and our department is complex and has a wide range of priorities and stakeholders. Sometimes it does take a bit of time to get to a position where we all want to be.

Q What role does HMRC play in an insolvency situation?

A In terms of our role, it's to go back to the basics and ensure that we maximise revenue and ensure that tax liabilities are handled appropriately. This can be done through fully understanding the facts of each case, being able to make evidence-based decisions and committing to work with IPs in an even-handed and efficient way. Building on that, where we have evidence of wrongful behaviour by a director or directors, the relevant areas of HMRC are keen to work with insolvency professionals and the Insolvency Service to ensure that appropriate action is taken, which could mean a disqualification from directorship. That is just one of the many interventions that may be possible.

Q Does HMRC consider itself to be a priority creditor, given that it features as a creditor in the majority of company and individual insolvencies? What does that mean for HMRC?

A HMRC is not a priority creditor, but what I would say is that we are significant and substantial creditor with corporates. We are often uniquely placed to provide an insight into an insolvent company's historic trading activities and directors' previous histories. As a result of that I'd say we are here to work with IPs and the Insolvency Service to make sure that any insolvency offences are identified and appropriate action taken.

Q When an IP picks up the phone to HMRC, what should they have ready?

A Actually, this will be more about the business itself, perhaps even before an IP has been appointed. It might be a business struggling to pay its liabilities and that's not just tax of course; it could be PAYE, VAT or even corporation tax. We'd really encourage a business to contact HMRC at an early point and be proactive about it. As things go ahead and business rescue may come in, a restructuring of debts may be needed. It can be more helpful to contact us earlier on so those debts don't reach a point where you can't do anything about them later on.

Q What is HMRC's role towards the end of an insolvency, perhaps if the company is heading towards a rescue rather than a liquidation?

A With potential rescues, there are circumstances where we will allow time to pay, for example. The critical issue is that businesses in distress contact us early with realistic proposals for how they are going to work through problems and settle their liabilities.

Unfortunately we often have an experience where businesses don't contact us, but instead wait until debts have reached a level of real significance. We ask businesses to contact us early and present realistic proposals of, for example, how they can restructure their debts. Then there is a real likelihood that we can support businesses trading through short-term difficulties.

> "We need to be honest about the progress and say that insolvency is complex and our department is complex and has a wide range of priorities and stakeholders. Sometimes it does take a bit of time to get to a position where we all want to be."

We really don't want to see businesses fail, but we're always going to be driven by the best way of enhancing our prospects of recovery. It comes back to that principle of maximising revenue, which is the key thing.

Q What are HMRC's priorities for the coming year?

A We hope to continue to build on what we're already doing. We've just produced our annual report. In summary, what we will be doing is helping the majority of individuals and businesses to comply with their obligations. That could be through extending the digital channels that we operate, providing a high level of customer service and ensuring that people receive their entitlements. This will also mean bearing down on fraud, evasion and tax avoidance. ◻

MATT JUKES is publishing manager of *RECOVERY* magazine.


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