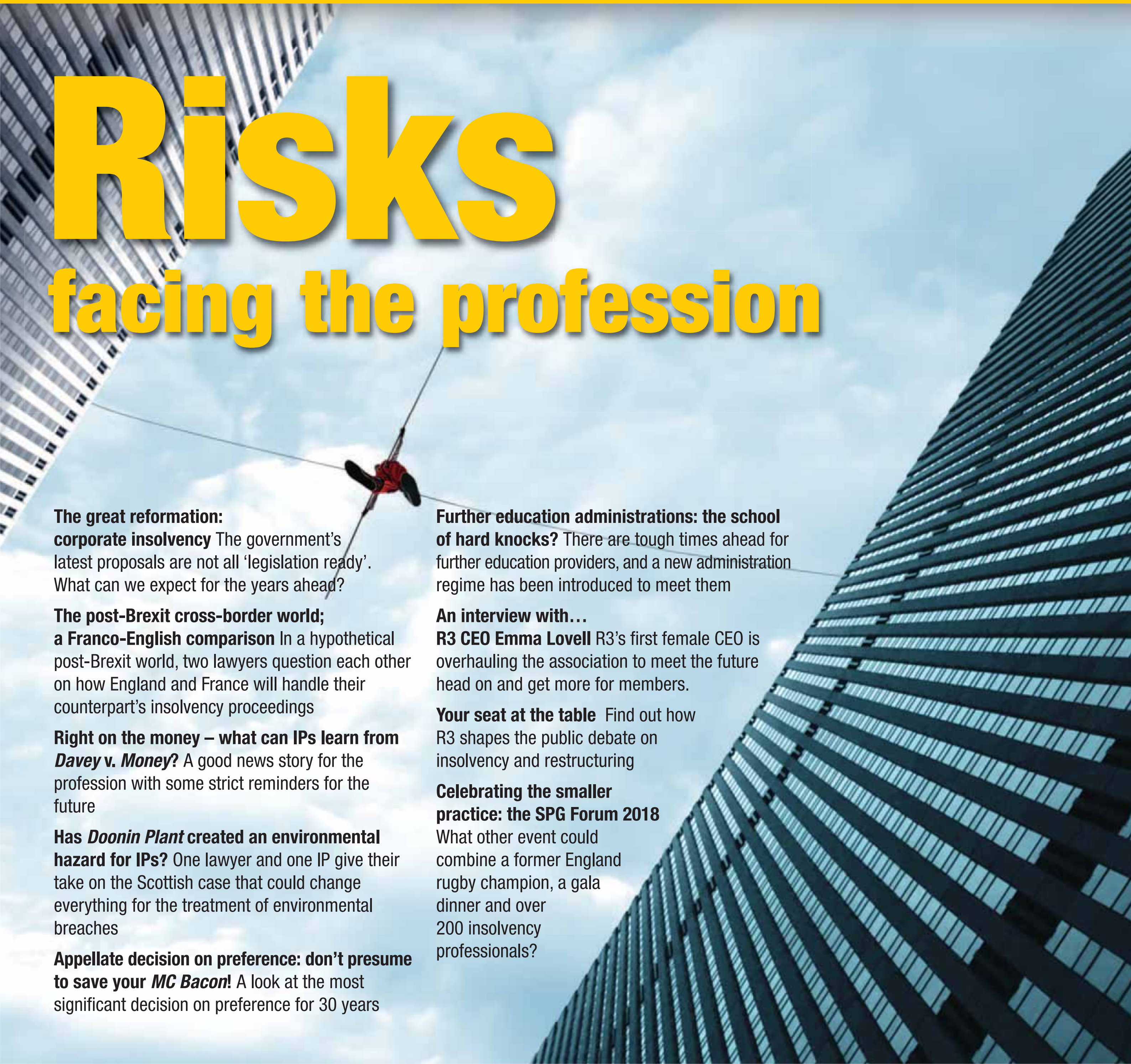
R3, the Association of Business Recovery Professionals | **www.r3.org.uk/recovery** Winter 2018

# RECOVERY



# Risks facing the profession

**The great reformation: corporate insolvency** The government's latest proposals are not all 'legislation ready'. What can we expect for the years ahead?

**The post-Brexit cross-border world; a Franco-English comparison** In a hypothetical post-Brexit world, two lawyers question each other on how England and France will handle their counterpart's insolvency proceedings

**Right on the money – what can IPs learn from *Davey* v. *Money*?** A good news story for the profession with some strict reminders for the future

**Has *Doonin Plant* created an environmental hazard for IPs?** One lawyer and one IP give their take on the Scottish case that could change everything for the treatment of environmental breaches

**Appellate decision on preference: don't presume to save your *MC Bacon*!** A look at the most significant decision on preference for 30 years

**Further education administrations: the school of hard knocks?** There are tough times ahead for further education providers, and a new administration regime has been introduced to meet them

**An interview with… R3 CEO Emma Lovell** R3's first female CEO is overhauling the association to meet the future head on and get more for members.

**Your seat at the table** Find out how R3 shapes the public debate on insolvency and restructuring

**Celebrating the smaller practice: the SPG Forum 2018** What other event could combine a former England rugby champion, a gala dinner and over 200 insolvency professionals?

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

# From the editor

There is much to digest in this issue. Sandwiched between Stuart Frith's president's column on page 4 and our interview with R3 CEO Emma Lovell on page 47 are some meaty articles (and not just the ones illustrated with pork pies or bacon). Stuart urges you to let him have your thoughts on the budget's resurrection of HMRC's preferential status and Emma talks about R3's development and what the association does behind the scenes.

In a worthy opinion column, Antony Fanshawe on page 7 reminds us that IPs must obtain, document and use the books and records of an insolvent entity. In our legal update pages Andrew Robertson (page 8) reminds us of the care and attention to be given to articles of association. Katherine Hallett (page 12) draws attention to *Re Zinc Hotels Limited*, a case where shareholders alleged unfair harm and sought unsuccessfully to replace administrators and where the judge commented usefully on both *Davey* v. *Money* and *Re VE Interactive*. Simon Hunter (page 13) also considers *Davey* v. *Money*, which he describes as a good news story for the profession that yields some cautionary tales.

As a prelude to our themed articles on risks facing the profession, Tim Cooper and Matt Henderson discuss, in our technical update (page 16), the worrying risk of environmental liabilities as a liquidation expense in the context of the Scottish cases of *Re Doonin Plant (in liquidation)* and *Re Dawson International*. Nick Cosgrove (page 22) reminds us of the government's insolvency and corporate governance reforms, particularly the new IP-monitored moratorium for prospectively insolvent companies, the scheme-like cross-class cram down restructuring tool and the proposed prevention of the enforcement of contractual termination clauses on insolvency. He notes the need for sensible revision to the current proposals and the conflicting demand that the opportunity to improve our corporate insolvency regime be taken without unnecessary delay, not least to emphasise the UK's international competitiveness.

I write at a moment when the prime minister's continuation in office is said to be threatened, the prospect of the withdrawal agreement she has negotiated with the EU being approved by parliament looks slim and the headlines are of crisis. Despite the continuing uncertainty being delivered by Brexit, Stefan Ramel and Georges-Louis Harang (page 27) bring some clarity to the future of Anglo-French cross-border insolvency in the event of there being no bilateral UK-EU agreement in place after the end of the transition period. (I note that the length of the transition period is itself uncertain in the light of a recent EU suggestion – and a potential practical requirement – that the withdrawal agreement could be modified to extend the transition period to 2022). Stefan's and Georges-Louis' hypotheses are essentially a product of the 'blind Brexit' that would ensue if the 'prime minister's deal' were to be approved by parliament. The political declaration on the future relationship between the UK and the EU, which is yet to be agreed as I write, will not be binding. Accordingly, despite the known preference of the UK and the EU for continuation of the existing cross-border insolvency regime, the preferred bilateral agreement may prove impossible to reach.

Having considered *Abdulali* v. *Finnegan*, and with succulent reference to *Re MC Bacon*, Séamas Gray and Joseph Curl (page 35) make clear that, to be voidable, a preference requires the presence and influence of an improper desire rather than the absence of a proper desire: the benefit of the statutory presumption is not a panacea.

C. Laughton

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

# Regulars




# Legal update



# Risks facing the profession



## Themes of *RECOVERY* 2019

| | |
|---|---|
| SPRING | Brexit: where does the UK fit now? |
| SUMMER | Sub-contracting and insolvency |
| AUTUMN | Regulation and risk |
| WINTER | TBC |

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


# Dates for your diary



# R3 matters



# Advertising features



# Features



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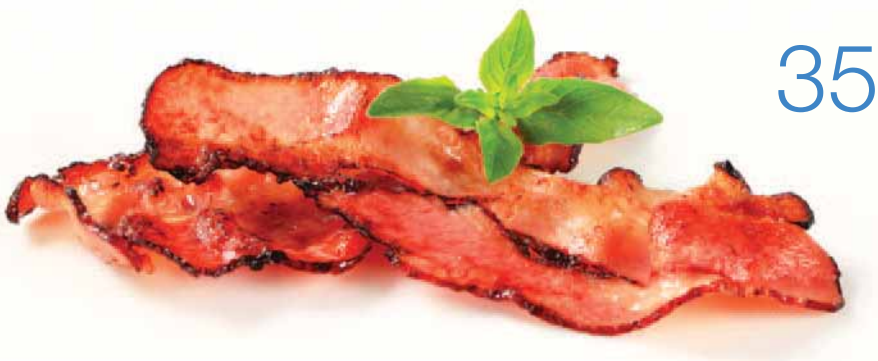

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# RECOVERY

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***RECOVERY* on the web**
*RECOVERY* is distributed to R3 members as part of their membership benefits. After an issue of the magazine has been sent to members, a PDF of the previous issue is uploaded onto the R3 website. This is so that the information may be disseminated to all the insolvency and restructuring community.
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# President's column

In between pressing the Insolvency Service for answers and meeting members, **Stuart Frith** asks from where the latest proposal on crown preferences originates.

At Halloween, delegates congregated for this year's R3 Smaller Practices Group (SPG) Forum. The dominant topic of conversation was the budget, announced a few days previously, and a surprise proposal as unexpected as any horror film jump-scare: the resurrection of HMRC's preferential status. As you might expect, it has not gone down particularly well with the insolvency and restructuring community.

## Not anybody's preference

Ordinarily, announcements as significant as this would not make their first appearance in the pages of the budget Red Book. Customarily, they would follow a period of consultation. The other insolvency and tax measure announced in the budget *did* appear in an April 2018 Treasury discussion document: a proposal to make directors 'involved in tax avoidance, evasion or phoenixism' jointly and severally liable for company tax liabilities 'where there is a risk that the company may deliberately enter insolvency'. This 2018 document contained no mention of a plan to restore the crown preference, which was previously removed as part of a suite of reforms proposed by the Enterprise Act 2002.

So where did this proposal come from? Restoring the preference is likely to have been on HMRC's wish list for a while, but appetite among other policy makers elsewhere in government for changes to the status quo has been limited. However, with the government seeking to live up to its end of austerity rhetoric, at the same time as shrinking a stubborn deficit, civil service thinking is likely to have changed. A focus on finding quick and easy ways of increasing government income, regardless of the wider consequences, may become a feature of government policy making in the near term.

We await the detail, but there appear to be two immediate consequences. First, the proposal is only for a partial return of the preference: only tax money already collected (from employees and customers) will be affected. The second is that this is not a fait accompli: there is still a long way to go before any changes are introduced. A consultation is promised and, despite having been buried in the budget small print, this proposal has not gone unnoticed. Creditor groups are understandably unhappy.

## Feeling the squeeze

The reaction of the banks and lenders to this proposal will be interesting. Floating charge lenders in particular will feel squeezed; after all, this isn't the only recent government proposal that would undermine floating charge holder returns. The government's recent corporate insolvency reform package contains proposals to increase the prescribed part from £600,000 to £800,000. Given that the prescribed part was introduced to make up for the absence of the crown preference, the existence of both might reasonably be viewed as unhelpful from the perspective of bank lending, to say the least.

> "The dominant topic of conversation was a government action as unexpected as any horror film jump-scare: the budget's resurrection of HMRC's preferential status."

It is disappointing that this proposal comes so soon after government proposals designed to *boost* business rescue. There is a chance that these new proposals would have the opposite outcome. As so often with government, there appears to be an absence of joined-up policy making.

R3 has already been in touch with HMRC to understand where this proposal has come from and the thinking behind it. We will be working with members and other stakeholders over the next few months to make sure the government doesn't introduce any changes that undermine the UK's insolvency and restructuring framework. To help us do this, we need to hear from R3 members: please tell us what you think about the proposals and how you think they would affect the cases you work on. The more evidence we have, the more we can do to change the government's mind. Email us your thoughts to **president@r3.org.uk**.

## Representing the profession

Since the last edition, I have been meeting R3 members to find out about the challenges and opportunities people are facing in their patch.

As well as attending an excellent SPG Forum, I have been able to get to member events in Manchester, Newcastle, Bury St Edmunds, Bristol and Birmingham. I was also in Leeds for one of R3's new initiatives: a member forum on the government's corporate insolvency reforms. It was really useful to hear from a wide cross-section of members about how they think the reforms will – and won't – work, and we'll be passing this feedback on to the government. Do keep an eye out for future forums near you. They're a great opportunity to have your voice heard.

It's not just me who's been busy with meetings this past month, either. We're aware that many members are concerned about the impact of the Official Receiver on the insolvency profession, and we've been raising these concerns with the Insolvency Service for some time. Last month, a group of R3 members – including past and future presidents – met Insolvency Service chief executive Sarah Albon to put member questions about transparency and IP appointments directly to her. We'll be bringing you up to speed with our work on Official Receiver issues in due course.

Together with our colleagues at the R3 office on Aldersgate Street, we have been busy in Westminster and on Fleet Street over the last few months. We have met with journalists, MPs, ministers and parliamentary select committee chairs. I've been catching up with business groups outside of our profession, too – talking CVAs with the British Property Federation in October, for example. Each of these meetings is an opportunity to get members' views and experiences listened to by policy makers and policy influencers. Thanks to HMRC's unexpected proposals, it looks like it's time to get back on the road again.

**STUART FRITH** is president of R3 and a partner at Stephenson Harwood.

# US cryptocurrency mining company falls owing millions

A US cryptocurrency mining company has filed for Chapter 11 Bankruptcy in Washington, owing millions to creditors. The company, Giga Watt, was founded by former Microsoft software engineer and bitcoin miner Dave Carlson in 2012. The business is believed to have less than $50,000 (£39,000) in assets, with liabilities of up to $50m. Shareholders met on 18 November to declare the corporation insolvent.

The utilities and electric providers are among the creditors, owed over $300,000 and $500,000 respectively. Bitcoin mining is notoriously power-intensive. In July this year *Wired* reported that Plattsburgh, New York, had taken action against large bitcoin operations which pushed the small city over its power supply quota. The mayor later sought legal advice to prevent further mining operations from opening in the area. China, Canada and the US have all since taken regulatory action against excessive power consumption by cryptocurrency mining operations.

Giga Watt's initial coin offering in 2017 (providing investors with a share in the business in the form of a cryptocurrency token) raised an estimated $22m. The company proposed to open up Bitcoin to smaller-scale miners via mining 'pods', which would have access to a cheap electricity supply and regular maintenance. The offering was controversial at the time due to Carlson's insistence that there was no need to register with the Securities and Exchange Commission.

In January 2018, legal action was launched against Giga Watt, alleging that the company had violated securities laws by selling investments in the business without registering them with the relevant regulatory entities.

Insolvencies relating to cryptocurrency are still a relatively rare phenomenon. In 2014, the Mt Gox Bitcoin exchange in Japan filed for bankruptcy following an announcement that customers' cryptocurrency had been stolen. The case is ongoing, including allegations of fraud against the CEO and the discovery of 'forgotten' bitcoin wallets that had vastly increased in value. In March this year, the trustee in bankruptcy announced that enough assets (Bitcoin) had been sold to cover claims of the creditors.

# Hullabaloo over disqualified husband

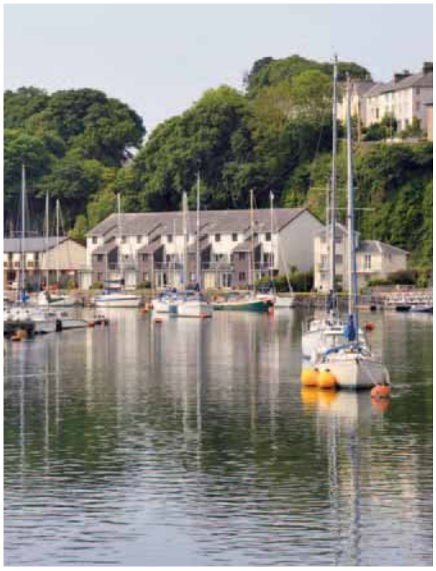
Two directors of an auto garage in Northumberland are facing a ban after they knowingly allowed a disqualified director, and spouse, to run their company. Janice Rogers, 61, and Elizabeth Dagg, 70, allowed Stewart Rogers, 72, – the husband of Janice and ex-husband of Elizabeth – to run Auto Testing Limited prior to its voluntary liquidation in 2016.

Stewart Rogers had been disqualified for five years in 2011 in relation to his conduct while acting as director of a separate company, Northern 4x4 Centre Limited. When Auto Testing Limited entered voluntary liquidation, the Insolvency Service was 'tipped off' and an investigation began. It was found that Rogers had been running the company, while the other two were aware of his disqualification.

Stewart Rogers has been given a new ban effective from 7 November 2018 to last for 11 years, while Janice Rogers and Elizabeth Dagg have been given bans of five years each, effective from the same date.

### Trampoline park bounces back

The operator of a pair of trampoline parks in south-west England has been bought out of administration as part of a rescue deal. Freedog Ltd operates two trampoline parks in Swindon and Bristol, which were built in refurbished warehouses. Neil Vinnicombe and Simon Haskew of Begbies Traynor were appointed administrators in October this year and secured a deal to sell the parks to Tom Gape, who runs Redpoint Bristol Climbing Centre. It is thought that 81 jobs at the parks have been secured.



### Luxury lodge liquidation

A company in Porthmadog, Gwynedd, that builds private leisure lodges has gone into liquidation. Joint liquidators John Lowe and Yasmin Bhikha of FRP Advisory LLP have been appointed to Cambrian and Sovereign Holding Group Ltd, and Sovereign Park and Leisure Homes Ltd. Challenging trading conditions had forced the business to cease trading prior to the liquidators' appointment.

# Always follow the accounting evidence

**Antony Fanshawe** says that complete accounting information is useful, but rarely seen.

Collecting, cataloguing and storing accounting records are the Aunt Sally tasks of insolvency work. I have been there and know the work is time consuming, expensive, cold and damp in winter, and largely thankless. In smaller cases it will consume a disproportionate part of limited assets. But it's important for two reasons: to comply with and to optimise the chances of success of any legal actions whether they are brought by the government (eg disqualification) or by you as an IP.

### Claims as assets

Nowadays the biggest (if not the best) asset an IP may have is a claim, or claims, against a customer or director. There is of course an emerging market for these claims; to name a few buyers Manolete, Escalate,

"Nowadays the biggest (if not the best) asset an IP may have is a claim, or claims, against a customer or director."

Ferguson or, of course, the defendant. So, you may think of the work you have to do to collect, catalogue and safeguard the records as the same as the collection and safeguarding of physical assets. They could all be saleable.

The issue now though has become even more important. It has become a new focus for regulatory action following the publication of issue 80 of Dear IP in March 2018 (pages 10.82 and 10.83), which concludes by saying that:

*'IPs should take reasonable steps to obtain, document and use the books and records of an insolvent in every case and commerciality should not outweigh the public interest or an office-holder's statutory duty.'*

Please note the word 'use', which implies review in addition to retention and cataloguing. Herein lie the seeds of conflict particularly as *'commerciality should not outweigh the public interest or an office holder's statutory duty'*. How IPs working on a fixed fee of £3,000 will manage to comply remains to be seen, and fortunately is not within the scope of this article. This will not be an easy sell to the directors!

I see a lot of accounting records. Arriving at a professional opinion is much easier when they have been well kept and full(ish) information is available. I find, however, that this is the exception rather than the rule. The accounting records I see are often less than ideal, either because they are on paper and have gone missing or, more likely these days, the digital records are incomplete or inaccessible.

### A matter of record

I know that accounting records are not necessarily definitive evidence of the intentions of the parties, but they are an, if not the most, important part of the evidential landscape, particularly if they are supported by other documentation (invoices, journals, board minutes etc).

As a general rule the better the company documentation is, the narrower the scope for interpretation. So, if the records are incomplete, the expert evidence may have to rely on a reconstruction of what happened commercially. That in turn will rely on the assumptions made, all of which are open to argument.

So, if there is any prospect that you will litigate, guard the records carefully. This means that the boxing up of paper records should not be delegated to the least experienced member of the team without supervision. You or a senior member of your staff should give specific and clear instructions about what needs to be stored and how. That is not to say that everything needs to be kept – far from it. But don't keep the petty cash book and throw away the nominal ledger.

### Digital dilemma

There will almost certainly be digital records. These should be copied as a matter of course and, ideally, the system cloned. This, too, should be overseen at a senior level. It is obviously important that that you can access the records at a later date. This may mean cloning the system or retaining a licence for the software, particularly if it is not commonplace. At the least you should include a note of what it is and how to access the software in your records, should you need to (assuming that the provider is still in business). And while on the subject: obtain, test and store any relevant access details (user names, passwords etc) for the financial information held either on the server or in the cloud.

It's not just the conventional information systems to which you need to pay attention. I was involved in a construction case where much of the financial information about contracts, valuations, new business, cash and projected margins etc was written on a white-board, which on administration was wiped off, without a copy being taken. The other

"As a general rule the better the company documentation is, the narrower the scope for interpretation."

records (or at least those that had been kept) were in poor order. The matter turned on the profitability of the company for which the white board could have provided valuable evidence, had an image been retained.

It's easy to take a photograph of the evidence before wiping it off. It may prove to be of little use, but then, in the organised chaos of the early stages of an insolvency appointment, who knows? And photographs are effectively free but could save thousands later on. Why wouldn't you?

So, keeping the records could be a win:win. You *can* comply and preserve an asset, at one fell swoop. ◻

**ANTONY FANSHAWE** is a chartered accountant, former IP, expert witness and director of FPN Chartered Accountants.

# Legal Q&A

Andrew Robertson answers your insolvency queries.

**Q I am working with a sole director of a private company who wishes to resolve to appoint me as administrator of the company. However, the articles of association of the company state that there must be a quorum of two directors for a valid board resolution. Can the sole director appoint me?**

A Paragraph 22(2) of schedule B1 to the Insolvency Act 1986 provides that the directors of a company may appoint administrators. If the company has adopted model articles under the Companies Act 2006, which have not been amended, the articles will allow the sole director to act alone in appointing you as administrator.

The general rule is that any decision of the directors must either be a majority decision or must have been made unanimously (model article 7(1)). However, where there is only one director (and no express requirement in the articles for there to be more than one director), model article 7(2) will apply so that the sole director can undertake all decision-making procedures by the directors under the model articles as a sole director. This will not apply if there is more than one director but one cannot attend a board meeting.

> It is generally accepted that the quorum requirements only apply where there are two or more directors.

The position is often confused with the requirement for a quorum in model article 11(2), which states that the quorum for any board meeting is two directors. While the position under model article 7(2) is not expressly stated to disapply the quorum requirements, it is generally accepted that the quorum requirements only apply where there are two or more directors. This principle is supported by the fact that a sole director can resolve to bind a company by way of written resolution, rather than by record of a formal board meeting. However, in respect of a decision to place a company into administration, a sole director should always maintain a clear audit trail on record as to why the company is being placed into administration.

If the company has not adopted model articles, or if there are specific requirements in the articles that the company must have two or more directors, a sole director should not proceed to making an appointment by way of a sole written resolution. In these circumstances, the director will either need to appoint additional directors or seek the approval of the company's shareholders to place the company into administration in order to formally ratify his or her actions.

A formal meeting of the company's shareholders may not be required if it can be shown that:

(1) all of the shareholders with a right to vote at a general meeting unanimously consent to the resolution seeking to place the company into administration and appointing you as administrator;
(2) each member is competent to give the consent; and
(3) that each member has full knowledge as to what is being consented to (the *Duomatic* principle).

Due care and attention should be given to the articles of association, the composition of the company's shareholders and any additional requirements in the articles regarding the consent of shareholders. The recent case of *Randhawa* v. *(1) Turpin (2) Hardy (as former Joint Administrators of BW Estates)* [2017] EWCA Civ 1201 highlights the issues around an administrator relying upon the authority of a sole director to appoint them, even where shareholder consent to the appointment is sought. ◻

> Due care and attention should be given to the articles of association, the composition of the company's shareholders and any additional requirements in the articles regarding the consent of shareholders.

**ANDREW ROBERTSON** is a senior associate at Pinsent Masons LLP.

# R3 2019 EVENTS

## CONFERENCES

R3 conferences offer an outstanding opportunity to bring the insolvency profession together to discuss, debate and shape the future of the profession. Conferences take place regionally around the UK and nationally at our Annual Conference.

### Annual Conference 2019 – Broadening Horizons

**22-24 May, Slaley Hall, Northumberland**

The 29th R3 Annual Conference is returning to the UK. The annual conference offers an unrivalled technical programme with excellent practical content, topical legal and regulatory updates, thought leadership and market-leading speakers. It addresses the challenges and concerns that the profession will face in the year ahead, as well as providing the number one networking opportunity for the insolvency profession. We hope to see many new faces, as well as our regular attendees, in Northumberland next year.

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

**19 September, London**

Each year R3 teams up with INSOL Europe to bring together an outstanding line up of international speakers to share their knowledge and expertise of international, cross border restructurings and insolvencies.

### SPG Forum

**October, Heythrop Park, Oxfordshire**

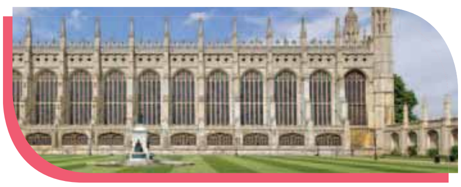
SPG Forum is the conference for smaller practices. Essential for insolvency practitioners, restructuring experts and their staff in small and medium sized practices, the SPG Forum programme is packed full of technical and practical updates that can be applied to your day-to-day work. After the success of this years' Forum, it will be returning to Heythrop Park in 2019.

## REGIONAL CONFERENCES

R3's regional conferences are organised by your local region to address local regional concerns. Next year the Southern Conference is being hosted by the South West & Wales region while the North West region will play host to the Northern Conference. In a new edition to the calendar, the Eastern region are hosting their inaugural annual conference.


### Southern Conference

**7-8 March, Bath**



### Eastern Conference

**28 March, Cambridge**

### Northern Conference

**September, North West**

# 2019 COURSES AND TOPICS

We are excited to launch the R3 2019 programme of events featuring more new topics than ever in more new locations. R3 provides the highest quality training for insolvency, restructuring and turn-around professionals across the UK, with courses being consistently rated "good" or "excellent" in 95% of feedback. Shortlisted once again for the TRI Awards "Education/Training Provider of the Year," R3 will uphold and surpass this distinction in 2019 with continued outstanding training, market-leading speakers and excellent networking opportunities.

Whatever your training needs and experience, R3 has the right course for you. Breakfast briefings, half day and one day courses are now categorised by topic, making it easier to find the training to suit you.

## SMALLER PRACTICES GROUP (SPG)

**SPG Technical Review**
*New locations!
Scotland, Exeter, London, Birmingham and Leeds

## BREXIT

**Germany: Facing up to Brexit**
*New topic!

**Life Post-Brexit – Insolvency Issues**
*New topic!

## PENSIONS & TAX

**Core Tax for Insolvency Professionals**
*New Location!
Manchester

**Pensions**

## INSOLVENCY

**Partnership Insolvency**

**Personal Insolvency Forum**
*New Locations!
Birmingham and Huddersfield

## LITIGATION/OFFICE HOLDER DUTIES

**Asset Tracing, Fraud and Forensics**

**Developments in Directors' Duties**
*New topic!

**Directors' Duties**

**Environmental Issues in Insolvency**
*New topic!

**Insolvency Litigation Update**
*New topic!

## RESTRUCTURING

**Complex Restructuring**

**Issues with retail CVAs**
*New topic!

**Restructuring Day**
*New Location!
Manchester

## PRACTICAL INTRODUCTION TO INSOLVENCY WORK

**Five-part series aimed at those new to or entering the profession**
*New locations!
Leeds and London

## SECTOR SPECIFIC

**Aviation Insolvencies**
*New topic!

**Blockchain & Cryptocurrencies**

**Challenging APNs**
*New Location!
Bristol

**Employment Issues – Tribunals**
*New topic!

**Lessons learned from Carillion**
*New topic!

**Receivables & ABL Financing**

# BOOK NOW!

**FOR MORE DETAILS OF INDIVIDUAL COURSES, PLEASE VISIT R3.ORG.UK/EVENTS OR EMAIL COURSES@R3.ORG.UK.**

# Recent case summaries

Latest insolvency update from **Katherine Hallett**.

## PERSONAL INSOLVENCY

***Lock* v. *Aylesbury Value District Council* [2018] EWHC 2015 (Ch), [2018] All ED (D) 136 (Aug)**

This was a successful appeal in which it was held that local authority petitioning creditors have a duty to identify what purpose a bankruptcy order would serve in circumstances where there are no obvious assets in the debtor's estate from which a distribution could be made.

S266(3) IA 1986 gives the court discretion to dismiss a petition if the debtor can show that they have insufficient assets to allow a distribution (after the costs of the bankruptcy), unless another purpose will be served by a bankruptcy order. The burden on the debtor is a high one and is not discharged by their sworn statement that they have no assets.

In this case, the court held that where a petition is presented by a local authority with some knowledge of the debtor's financial circumstances, and no assets of substance have been identified, the debtor discharges the burden of evidencing the extent of their estate, unless the local authority explains why it believes a purpose will be served by bankruptcy. It appears to follow that local authorities should not present petitions speculatively in the hope that the debtor may have undisclosed assets.

The debt here was based on a liability order. The local authority knew that the debtor was unemployed and lived in rented accommodation. Prior to presentation, the local authority acknowledged internally that the debtor appeared to have no assets but pursued a bankruptcy order because she may have received an inheritance. However, the point was not mentioned in the petition or subsequently in its evidence.

The district judge at first instance refused to hear the debtor's substantive submissions (including the s266(3) point) because she had failed to file a skeleton argument in accordance with directions. Permission to appeal was granted by the High Court on this ground. On appeal, the local authority argued that the procedural irregularity in refusing to hear the argument had caused no injustice because the debtor had failed to discharge the heavy burden of evidencing an insufficiency of assets.

In the appeal judgment, the judge confirmed the heavy burden on the debtor in such cases. However, in petitions resting on unpaid council tax, local authorities bore the burden of at least raising a *prima facie* case that a bankruptcy order would achieve some useful purpose. It should have identified the possibility of an inheritance and that the debtor's provision of financial information was inadequate. The point had to be put squarely before the court so that the debtor had the opportunity of addressing it in evidence.

The decision applies directly to local authority petitioners but the reasoning could be applied to other creditors with particular knowledge of the debtor's financial circumstances.

## CORPORATE INSOLVENCY

***Zinc Hotels Investment Limited* [2018] EWHC 1936 (Ch), [2018] All ER (D) 172 (Jul)**

The High Court held that there is no power to appoint a provisional administrator before a company has gone into administration. Once a company is in administration, the court can appoint an additional administrator under paragraph 103 of schedule B1 of the IA 1986. The court may grant an interim order to appoint an additional administrator under para 74(3)(d) of sch B1. In order to appoint an additional administrator (interim or final), the conditions of para 103 must be met. Where an initial appointment is made by a qualifying floating charge holder under para 14, sch B1, an additional administrator can only be made by the floating charge holder or the court upon the application of the existing administrator. A shareholder does not have standing to apply for the appointment of an additional administrator where the administrator was appointed under para 14.

> "A shareholder does not have standing to apply for the appointment of an additional administrator."

The Zinc group of companies was placed into administration by qualifying floating charge holders. The shareholders applied under sch B1, paras 74, 75, and 88, alleging unfair harm by the administrators and seeking their replacement. Lack of independence was also alleged because of the administrators' pre-appointment dealings with the charge holders. The key question was whether additional administrators should be appointed to represent the interests of the shareholders pending trial of the application to remove them.

The shareholders were unsuccessful. The judge held that the court did have the power to appoint an additional administrator, not from its inherent jurisdiction, but rather from sch B1, para 7. It was clear that a floating charge-holder has the right to decide who the administrator should be.

The judge went on to consider the position if he were wrong on jurisdiction. If such a power existed, it would be necessary to apply the three-stage test in *American Cynamid* v. *Ethicon (No 1)* [1975] AC 396. To exercise it against the wishes of the existing administrators would cause a stalemate situation and might prevent the realisation of assets. The judge accepted there was no conflict of interest – in most insolvencies of any size or complexity, the proposed office-holders would be engaged prior to the commencement of the proceedings.

There was no serious issue to be tried arising from the administrators' failure to pursue the first objective in sch B1, para 3 (rescuing the company as a going concern). There was no possibility of the debt being paid without realisation of assets: the first objective was therefore impossible to achieve. Rescue as a going concern did not mean paying creditors in full or making a distribution to shareholders from realisations (*Davey* v. *Money* [2018] EWHC 766 (Ch)). It meant that the company was restored to financial health for the benefit of its shareholders without its assets being sold.

The decision is also useful for (a) summarising the important legal points in *Davey* v. *Money* (grounds for challenge of an administrator's decision as to which objective to pursue) and (b) making clear that the reasoning in *Re VE Interactive Ltd* [2018] EWHC 186 (Ch), in which administrators were removed due to a conflict of interest, is limited to pre-pack administrations. ◻

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# Right on the money – what can IPs learn from *Davey* v. *Money*?

**Simon Hunter** examines a case where IPs were exonerated, but with a strict reminder about working relationships and drafting statements with care.

This case is, rightly, regarded as a good news story for insolvency practitioners. Certainly any suggestion that (putting it colloquially) the administrators were in the pocket of the secured creditor was soundly rejected. In the course of his judgment (a mammoth work of 786 paragraphs spread over 230 sides of A4), Mr Justice Snowden makes some important points of wider implication. Some are part of the good news story. Others are cautionary tales.

> “Any suggestion that the administrators were in the pocket of the secured creditor was soundly rejected.”

## Background to the case

In the briefest of summaries, the facts of the case are as follows. A company, Angel House Developments Limited (AHDL), was the owner of a property in London's Docklands called Angel House (the property). The property was subject to a fixed legal charge in favour of Dunbar Assets plc (Dunbar). Dunbar was owed in the region of £16m. The facility from Dunbar expired on 3 September 2010. As a part of the consideration for agreeing an extension of the facility, Dunbar took a personal guarantee up to the value of £1.6m from Ms Julia Davey, the director of AHDL.

Both before and after the expiry of the facility, plans were being considered to redevelop the property. A planning application in 2008 was withdrawn because the local authority's requirement to include at least 35 per cent affordable housing in any residential development of this type was thought to make it non-economical. A resubmitted planning application was ultimately refused (along with plans for a neighbouring site owned by another party) in 2010 because of their impact on the local area. A third planning application was submitted to the local authority on 31 August 2012, with a target decision date of 19 January 2013.

> “Concern was raised that this might be an attempt to get the contract with the intention of thereafter delaying and chipping away at the price to be paid.”

Following extensive discussions and a red book-compliant valuation of the property from Savills, Dunbar made final demand for repayment of its facility on 18 December 2012. This was repeated on 21 December 2012. AHDL failed to meet the » demand, and on 27 December 2012 Dunbar appointed Mr James Money and Mr Jim Stewart-Koster as administrators.

Managing agents were appointed by the administrators, their fee structure having been previously agreed with Dunbar. The managing agents began investigating the position with the 2012 planning application. The general consensus was that the planning team (a) were owed in the region of £250,000 and (b) would require at least a further £150,000 to take the matter to the planning committee stage. Proposals were forwarded to creditors in February 2013 that indicated that the administrators would continue with that application, this being the recommendation of the managing agents.

> Five breaches of duty by the administrators were relevant at trial. All were ultimately dismissed.

However, by a memo of 17 May 2013 the managing agents changed their position, recommending that the 2012 planning application not be continued with. In early July 2013 Dunbar refused to fund the 2012 planning application. Requested information not having been provided, the local authority finally disposed of the 2012 planning application on 8 August 2013.

Following meetings between the agents, the administrators and Dunbar, it was decided to commence a 'soft' marketing process for the property, and the agents began this in September 2013. This was completed in early October 2013. There was substantial interest in the property. The managing agents were instructed by the administrators to commence formal marketing of the property.

On 18 October 2013 Ms Davey, through an accountant acting as her agent, indicated that she was interested in making a bid for the property herself. On 11 November 2013 offers for the property were invited from 16 interested parties (including Ms Davey) by noon on 15 November 2013.

On 13 November 2013, expressing concern about the corporation tax liability to AHDL if the property were sold, Ms Davey's solicitors proposed that Ms Davey would procure payment of £17m to discharge the debt to Dunbar plus up to £1m to pay the administrators' costs and the unsecured creditors. This was all part of a 'funded rescue' package. The administrators required proof of funding from Ms Davey. There were discussions about whether Ms Davey would have to put down a 10 per cent deposit.

By the 15 November 2013 deadline, four bids had been received for the property (none from Ms Davey). They ranged in value from £15m to £17m. In a second round of bidding, three bids were made valued at £12.5m, £16.95m, and £17.05m. For various reasons, including track record, proof of funds and the fact that they had completed on an adjacent property, the agents recommended accepting the £16.95m bid.

On 22 November 2013 Ms Davey indicated through solicitors that she would have access to up to £20m to refinance AHDL. This was to be funded by Blackcube Group Limited, an investment business of Mr Bernard Eastwood. Late offers were also received, one of £17.5m and one of £19.12m. In relation to the latter, concern was raised that this might be an attempt to get the contract with the intention of thereafter delaying and chipping away at the price to be paid. In any event, the funder later pulled out of the bid.

Further opportunities to provide relevant information and proof of funds were provided to Ms Davey, but on 1 December 2013 final draft heads of terms were agreed with the bidder who had previously offered £16.95m. As a part of the process they had been persuaded to up their bid to £17.05m to match the higher bid in the second round of bidding. Following considerable correspondence and communication between the administrators, the agents and Ms Davey's funder (which did not lead to a deal being agreed for a funded rescue), contracts were exchanged with the bidder on 9 December 2013. The sale completed 10 days later.

After payment of the relevant fees, the remainder of the proceeds of sale (some £15.98m) were paid to Dunbar in partial discharge of its debt.

### The questions before the court

There were two claims before the court, of which only one is relevant here (the other, a claim by Ms Davey against Dunbar, is of less relevance to this publication). Five breaches of duty by the administrators were relevant at trial. All were ultimately dismissed. They were:

- taking a wrong approach to the administration;
- failing to properly consider the appointment of the managing agents;
- failing to obtain a proper price for the property;
- failing to explore the funded rescue option; and
- failing to exercise independent judgment.

Questions also arose about whether any breach was a breach of fiduciary duty, and about causation.

Rather than go through each of these breaches and questions in turn, this article will try to draw some practical and legal lessons from the findings made by Snowden J. For reasons of space these (a rather rag-tag collection of points) are by no means all the interesting points that arise from this extensive judgment.

### The purpose of the administration

Readers of *RECOVERY* will be well aware that there is a hierarchical list of three purposes for administration, found in paragraph 3, schedule B1 of the Insolvency Act 1986. Sub-paragraphs (3)(a) and (4)(a) make provision about when an administrator can cease to pursue objective 1 (rescue as a going concern), and when he or she can start to pursue objective 3 (realising property to make a distribution to a secured creditor). In each case the first relevant question is what the administrator *'thinks'*. In relation to pursuit of objective 3, however, the administrator must also *'not unnecessarily harm the interests of the creditors of the company as a whole'*: see sch B1, para 3(4)(b).

> No amount of records can make certain that a court will find objectively that the actions of the administrator have not done unnecessary harm.

Snowden J points out the difference between these two. What an administrator *'thinks'* is subjective, and the relevant standard of review is good faith and rationality (para 255; references to paragraph numbers without further indication are to the paragraphs of the judgment). However, the test under sch B1, para 3(4)(b) is objective (para 256). It must be considered in isolation from what the administrator thinks.

This fine distinction has practical consequences. While an administrator may be well advised to keep a good record of why he or she takes any decision about the objectives (not least for the purposes of preparing a statement of proposals – see opposite), no amount of records can make certain that a court will find objectively that the actions of the administrator have not done unnecessary harm. Thus, where objective 3 is being pursued, real care must be taken about this aspect.

### Obtaining valuations

It was suggested that the administrators should have obtained their own valuation of the property before deciding that they could not pursue objective 2 (obtaining a better result for the creditors as a whole than in liquidation: para 269).

The administrators' answer to this was that they were entitled to rely on the red book valuation undertaken by Savills for

 

Dunbar. The administrator's evidence was that he did not feel that another valuer's view would have been much different (para 274). Snowden J accepted that the administrators behaved *'entirely rationally'* (para 281).

This is helpful for administrators in cases where secured lenders have recently obtained red book valuations of relevant properties. While each case, of course, turns on its facts, office-holders can have more comfort that they can rely on such valuations and do not have to obtain their own.

### Duty to consult directors

Rather surprisingly, it was suggested to Ms Davey that there was an absolute duty to consult with the directors before an administrator can conclude that objective 1 cannot be met. Indeed it was put rather higher, that the administrator should *'invite their proposals or **confirmation** that [objective 1] is not feasible'* (emphasis added). This was given short shrift by Snowden J, who noted that directors may have *'unrealistic and over-optimistic'* views about the prospects of rescue (para 286–287).

> There is a fine line between a proper working relationship between office-holders and secured creditors and improper assistance.

However, Snowden J did point out that if the issue is whether the company can continue in the hands of the directors after the administration then the administrator will need to be satisfied as to the viability of the directors' business plan, but this is a different point.

### Assistance to a secured creditor

This is probably the most generally important of the problems that arose for the administrators in this case. It is relevant that Dunbar were taking steps in early 2013 to enforce their guarantee. In February 2013 arrangements were made for the administrators to assist Dunbar in serving proceedings on Ms Davey. On 30 April 2013 a manager assisting the administrators provided a sheet containing *'miscellaneous details [he had] collected about [Ms Davey] during [his] time on the case'*. This included personal details, as well as information about her assets and family.

Snowden J held that the assistance given was not justified (para 311). They were not *'designed to further the purposes of the administration'* and were therefore not part of the *'proper function of the administrators'* (para 312). However, he also accepted that this had no effect on the direction of the administration (para 313).

This is a cautionary tale for administrators where secured creditors are pursuing parallel proceedings against the directors, for instance on a guarantee. There is a fine line between a proper working relationship between office-holders and secured creditors and improper assistance going beyond the proper function of the office-holder's position.

### Drafting statements of proposals

Sch B1, para 49 provides for the provision of a statement setting out the proposals for achieving the purpose of the administration. Sub-paragraph (2)(b) of that paragraph provides that this be done where an administrator thinks that objectives 1 and 2 cannot be achieved.

The statement of proposals in this case said that the administrators proposed that objective 3 be pursued, but did not explicitly explain why objectives 1 and 2 could not be achieved. While it was clear by implication, Snowden J agreed that the reasoning should have been made explicit. This was a defect. The relevant paragraph was described as *'singularly uninformative'* (para 321).

The suggestion that this failure invalidated all the later conduct of the administrators was roundly rejected by Snowden J. This might not come as a surprise. However, practitioners should consider the drafting of statements of proposals with care. Even if it is entirely obvious from the information given, explicit reasons for not pursuing objectives 1 and 2 must be given.

### Agents, independence and beauty parades

The managing agents were appointed on the recommendation of Dunbar. Ms Davey alleged both (a) that the administrators should not have appointed an agent recommended by Dunbar, and (b) that they should have conducted a 'beauty parade' to choose a suitable agent from among well-known names in the industry.

The first contention was rejected by Snowden J, who noted *'the essential question in all cases will be whether the agents to be appointed are competent and able to discharge their fiduciary duties to the company'* (para 341).

The second contention was that only some international firm of specialist sales agents had the necessary expertise to conduct the sale of the property, and a 'beauty parade' should have been arranged to allow them to give their views on marketing and to allow the administrator to select the most appropriate agent for the job.

Two intermediate points arose on which Snowden J found as follows:

- *'An administrator is entitled to have regard to his own experience of a candidate firm when deciding who to engage as selling agents'*; and
- Where it is doubtful, even uncertain, whether the sale price of the property will exceed the value of the security, he is also permitted to *'take into account the views of the secured creditor as to the identity of any agent'* engaged (para 431).

> It cannot be the case that the 'big boys' have a monopoly on competence or relevant local knowledge so that it is necessarily negligent not to instruct them.

When it came down to it, the view of Ms Davey's expert on the duties of IPs appeared to be that a large, recognised firm should have been appointed because it was a safe option that would not have been open to criticism (para 433). This was rejected – the test is not avoiding criticism but appointing a suitable agent. This led to one of the more memorable aphorisms to come from Snowden J's judgment:

*'In that respect, it seems to me that as a matter of principle, it cannot be the case that the "big boys" have a monopoly on competence or relevant local knowledge so that it is necessarily negligent not to instruct them.'*

This must be of wider relevance, and must apply to the appointment of any kind of agent by an office-holder. The relevant question is not how well-known the agent is, but whether they are suitably qualified for the job at hand.

### Conclusion

This judgment contains many points of interest. Of particular practical relevance among those discussed here will be the clarification of the positions regarding prior red book valuations and the instruction of agents. All in all, while there are cautionary tales in what happened in this case, this judgment remains a good news story not only for the practitioners involved but also for the profession as a whole. ◻

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# Has *Doonin Plant* created an environmental hazard for IPs?

**Tim Cooper** and **Matt Henderson** examine the extraordinary judgment in Scotland's *Doonin Plant Limited* and whether it will make waste management a make-or-break issue in insolvency.

In the landmark Scottish case of *Doonin Plant Limited (in liquidation)* [2018] CSOH 89 (*Doonin Plant*), Lord Doherty delivered an opinion (opinion) in the Court of Session on the status of certain environmental obligations of a company in liquidation. The case adds to a body of case law and statutory provisions, particularly in Scotland, which indicates a general direction towards the supremacy of environmental obligations over creditors in corporate insolvency. Viewed narrowly, *Doonin Plant* concerns only one specific area of environmental law as it applies to Scotland, and the principles upon which Lord Doherty reached his conclusions may be persuasive only.

> "Lord Doherty opined that the costs of the s59 obligations were not contingently owed to SEPA, and that by their *nature* the obligations were required to be discharged as liquidation expenses."

However, the opinion in *Doonin Plant* creates a new level of uncertainty for insolvency practitioners (IPs), in interpreting similar environmental obligations of an insolvent company and potentially other statutory public law obligation. Assuming the principles taken from *Doonin Plant* to be right, they raise key questions for seasoned IPs (not to mention lenders, creditors, directors and their advisers) regarding their approach to appointments in such cases in future.

### The background to *Doonin Plant*

The opinion in *Doonin Plant* concerns the status of an insolvent company's obligations to carry out works required by notices issued by the Scottish Environment

Protection Agency (SEPA) under s59 of the Environmental Protection Act 1990 (EPA90). S59 EPA90 provides:

*'(1) If any controlled waste is deposited in or on any land in the area of [SEPA][1], [SEPA] may, by notice served on him or her, require the occupier to….take within such period specified steps with a view to eliminating or reducing the consequences of the deposit of the waste.*

*(6) Where a person…fails to comply with the requirement, [SEPA] may do what that person was required to do and may recover from him any expenses reasonably incurred by the authority doing it.'*

So, s59 gifts SEPA (and the Environment Agency (EA) in England & Wales) a discretionary power to require works to be done by an occupier of land to put right unlawful deposits of 'controlled waste' in contravention of s33 EPA90. In addition, ss59(7) and 59(8) empower SEPA to pursue the depositor of the waste in various circumstances, if the occupier did not make or knowingly permit the deposit.

Doonin Plant Ltd went into liquidation in January 2015. At the time it was already subject to a s59 notice issued in 2012 by SEPA requiring the removal of hundreds of tons of mixed waste deposited at Doonin Plant's Armadale site in 2010. SEPA was also in the process of investigating further alleged depositing of controlled wastes without a licence or exemption, relating to tens of thousands of tons of 'trommel fines' alleged to contain substances harmful to environmental and public health. SEPA issued a formal s59 notice on the company in December 2015, requiring the removal of the trommel fines and remedial work in relation to its contaminating effects.

The liquidators considered that, following Lord Neuberger in *Re Nortel GmbH*[2], as the alleged fly-tipping and dumping and/or keeping of controlled wastes took place before liquidation, the company's liability to carry out the works was an obligation in existence at the date of liquidation, the costs of which were contingently owed to SEPA. SEPA, however, considered that the obligations of the company under both the 2012 and 2015 notices constituted expenses of the liquidation, and that the liquidators were obligated to have the company carry out the s59 works using the funds available in the liquidation, before payment to creditors. The costs of full compliance were estimated to far exceed the assets available in the liquidation.

### Considering s59

The liquidators sought directions from the court to clarify the status of the s59 notice obligations and the costs of the required works.

In rejecting the liquidators' arguments, Lord Doherty opined that the costs of the s59 obligations were not contingently owed to SEPA, and that by their *nature* the obligations were required to be discharged as liquidation expenses. The key foundations of these conclusions were:

a) Lord Neuberger's description of administration expenses in *Nortel* (by analogy, applying similarly to liquidation expenses), being an expense *'if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf), or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration – **either** because of the nature of the liability **or** the terms of the statute' (emphasis added).*

Lord Doherty focused on the first limb, to conclude:

*'Viewing the nature of the liability imposed by a s59(1) notice through the prism of the directive, which part II of the EPA was intended to implement, I conclude that it must reasonably have been intended by the legislature that expenditure by a liquidator complying with a s59(1) notice should be a liquidation expense. Otherwise it is very likely that polluters who become insolvent would frequently escape paying for the damage to the environment that their conduct has caused.'*

b) SEPA submitted that, as a matter of policy and in view of limited resources, it does not (or rarely does) use its power to carry out works required by a s59 notice and claim the costs back from the occupier/depositor. Lord Doherty therefore found that *'on any common sense view of the circumstances at the liquidation date there was not a real prospect of SEPA carrying out the necessary remedial work in the future. There was not a real prospect of the company becoming liable to reimburse SEPA.'* Accordingly, the costs of the required works arising from the remediation obligations for dumping of waste pre-liquidation were not contingently owed to SEPA.

> "In *Dawson*, the issues concerned historical contamination of groundwater from activities conducted by the company in administration, under an assumed responsibility for, but not as an owner of, the site in question."

### *Dawson International*

After the directions hearing, but before the opinion by Lord Doherty, Lord Clark of the Outer House of the Court of Session also issued an opinion in respect of the case of *Dawson International*[3] – an opinion Lord Doherty had been referred to in written submissions. Unfortunately, while Lord Doherty noted he had been referred to the decision, he did not reconcile it with his opinion in *Doonin Plant*. One must assume he dismissed its relevance, which is difficult to understand given its facts and the conclusions of Lord Clark.

In *Dawson*, administrators brought a note for directions as to the status of obligations of a Scottish company in administration and costs of continuing works relating to the prevention of groundwater contamination at a site in England. The substance of the note is yet to be heard but, as a preliminary matter, Lord Clark heard a debate between the » parties as to whether (among other things), the EA can or could have a claim as a creditor of *Dawson* (without which the EA may not have locus to be heard on the substance of the note).

In *Dawson*, the issues concerned historical contamination of groundwater from activities conducted by the company in administration, under an assumed responsibility for, but not as an owner of, the site in question. The EA claimed that the company had 'knowingly permitted' the continued contamination of groundwater under the site and, as a consequence, the company was an

> Nowhere can one find any mention of how the 'polluter pays' principle operates in the waterfall of expenses and claims in insolvency procedures.

'appropriate person' for the purposes of part 2A of the EPA90 (issues of potential harm to human health and pollution of controlled waters) and a 'responsible person' for the purposes of the Water Resources Act 1991 (WRA91).

For the EA to crystallise a claim against the company, there were certain statutory procedures that needed to be fulfilled: the local authority would first have to designate the site as contaminated land and as a special site, such that the EA would have a right under EPA90 to have the contamination remedied. Secondly, the EA would be required to issue a 'works notice' under s161 of WRA91, requiring certain remediation works by the company. If the company failed to comply, the EA could carry out the work and claim the costs from the company. The EA, in contrast to SEPA in *Doonin Plant*, claimed to be a contingent creditor (or creditor for an unascertained amount) despite the steps for enforcement, triggering the liability of the company, not having been taken at the date of administration or subsequently.

In a pivotal passage of Lord Clark's opinion, concluding that the EA was contingent creditor and having regard to the same passages of *Nortel* considered by Lord Doherty in *Doonin Plant*:

*'The companies had taken "some step or combination of steps"; they had assumed control of knowingly contaminated subjects, failed to take reasonable measures to remediate the contamination at the site and thus knowingly permitted the continued contamination. …the [EA] can, if and when the land is designated as contaminated and as a special site, serve a notice requiring remediation. Under the [WRA91], the [EA] can issue a works notice. The steps taken by the companies therefore had "some legal effect" and put them under "some legal duty or into some legal relationship", which resulted in them being "vulnerable" to the specific liability in question. … The [EA] is identified in the statute as the person responsible for enforcement and that is… sufficient for the existence of a duty or a relationship. Moreover, under the [WRA91] the first respondent is able to serve the notice. There is plainly a real prospect of liability being incurred… There existed, prior to administration, as a result of what the companies had done or failed to do … an obligation whose enforceability is dependent on the occurrence of future events (the designations of the site as contaminated land and as a special site and the issuing of the relevant notices), which may or may not occur. Therefore, there is a contingent liability.'*

Even allowing for the fact *Doonin Plant* and *Dawson* examine different parts of the EPA90's regimes, it is difficult to reconcile the above passage from Lord Clark's opinion with the opinion in *Doonin Plant*.

### Does the polluter really pay?

The most alarming aspect of *Doonin Plant* is the reasoning of Lord Doherty, which found a statutory public law obligation to be a liquidation expense – not because *'it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an [administrator or liquidator]'* (in the words of Lord Neuberger), but purely *'because of the **nature** of the liability'* (taking in part from Lord Neuberger's clarifying words).

> The most alarming aspect of *Doonin Plant* is the reasoning of Lord Doherty, which found a statutory public law obligation to be a liquidation expense.

On reading the express words in s59 EPA90, the explanatory notes to EPA90, the preambles or guidance in the European Framework Directive, any explanation of the 'polluter pays' or any reading of papers on parliamentary debate during the passage of EPA90, nowhere can one find any mention of how the 'polluter pays' principle operates in the waterfall of expenses and claims in insolvency procedures.

The terms of s59 EPA90 are replicated by s59ZB to apply to England & Wales, save that it is the EA, not SEPA, which is the relevant authority. There is no special principle of Scots law on which *Doonin Plant* relies, resulting in Lord Doherty's opinion being a relevant and persuasive authority for the application of the same principles in English or Welsh cases.

Yet, in *Dawson*, an opinion at the same level of the Court of Session that examined the English provisions of the EPA90 and related English legislation (at least as regards contingent liabilities), a conclusion was drawn in complete contrast to *Doonin Plant*. In *Dawson*, however, the substance of the directions, which include questions as to the liabilities ranking as an expense, are yet to be decided.

> How can an IP be sure that a s156 application to the court to reprioritise expenses will be successful? The uncertainty means that there is a risk that the IP will be unable to take remuneration.

So, where does this leave an IP contemplating accepting appointment in relation to a company facing insolvency due to insurmountable environmental liabilities? Does this give IPs wider concern over insolvency appointments generally in an increasingly difficult and burdensome regulatory environment?

Let's ask an IP, Matt Henderson to be precise. »

1 SEPA being a 'waste regulation authority' for the purposes of s59(1) EPA90

2 [2014] 1 AC 209

3 *Re Dawson International plc* [2018] CSOH 52

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# The IP's take on *Doonin Plant*: what does it mean for the future?

**Q Is any part of your internal process for accepting appointments affected by this decision?**

A We have a detailed take on procedures that raise questions, including those with exposure to risk. This would cover environmental issues – contaminated land and pollution or hazardous stock. If there is an exposure to risk of personal liability, or of being unable to meet remuneration and costs, then we would not provide consent to act.

> The *Doonin Plant* decision indicates that the courts can be unsympathetic towards the practical considerations of concern to the insolvency profession.

**Q What issues do you see from these decisions to go through internal risk assessments to be able to accept appointments?**

A The *Doonin Plant* decision makes matters much more difficult for IPs. How can an IP be sure that a s156 application to the court to reprioritise expenses will be successful? The uncertainty means that there is a risk that the IP will be unable to take remuneration. Also, there is potential for personal exposure to risk for an IP in the post-appointment period that could result in large claims made against the IP personally if great care is not taken.

The decision leaves the IP exposed to both these risks and, as things stand, there is little sympathy coming from the court that IPs (who did not cause the pollution) have been left with the practical consequences. The court has sent a message to IPs: 'if you want to take on an appointment with environmental issues, such as the *Doonin Plant* case, then you're on your own making this work out in an insolvency.'

Matters are further complicated because an application to a Sheriff Court can effectively be a judicial lottery, as their decisions are demonstrably inconsistent.

**Q What are your thoughts on accepting an appointment where you need to immediately apply to court for its discretion on reprioritising expenses to ensure you get paid?**

A At the very outset of a case, an IP is unlikely to be in a situation where the extent of the remedial costs is known. That makes it difficult to lodge an application to reprioritise expenses until there is greater certainty about what the expenses are, and the court might decide to reject the application until the position becomes clearer.

It would be unwise for IPs to rely on the court to provide a swift decision that would be supportive of the insolvency profession. The *Doonin Plant* decision indicates that the courts can be unsympathetic towards the practical considerations of concern to the insolvency profession. IPs are highly regulated and responsible people acting with integrity and professionalism often in extremely difficult and often hostile situations – a point that does not seem to gain any noticeable recognition in these decisions.

**Q Is it enough that SEPA, or any other authority, says that they would not object to a s156 order application? If not, why?**

A It is not enough. SEPA's current undertaking is informal and could be withdrawn without reason or notice, particularly if they are not in agreement with the way in which assets are being applied in practice. It is not embodied in legislation and so it lacks reliability. In addition, the concerns of local planning authorities (who may also believe that they have an interest) and floating charge holders (if any) might choose to object. I am also curious as to how SEPA can reconcile their belief that they have an input to any s156 application anyway, when they say they are not a creditor. IPs always prefer certainty and any undertaking from SEPA not to object does not provide that.

**Q What are your thoughts about the idea of having to contract to do continuing work and operations in a liquidation with finite and limited funds?**

A This is unsatisfactory. To do this properly an IP will need to have the best legal advice, which would ordinarily be a liquidation/administration expense. So not only would the IP need to apply for access to funds to be remunerated, there would also be a requirement to convince the court that the legal expenses for looking after the IP's interests should rank ahead of the environmental liability. I believe that there is uncertainty that the court will be sympathetic enough to allow for the IP's legal costs as well as his or her own remuneration in a s156 application to reprioritise expenses.

**Q Do you think cases like this will just be more difficult, or impossible, to accept? If impossible, why?**

A Taking on cases like *Doonin Plant* will become much more difficult because of the need to apply to the court for permission to use funds to meet remuneration and costs, and because of the contractual relationships that would need to be entered into with adequate protection from personal liability.

> The implication is that companies involved in recycling or in waste management might now be financially unsupportable.

**Q What other implications are there?**

A The decision elevates the clean-up costs ahead of the creditors waiting for a distribution from the normal distribution waterfall, which is blocked by this new obstacle of reprioritised liquidation expenses. Apart from disrupting the public policy of providing returns to the creditors of insolvent companies (and the efficient allocation of resources), there is the question that the recoverability of secured debt lent by financial institutions to companies in this situation has now become significantly impaired, if not worthless. Why should floating charge holders be penalised in this way? They have done nothing wrong. The implication is that companies involved in recycling or in waste management might now be financially unsupportable.

An effect of the *Doonin Plant* decision could be that companies operating in the waste management sector might find difficulty raising the finance required to invest in the latest and most efficient recycling plant. Such businesses could therefore become financially unsupportable because of their exposure to claims of breaches of environmental law, which could result in them being starved of support from lenders and investors.

Another implication is that unwary, inexperienced or ill-advised IPs could end up in a situation that could have severely disadvantageous financial consequences for themselves and for their firms.

**MATT HENDERSON** is a partner and licensed insolvency practitioner at Johnston Carmichael based in Edinburgh.


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# Risks
## facing the profession



# The great reformation: corporate insolvency

**Nick Cosgrove** looks at the government's corporate insolvency reforms based on member feedback and tries to decipher their possible implementation and future.

In August 2018, the government announced plans for the most significant overhaul of the UK's corporate insolvency framework for almost 20 years. Making up the reform package are new insolvency procedures, tweaks to existing parts of the framework, new office-holder powers, new director liabilities, an expansion to the director disqualification regime, and promises of future consultations on a number of subjects.

The reforms cover so much ground that they're hard to sum up simply. There are parts that will affect the insolvency and restructuring profession (and the UK's businesses) sooner rather than later. There are parts that will take several years to come to fruition. And there are parts that may not see the light of day again.

### Two years, two consultations

The scope of the proposals is down to the fact that they spring from two separate government consultations, both with different objectives.

There are proposals based on the government's 2016 *Review of the Corporate Insolvency Framework*, initially launched to keep the UK in step with EU reforms and World Bank ranking requirements. Some of these proposals have the potential to be useful – with the right amendments – but Brexit and the 2017 general election have held up meaningful progress, until now.

> "It's not a surprise that the proposals based on the 2016 reforms are the more 'legislation ready' parts of the package."

The remainder of the proposals come from the government's spring 2018 consultation on *Insolvency and Corporate Governance*. This was launched in response to a number of high profile insolvencies and featured proposals for tough new rules on selling insolvent subsidiaries, new office-holder powers to tackle 'value extraction', an extension of the director disqualification regime, and a number of ideas for boosting UK corporate governance. It's fair to say that the reaction from the insolvency and business

community to this second consultation was fairly negative; many were worried about the impact these proposals would have on business rescue and investment. This message came through loud and clear at an R3 roundtable (with government officials in attendance).

It's not a surprise that the proposals based on the 2016 reforms are the more 'legislation ready' parts of the package and potentially could be introduced reasonably soon. By contrast, a number of the proposals from the second consultation have been significantly scaled back or sent back to the drawing board. While parts of the 2018 consultation have emerged unscathed (an extension of the prescribed part to £800,000 and an extension of the disqualification regime to dissolutions, for example), it's likely we'll see further consultations on many of the spring 2018 measures rather than any immediate changes.

Given that the 2016 reforms are more likely to be integrated into the insolvency and restructuring framework first, this article will focus on how these might work.

### The moratorium

The 2016 consultation included proposals for a new business rescue moratorium, a court-based restructuring tool, changes to the essential supplies rules, and rescue finance reforms. Over the past two years, R3 has been working hard to make sure member feedback on these proposals has been passed on to the government, meeting MPs, the insolvency minister, and other business groups to share views and call for changes to the proposals. The government's announcement of plans to introduce a moratorium followed an R3 paper on how such a procedure might work.

All but the rescue finance proposals made it into the August reform package, while parts of the surviving proposals are much changed from their original form.

Possibly the most significant proposal in the reform package is the introduction of a new moratorium on creditor enforcement action against struggling companies. Among R3's objections to the original proposal were concerns about the length of the proposed moratorium – a minimum of three months – and concerns that the moratorium would lack proper oversight. Both of these issues have now been addressed: the moratorium will last an extendable 28 days and must be overseen by a licensed IP.

In some ways, the new moratorium will be similar to the pre-CVA schedule A1 moratorium (which is to be scrapped as part of the new reforms). It is designed to give a company time to plan, discuss, consult on or put in place a process for resolving its financial problems. The company's directors will remain in charge during the course of the procedure.

> "Possibly the most significant proposal in the reform package is the introduction of a new moratorium on creditor enforcement action."

The process will be open to all solvent companies facing prospective insolvency (a change from the original proposal, which would have allowed insolvent companies to enter the moratorium) and will be triggered by a filing at court rather than a full application – no prior notice for creditors will be required. Companies entering a moratorium will have to meet a prospect of rescue test and will have to show that rescue is 'more likely than not'. Companies will also have to show that they have sufficient funds to continue to trade and pay suppliers during the moratorium.

### Monitoring the moratorium

The monitor role is limited to the 'functions necessary to support the integrity of the moratorium process and [to] ensure creditor interests are protected.' He or she will be responsible for: assessing the eligibility conditions of the commencement of the moratorium; assessing and monitoring the qualifying conditions at the commencement of and throughout the duration of the » moratorium; where the qualifying conditions cease to be met during the moratorium, terminating it; and the sanctioning of asset disposals outside the normal course of business and the granting of any new security over company assets.

The monitor will have the power to request any information from the company that they 'may reasonably require in order to satisfy themselves that the eligibility tests and qualifying conditions are met at the commencement of the moratorium, and that the qualifying conditions continue to be met.' Directors will have a legal duty to provide this information. When the monitor concludes a company no longer meets the qualifying conditions, they will be required to immediately commence the termination of the moratorium.

> The second 'new' tool included in the 2016 reforms will be familiar to many in the profession: it's almost a copy and paste of an English scheme of arrangement.

Some potential problems with the structure of the proposed moratorium should be immediately apparent. The restriction of the moratorium's availability to only solvent companies risks making the procedure redundant, while R3 members have expressed concerns that, as with the schedule A1 moratorium, the liabilities to which the monitor will be exposed would be off-putting for insolvency practitioners. Further changes will be needed if the moratorium is to be truly useful.

### The restructuring tool

The second 'new' tool included in the 2016 reforms will be familiar to many in the profession: it's almost a copy and paste of an English scheme of arrangement. Beyond confirmation that this new tool will be a standalone procedure (and will not involve reforms to, for example, CVAs), not much has changed from the 2016 consultation.

The new tool is a cross-class cram down procedure available to any company seeking to bind creditors to a restructuring proposal. Proposals will be reviewed and approved by creditors and the courts.

There will be limited prescription for what the restructuring tool can cover and the changes proposed by the plan can be economic and financial. The government suggests that, among other things, the plan could be used for debt write downs, debt postponement, a change in the management team, or selling off loss-making parts of the company.

### Termination clauses

The reforms to essential supplies rules, like the moratorium, are also much changed from what was originally envisaged. For a start, they're no longer 'essential supplies' proposals, and now cover just 'termination clauses'. In 2016, the government proposed that directors would be able to designate essential suppliers who could be forced to continue to supply a financially distressed or insolvent company, but who would become a preferred creditor if the rescue attempt were to fail. R3 and others criticised this proposal for being open to abuse and too onerous for suppliers, so the government has opted for something simpler: it will prevent the exercise of clauses that allow the termination of contracts for the supply of goods and services on the grounds that one of the parties to the contract has entered a formal insolvency procedure.

These new rules would sit alongside existing rules on ransom payments (s233 of the Insolvency Act 1986), although they will operate slightly differently: personal guarantees won't be required in return for a suspension of a termination clause. We've asked for clarification of whether the proposal will also prevent an insolvent company's contracts from being terminated where *they're* the supplier.

R3 members have queried how useful the new essential supplies rules might be: the legislation says that contracts may be terminated for reasons other than insolvency, which might allow suppliers plenty of wiggle room. Regulatory licences will be exempt from the reforms, too, which would be problematic. Further carve-outs may come before the government finalises its proposals.

### The corporate governance reforms

The centrepieces of the government's spring *Insolvency and Corporate Governance* reforms were plans for making parent company directors liable for creditor losses should a subsidiary they have sold become insolvent, and proposals for new tools for office-holders to reverse a transaction considered to have unfairly removed value from a company ahead of insolvency in cases where the company had previously been rescued or received fresh investment. Both of these proposals have been revised as a result of feedback from R3 and others.

Instead of being made financially liable for creditor losses in the event of a subsidiary becoming insolvent post-sale, parent company directors now only face sanctions under the current disqualification regime if they fail to consider the impact of a subsidiary's sale on stakeholders. Meanwhile, the value extraction proposals have morphed into a welcome promise to review the IP's existing toolkit for pursuing claims.

While the subsidiary sale proposals have been dialled back, they could still prove to be off-putting to parent company directors worried about the risk of disqualification. More liquidations and fewer business rescues might be the outcome if the government persists with the proposal.

### Influencing the future

While the 2016 parts of the August reforms are more legislation ready than the rest, they're by no means a done deal. The government says that it will introduce legislation 'as soon as parliamentary time permits', but, thanks to Brexit and the government's missing majority, parliamentary time isn't exactly permitting at the moment. While further delays to implementing the reforms might be frustrating, it does at least afford extra time to get the reforms right.

> R3 will be doing all it can to support the government and make sure the reforms make a lasting and positive difference to our insolvency framework.

R3 has held member forums on these reforms in London and Leeds, and has gathered plenty of feedback to pass onto the government as it continues to mull over its proposals. So far, the government has proven to be receptive to feedback from the profession; hopefully it will continue in this vein. The reforms will have a significant impact on the way insolvency and restructuring works in the UK, and they will, potentially, make a big difference to the UK insolvency and restructuring framework's international competitiveness – all the more important considering Brexit may make it harder to resolve cross-border European insolvencies from the UK. This is not an opportunity for the government to miss and it is vital that it gets the reforms right. R3 will be doing all it can to support the government and make sure the reforms make a lasting and positive difference to our insolvency framework.

**NICK COSGROVE** is head of communications at R3.


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# The post-Brexit cross-border world; a Franco-English comparison

Over the next five pages, **Stefan Ramel** and **Georges-Louis Harang** pose questions and answers on cross-border insolvency proceedings in a world where Brexit has sent processes back in time.

As we write this piece in the autumn of 2018, the clock is rapidly ticking towards 23.00 GMT on 29 March 2019, the date of the UK's exit from the European Union. The date set by Michel Barnier, the EU's chief negotiator, for the completion of the intricate disentanglement negotiations – 31 October 2018 – came and went with no agreement.

However, on 14 November 2018, both the EU and the UK published a final Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018. The agreement will need to be approved by the domestic bodies of the EU and the UK. The draft makes provision, at article 126 for a transitional period until 31 December 2020.

During the transition period, 'union law' will continue to apply in the UK. In theory, that will include Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the insolvency regulation) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels regulation).

On 12 July 2018, following a much-publicised meeting of ministers at Chequers, the UK published a white paper on the future relationship between the UK and the EU. Regarding insolvency and civil and commercial litigation generally, the UK's proposal is to seek to join the Lugano convention, while also exploring a new bilateral agreement with the EU on civil judicial cooperation, which would include a package of laws on jurisdiction, applicable law, and the recognition and enforcement of judgments including in relation to insolvency. As matters stand, the EU is not prepared to accept the 'Chequers plan'.

This piece is written from the starting hypothesis that no bilateral agreement is reached between the UK and the EU (and that there is no applicable international convention) that would govern the period after the end of the transitional period referred to above. The premise is that the insolvency regulation will cease to apply, as will the Brussels regulation. We are in no doubt that, should that came to pass, it would have serious consequences for cross-border insolvency. But what would the landscape look like? Will UK proceedings be recognised abroad, and vice versa?

In the first case, the French avocat will pose questions to the UK lawyer about the extent to which it is possible to recognise French proceedings and judgments stemming therefrom in the UK post-Brexit. Then, the roles will be reversed, with the UK lawyer asking the French avocat for assistance in obtaining recognition of UK proceedings in France.

In true European cross-border spirit, and because this article will be of relevance to practitioners in both the UK and in France, it is being published in English in *RECOVERY* magazine and it will also be published in a French journal.

We wish, for the avoidance of doubt, to make clear that the views expressed in this article are our own, and that they are not intended to be relied upon as legal advice. The questions we address are deliberately generic and focus on the available framework to insolvency practitioners (IPs) in the relevant scenarios.

### Each country's probable position

In the UK, the two key sources of law that deal with the inward-looking request for assistance of a non-UK insolvency office-holder are, firstly, the UNCITRAL Model Law on Cross-Border Insolvency of 30 May 1997 UNCITRAL, incorporated into UK law by the Cross-Border Insolvency Regulation 2006 (SI No. 1030/2006) (the model law). Secondly, the common law on cross-border insolvency, which in the last ten years has seen unprecedented and dramatic developments to the circumstances in which it applies and its scope. There is a third source, in the form of s426 of the Insolvency Act 1986, albeit in case of an incoming request for assistance from France, that section is unlikely to be of much use, since France is not a relevant country or territory for the purposes of s426(4).

In France, on the basis that France has not implemented the UNCITRAL model law on cross-border insolvency, and in the absence of a bilateral convention between France and the UK, a UK IP seeking to act within the territorial jurisdiction of France will need to rely upon French private international law and the specifically existing French jurisprudence, which currently applies in insolvency scenarios in respect of countries that are not parties to the insolvency regulation or the Brussels regulation. Such a practitioner will need to consider French insolvency law, in particular articles L 610-1 *et seq* of the *Code de commerce* in addition to other French legislation depending on the specific issues that arise. For example, if the issue concerns a security interest, it will be necessary to refer to the relevant law on security interests, most of which is to be found in the *Code Civil*. »

POST-BREXIT ENGLAND AND WALES

# The status of French proceedings in England and Wales

Avocat Georges-Louis Harang poses questions to barrister **Stefan Ramel**.

**Is there a risk that rival insolvency proceedings concerning the same debtor could be opened in France and the UK?**

Under the insolvency regulation, save for a scenario in which an entity has its 'centre of main interests' in one member state – thus opening the door to the opening of main insolvency proceedings – and an 'establishment' in a second member state – thus enabling the opening of secondary proceedings – it is not (or at least it shouldn't be) possible to have rival insolvency proceedings.

Without the insolvency regulation, the short answer to the question is, *yes*, there is a risk. That is not, however, a full answer to the question. The French office-holder, or, in certain circumstances, a French creditor, may have a number of different options in relation to potential English proceedings.

Under the model law, provided that the relevant French insolvency proceedings qualify as a 'foreign proceeding' (for example, a French *conciliation* may not qualify) and the French office-holder qualifies as a 'foreign representative', then the panoply of remedies contained in the model law becomes available. The first step ought to be to seek recognition (articles 15–17). Thereafter, articles 20 and 21 may be engaged in enabling the French office-holder to seek relief from the English courts. That relief could include, for example, a stay on creditor actions or execution against the debtor's assets.

I would strongly recommend seeking advice at that point. There is no guarantee that an English court would necessarily grant a stay: see, for example *Bakhshiyeva* v. *Sberbank of Russia* [2018] EWHC 59 (Ch), a decision of Hildyard J who, at the request of a number creditors with potential claims based on instruments governed by English law, applied the rule in *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 and declined to continue a stay in support of Azeri law restructuring proceedings.

> "The premise is that the insolvency regulation will cease to apply, as will the Brussels regulation."

Under the model law, it would be open to the French office-holder to apply directly to the English courts to commence insolvency proceedings against the relevant entity under the Insolvency Act 1986 (article 11). Moreover, and in the case of a French creditor, by article 13 of the model law, a French creditor has the same rights as regards the commencement and participation of a proceeding under English insolvency law as a creditor in Great Britain.

If proceedings against the relevant entity are opened in England and Wales, then by article 28 of the model law, and provided that the French proceedings qualify as 'foreign main proceedings' under the model law, then the UK proceedings would, so far as the debtor's assets are concerned, effectively be territorial. The model law also contains provisions for both court to court and office-holder to office-holder cooperation and communication.

If, for whatever reason, it was decided not to proceed under the model law, much the same outcome could probably be achieved by invoking the English court's discretionary jurisdiction to order the ancillary winding up of the relevant entity: see, for example, *Re BCCI SA* (No 10) [1997] Ch 213. In this scenario, the powers of an English office-holder would very likely be limited to collecting English assets, settling a list of English creditors, and, after paying any preferential creditors, remitting the balance of any realisations to the foreign insolvency proceeding.



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If the English court opted not to make an ancillary winding-up order, or such an order was not sought at all, it would nonetheless be open to the English court to supply assistance where possible and, within the confines of UK law, to the French proceedings: *Singularis Holdings Ltd* v. *PricewaterhouseCoopers* [2014] UKPC 36. Such assistance might include permitting

> A UK IP seeking to act within the territorial jurisdiction of France will need to rely upon French private international law and the specifically existing French jurisprudence.

the French office-holder to realise assets in the UK, or even instituting proceedings in the UK. It is difficult in addressing this generic question, though, to go much further than to indicate that there would be a willingness to assist a French proceeding.

**What would be the criteria for the opening of concurrent proceedings?**

If a French insolvency office-holder proceeded under article 11 of the model law, then, according to the terms of the model law, it is simply necessary for the French office-holder to demonstrate that the requirements under the Insolvency Act 1986 for the commencement of such a proceeding are met. There is, as matters stand, limited assistance that can be derived from cases directly on point on article 11 of the model law; this is an area in which one could expect development of the English court's approach through jurisprudence in due course.

In the case of administration under schedule B1 of the Insolvency Act 1986, and assuming that a French registered entity would be a qualifying entity for the purposes of paragraph 111(1A) of schedule B1, the French office-holder would need to demonstrate that the entity is insolvent, and that one of the purposes of administration is reasonably likely to be achieved. In the case of liquidation, it would presumably be necessary to satisfy ss221 *et seq* of the Insolvency Act 1986. That would include, for example, demonstrating that the relevant entity has ceased to carry on business, or is carrying on business only for the purposes of winding up its affairs. In addition, however, the English court retains discretion on whether to order a winding-up.

In the case of an ancillary winding up, and assuming for a moment that the French entity is in a formal French insolvency process, and that the French

courts are the appropriate courts in which to conduct the winding up, then the English court has discretion over whether or not to open ancillary winding-up proceedings. It would take into account whether ancillary winding-up proceedings are necessary, or whether it would be more appropriate to grant the French insolvency office-holder assistance but without opening insolvency proceedings in England and Wales.

**If any such proceedings were to be opened, would they be rescue or liquidation proceedings?**

As to whether the proceedings would be in the nature of rescue proceedings or winding-up proceedings, if the French insolvency office-holder was driving the process, then they ought to have a choice of which proceeding to apply for.

> A French creditor has the same rights as regards the commencement and participation of a proceeding under English insolvency law as a creditor in Great Britain.

If, however, a hostile French or UK creditor was driving the process then, whether under the model law or the common law, it is very likely that the English court would require the French office-holder to be informed of the request to open the proceedings and would then permit that office-holder to be heard on whatever application was made by the hostile creditor. Note: as they currently stand, rr3.10, 3.12(g) and 7.9 of the Insolvency (England and Wales) Rules 2016 require notice to be given to a member state liquidator; it will be necessary in due course to ascertain how those rules are amended after Brexit.

Assuming though that the relevant French insolvency office-holder has notice of any request to open proceedings then, in such circumstances, the French insolvency office-holder would, in any event, retain the option to cross-apply for the more appropriate type of proceedings (provided the criteria referred to in the previous answer were made out).

**What documents will the French insolvency office-holder need in order to perform their functions in the UK?**

The model law is prescriptive as to what documents would be required in order for a foreign insolvency office-holder to obtain recognition of their proceedings in the UK.

> Much the same outcome could probably be achieved by invoking the English court's discretionary jurisdiction to order the ancillary winding up of the relevant entity.

By article 15(2) of the model law, in the case of an application for recognition, it is necessary for the application to be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or by a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative. By article 15(4) of the model law, those documents would need to be translated from French to English. It would be best practice to obtain and use the same documents, if proceeding under the common law, for instance to obtain an ancillary winding-up order. »

**STEFAN RAMEL** is a barrister at Guildhall Chambers.

POST-BREXIT FRANCE

# The status of English and Welsh proceedings in France

Barrister Stefan Ramel poses questions to avocat **Georges-Louis Harang**.

**Is there a risk that rival insolvency proceedings concerning the same debtor could be opened in France and the UK?**

On the starting premise that the insolvency regulation has ceased to apply, there would be a risk of conflicting insolvency proceedings. The concepts of 'main proceedings' and 'secondary proceedings' would no longer apply and each side could argue that its own courts were competent to open such proceedings. The principle of the jurisdiction of the court first seized would not apply.

> There is, as matters stand, limited assistance that can be derived from cases directly on point on article 11 of the model law.

There is a risk that parties will use the possibility of rival proceedings in another country as part of a strategy to persuade a domestic judge to open insolvency proceedings in their own country, so as to benefit from that judge's protection. The opposite may however be true: the parties could use the lack of automatic recognition of a UK insolvency proceeding in France to continue to treat the company situated in France as solvent and to ignore all the mandatory rules of the UK insolvency proceedings, in particular the prevention of ongoing payments and the moratorium on creditor action.

Finally, a 'hard' Brexit would have the effect of transporting parties who have interests in France and in the UK back in time to a point in recent history before the application of EU regulations, a time at which separate insolvency processes were managed with the complexity that is a by-product of multiple jurisdictions and of having a company with assets in France or of a defaulting debtor company situated in France.

**What would be the criteria for the opening of concurrent proceedings?**

A UK office-holder, a French creditor, a French debtor company or even a third party wanting to commence proceedings before a French judge would need to respect French procedural law in order to open such proceedings, which would mean meeting the relevant jurisdictional criteria.

According to the provisions of article R 600-1 of the *Code de commerce*, those jurisdictional, geographical criteria depend on the domicile or head office of the debtor company or, in the absence of a head office, the centre of its principal interests in France, which, if it had an establishment (not in the sense of the insolvency regulation) in France, to the place where that establishment or the main one of its secondary establishments were situated in France (*Cour de cassation, chambre commerciale*, 11 April 1995).

It is also relevant to have in mind the potential impact of:

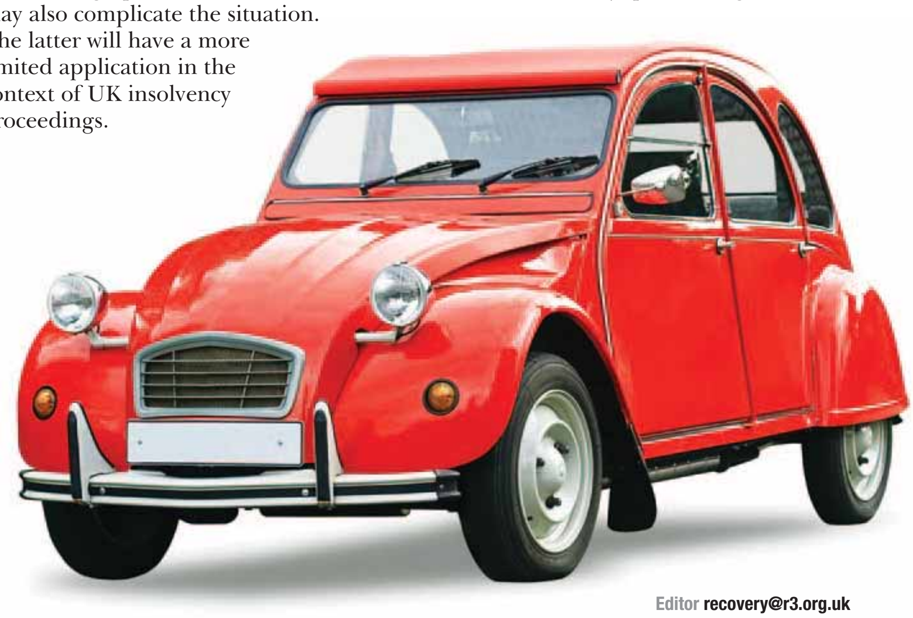
- the provisions contained in articles 14 and 15 of the *Code civil*, which deal with the 'nationality privilege', enable a French jurisdiction to be seized on the basis that one of the parties (for example, creditor or debtor company) has French nationality. However, the possibility of using those articles is curtailed somewhat by (i) the *Cour de cassation*, which limits the efficiency of articles 14 and 15 in order to give effects to foreign decisions, and (ii) the fact that the provisions of the above-mentioned article 15 also provide that they are excluded if the litigation is connected in a specified way to another state whose jurisdiction has been seized first, and that that other choice of jurisdiction is not fanciful.
- the notion of *confusion de patrimoine* (intermingling of assets and liabilities between entities) and *fictivité* (alleging that a foreign procedure is not valid) may also complicate the situation. The latter will have a more limited application in the context of UK insolvency proceedings.

Having said all of that, proceedings that affect UK and French interests could intermingle and rival each other, which would put into play different interests and create a period of uncertainty as to what ought to happen to existing contracts, what debts should appear as liabilities of the entity, and as to assets, such as movable and immoveable property, which can be realised.

> A 'hard' Brexit would have the effect of transporting parties who have interests in France and in the UK back in time to a point in recent history before the application of EU regulations.

This could, however, be avoided if the judgment opening the proceedings in the UK obtains an *exequatur* (recognition), allowing it to be recognised in the French legal system and acquiring the authority of *res judicata* to make it enforceable. In this context, no further proceedings could be opened and the UK procedure would apply in France as well as the law applicable to this procedure (except in some cases where French law will still apply, for example in relation to property and employees).

A UK office-holder should promptly seek the *exequatur* of the judgment opening the UK insolvency proceedings to make



that decision enforceable as a matter of French law and to enable the office-holder to serenely exercise his or her functions without competition from a French proceeding and for the benefit of the parties for whom he or she acts. Failing that, a French creditor, or a French debtor company, could be tempted to seize its 'own' (French) judge to obtain their protection, and the application of its (French) national law, and to avoid the realisation of its assets or, to the contrary, to ensure that its assets are seized before a foreign insolvency office-holder for the benefit of foreign creditors.

There would almost certainly be a rush to obtain an *exequatur*, given that insolvency proceedings are time sensitive.

**If any such proceedings were to be opened, would they be rescue or liquidation proceedings?**

The type of French insolvency proceeding selected does not depend on rival proceedings in another country, although, of course, such proceedings could be considered if the relevant judgment-holder obtained an *exequatur*.

A UK office-holder would have to refer to the criteria fixed by French law for the opening of a proceeding of *redressement judiciaire*, *liquidation judiciaire* or even *sauvegarde*. The criteria that will be applied are those that apply to those types of procedures, and in turn they depend on the extent of the financial difficulties affecting the insolvent entity.

"Proceedings that affect UK and French interests could intermingle and rival each other, which would put into play different interests and create a period of uncertainty as to what ought to happen."

A UK office-holder (or their lawyers) will need to acquaint themselves with such criteria and to ensure that they are observed, except where the UK office-holder sought to obtain an *exequatur* of their own (UK) procedure in France.

Once a French insolvency proceeding is opened, depending on the type of proceeding, a UK office-holder will have imposed upon them the various bodies of that French *procédure collective*, and will need to work with those bodies. It is not difficult to see how the interests of the UK office-holder and the relevant French body might diverge, for example in the context of claims to recover debts, managing the position of employees or the realisation of

assets, or even whether the entity should continue trading.

The insolvency regulation introduces a level of cooperation between office-holders in different jurisdictions; it is to be feared that the situation post-Brexit will give rise to antagonisms between office-holders, each one defending their own interests and not the more global interest that a universal insolvency proceeding would have.

All of the above strongly militates in favour of considering, as early as possible, obtaining an *exequatur* in France of the UK decision opening insolvency proceedings, and all other judgments that flow therefrom. The earlier an *exequatur* is obtained, the sooner it will create an advantageous situation, in particular where a procedure has a UK office-holder in the driving seat and the judgment opening their proceedings is enforceable against others (a French insolvency office-holder, a French creditor, the employees located within the French jurisdiction, and the French debtor), and UK not French law applies (except in some cases, as for properties and employees).

**What documents will the UK insolvency office-holder need in order to perform their functions in France?**

This will depend on what the UK office-holder/UK parties with interests in French assets or a French debtor entity wish to do.

Without any particular procedural steps, and because a foreign decision opening insolvency proceedings is considered in French law to be a *titre* (title) that cannot be ignored, a UK office-holder could, for example, initiate proceedings before a French court to represent UK creditors, seek the opening of a French insolvency proceeding or lodge, in a French insolvency procedure, a claim on behalf of creditors that they represent. In short, they would have title to act in France: *DFC Group AS, Cour de cassation, chambre commerciale*, 28 June 2016.

If it is a case of recognising the decision opening UK insolvency proceedings, as explained above, it will be necessary to obtain the *exequatur* of the judgment opening proceedings and any judgments that flow therefrom to ensure they become enforceable in France and to ensure a freedom of action without having to deal with a French insolvency process and to prevent the potential loss of assets since the debtor (whether foreign or French) who is located in France is not subject to any moratorium on legal process or impediment to disposing of its assets (and the assets could be disposed of to the detriment of the UK insolvency proceedings).

In order to do that, it is necessary to meet the conditions imposed by the decisions in *Munzer* (*Cour de cassation, 1st chambre civile*, 7 January 1964) and *Bachir* (*Cour de cassation, 1st chambre civile*, 4 October 1967) and more recently the decision in *Conelissen* (*Cour de cassation, 1st chambre civile*, 20 February 2007) that consist of ensuring that the following are met: (i) the jurisdiction of the foreign tribunal or court, (ii) whether the decision conforms to public international law and (iii) the absence of fraud.

It is also necessary that no insolvency proceedings have been opened in France in relation to the same debtor: see the decision of the *Cour de cassation* in its judgment in *BCCI* (*Cour de cassation,*

"The *exequatur* could become, in the future, a weapon to which a UK office-holder will frequently have to have recourse."

*Chambre commerciale*, 11 April 1995). If that condition is not met, a UK office-holder will not be able to obtain an *exequatur*, and will need to cooperate with any rival French insolvency proceeding in discharging his or her functions. Without an *exequatur*, it will be open to the UK office-holder to oppose the opening of a rival French insolvency proceeding, if the latter is sought after the judgment in relation to the *exequatur* of the foreign decision.

It is important to note that an *exequatur* is generally considered prospective and not retrospective; it applies for the future from the moment when the decision to grant the *exequatur* is given.

The *exequatur* could become, in the future, a weapon to which a UK office-holder will frequently have to have recourse, and should, in cross-border cases involving France, become an automatic part of the armoury.

**GEORGES-LOUIS HARANG** is an avocat at Hoche Avocats.

# Don't sell your claim undervalue!

**Mark Beaumont** says that creditors wouldn't tolerate an asset sold off undervalue so why should litigation or ATE insurance be any different?

If you were told that the largest asset in an insolvency was sold with no regard for due process, would you have any concerns? What if the asset was only offered to one buyer or sold at an obvious undervalue by someone with no knowledge of the market? Are those alarm bells getting louder?

Given this background, it may raise eyebrows that some IPs only approach one litigation funder or insurer, or even leave it to the solicitors to approach their own preferred funder. Creditors often pay the price for this and it will come as no surprise that more creditors are raising concerns in this area.

### They are all the same, so it doesn't matter anyway[1]

The difference in costs from one funder or premiums from one after-the-event (ATE) insurer to the next can be enormous. The sums involved can be small (ATE policies of £100k or funding of £20k) or very large (multi-million pound ATE premiums and litigation funder investments of many millions but the fact is the difference between the best and the worst deals will always be very large as a percentage of recoveries.

> A significant litigation asset in an insolvency could be reduced in value by over 20 per cent for no other reason than the IP did not explore the market properly.

To put this in context, a significant litigation asset in an insolvency could be reduced in value by over 20 per cent for no other reason than the IP did not explore the market properly. Does the word 'litigation' in that sentence make everything OK? Without that word, it reads: A significant asset in an insolvency could be reduced in value by over 20 per cent for no other reason than the IP did not explore the market properly. IPs need to consider the consequences of bringing this risk into their practice, especially because it is easily avoidable and unnecessary.

### The role of the lawyers

IPs typically have good relationships with their preferred litigation solicitors. The same is often true of solicitors and the barristers they are close to. Their costs should be recoverable as part of the litigation (in theory) and are therefore somewhat controlled by *inter partes* recoverable costs and general market pressures.

It would be wrong to say that the same controls exist in the opaque world of litigation insurance and finance, where pricing can fluctuate wildly between providers or even with the same provider on a different day!

The deals done with litigation funders and ATE insurers directly relate to returns to creditors: how does the IP show that what they've agreed with the funders or insurers is reasonable? Is it possible to do so without exploring the wider market?

### What is reasonable?

The market for funding has never been more competitive. The days of giving 30 per cent of damages away to funders are largely behind us – and would be long gone but for naïve clients paying over the odds for funding.

I hear the argument that, just as with their solicitors, it makes sense to have a 'rough with the smooth' relationship with one funder. The argument here seems to be that the funder would cover its losses by recovering in other cases. I wouldn't like to try to justify this to a creditor committee that is paying over-the-odds to a funder on the basis that they are paying for losses in another funded claim!

The reality is that if a claim is potentially worth funding, then there will be multiple parties interested in doing so. If it's a poor claim, no one will be interested – including your 'friendly funder'. I am yet to see a compelling argument in favour of creditors over paying for funding and insurance.

### I have a good relationship with 'ABC'

There is nothing wrong with cultivating relationships. At Annecto we also build relationships. We know what the best deals are and how to secure them: we wouldn't be working with dozens of funders and insurers if just one was perfect for every single type of case.

Claims vary and so do funders. Their appetites shift based on recent successes, failures, the balance of the existing caseload in the portfolio, new fund raising, timing within their financial year, changing staff and countless other factors. It's also good to keep even the best of relationships on its toes with a little competition from time to time.

> The reality is that if a claim is potentially worth funding, then there will be multiple parties interested in doing so.

### Managing risk

As a sector we hold a responsibility to maximise value to creditors. There is no reason to let this slip when it comes to litigation funding and ATE insurance. Overpaying here hits creditors just as hard as selling an asset at an undervalue.

By exploring the full market, or even using a decent broker to do so for you, you ensure you are meeting your obligations to creditors, but you may also find that there are far more interesting, useful and economic options out there than you'd been led to believe. □

[1] They are not. Nor are all IPs (or brokers for that matter!).

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

# Practising fairness in insolvency practice

**John Smith** says that how you treat debtors really matters in the long run, and suggests IPs get controls in place now.

Now, possibly more than ever, there is a push in the industry to ensure debtors are being given the best advice and being put into a debt solution that is most suited to their situation. This is a positive drive – the horror stories of debtors being mis-sold debt solutions are something we would all like to eradicate.

> The IP must differentiate the advice stage from the IVA to clearly show no pre-disposition to directing a client towards an IVA.

### Following the FCA rules

In conjunction with this trend, there has been a move to adhere to the Financial Conduct Authority's (FCA) treating customers fairly (TCF) principles. So, what are the TCF principles? Well, they basically set out six consumer outcomes that firms should strive to achieve so that customers are sold the correct solution for their specific situation and are treated fairly throughout their journey. In summary, the TCF principles say that an IP must ensure:

- fair treatment of customers is central to corporate culture;
- products and services are designed to meet the needs of identified consumer groups;
- consumers are provided with clear information and kept appropriately informed;
- advice given to consumers is suitable and takes account of their circumstances;
- products\services are of an acceptable standard and perform as consumer led to expect; and
- processes exist post-appointment to allow consumers to make a complaint.

To put this into context, let's consider applying the TCF principles to an IVA. With respect to ensuring that best advice is given and that an IVA is the correct solution for the client, the IP must differentiate the advice stage from the IVA to clearly show no pre-disposition to directing a client towards an IVA. All aspects of an IVA should be clearly explained to the client as per SIP 3.1. A full, audited I&E (SFS anyone?) using well-known guidelines is a must. An automated decision matrix that weighs up the case and compares the outcome with other potential solutions (DRO, BKY etc) is also hugely useful.

### Don't be daunted

Many IPs have implemented some, or all, of the FCA's TCF principles successfully into their daily operation. Adhering to the FCA's TCF principles can seem like a daunting process, one that will require an overhaul of a firm's daily operation. However, it's not as daunting as it would seem. This can be achieved by adding small steps to your daily operation: for example, carrying out a full review and comparison of all potential solutions available to the debtor and carrying out additional vulnerability checks during the insolvency process.

> Adhering to the FCA's TCF principles can seem like a daunting process, one that will require an overhaul of a firm's daily operation.

### I come with good news

Here's the best bit! There are systems that can carry the burden of ensuring that IPs adhere to the FCA's TCF principles through automated processes such as:

- best advice, provided through a rule-based decision engine that automatically reviews the debtor's unique situation;
- a step-by-step review of a customer's vulnerability, which results in the debtor being worked with in an appropriate manner depending on their personal circumstances;
- automated multichannel communications, so that a debtor can decide how and when they would like to be contacted and for that contact to be made without the need for user interaction: for example, a gently worded SMS to the customer letting them know a payment has been missed when a contribution hasn't been received within a set number of days. It is essential however that there are controls to ensure that the client is not bombarded;
- dynamic workflows that react not just to case-specific information, but also to changes in the client's personal situation automatically without reliance on users; and
- management information reports that highlight any failures in process and are automatically delivered to the correct recipients on a scheduled basis.

> Review your daily operation to verify that you are confident that you are treating debtors as fairly as possible.

The fair treatment of debtors is of increased importance and that importance seems to be growing by the day. It seems as though firms with a reputation for treating their customers fairly, and those with low failure rates, are starting to see the benefits. It's crucial to put the controls in place now, in order to stop your firm falling behind.

My advice? Step one: review your daily operation to verify that you are confident that you are treating debtors as fairly as possible. Step two: review your systems now to ensure you are set up to do so in the most effective and efficient method possible. □

**JOHN SMITH (technical director)**

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

# insolvent

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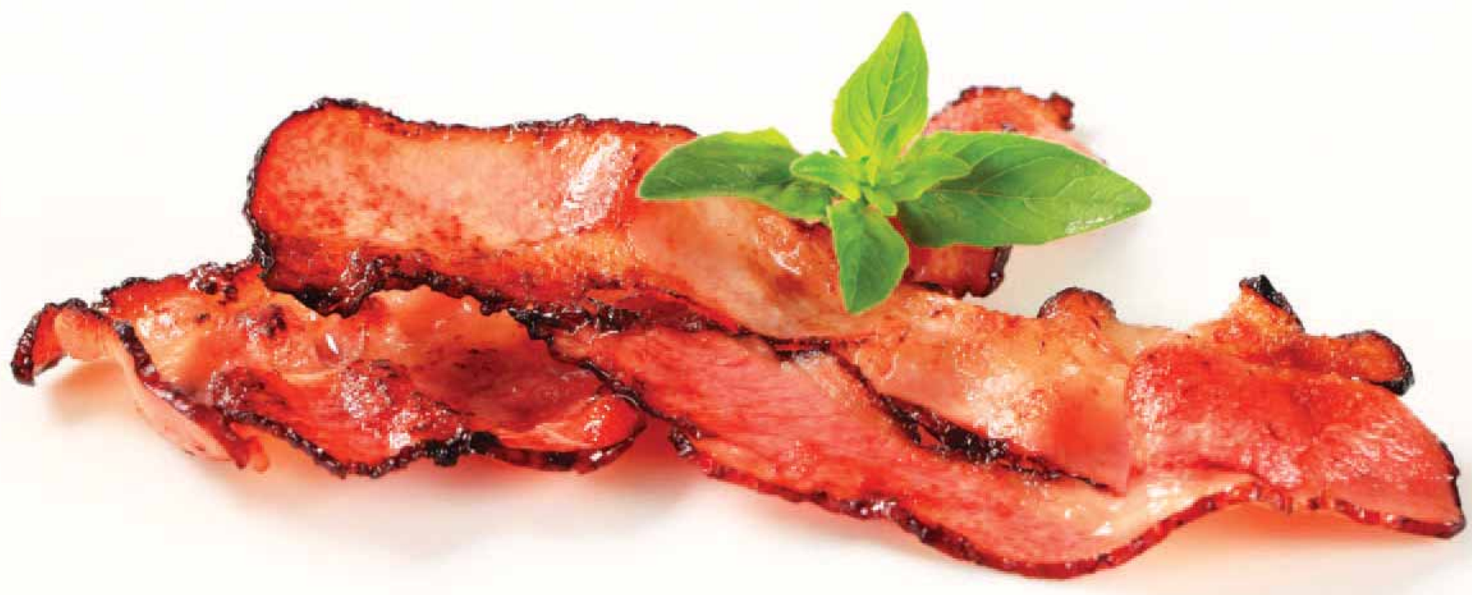


# Appellate decision on preference: don't presume to save your *MC Bacon*!

**Séamas Gray** and **Joseph Curl** look at the most significant decision on preference for 30 years.

On 17 July 2018, Mr Justice Birss handed down his appellate judgment in the case of *Abdulali v. Finnegan & another* [2018] All ER (D) 133 in what may be one of the most important decisions on preference since the decision of Millett J (as he then was) in *MC Bacon* nearly 30 years ago.

The appeal followed the initial decision of district judge (DJ) Salmon (as he then was) on 15 December 2017. This case is a salutary reminder for IPs not to rely solely on the benefit of the statutory presumption.

The judgment also provides excellent guidance for advisors and IPs alike as to the interpretation of s340 and 239 of the Insolvency Act 1986 (the Act); what exactly is meant by the phrase: '*influenced by a desire to prefer*'; whether such a phrase is referred to or used correctly; and what motivating influences of a debtor (in making a preferential payment *in fact*) might be considered permissible by a court so as to exclude such a payment from being challenged as a preference *in law* under the section.

## Background

For present purposes, the following are the core essential facts (which were not in dispute between the parties):

- The debtor (D) was a director and founder investor in an Irish limited company, Liberty Asset Management Limited (Liberty), which was sold to Friends First Limited (Friends First) for €20m in 2007.
- D invested the proceeds of the sale in various property and other non-liquid investments. The property crash in 2008 left such assets in substantial negative equity and D became liable to Friends First for the approximate sum of €2.3m pursuant to various breaches of various warranties relating to the sale.
- In 2008, D also entered into agreements with two of his former Liberty co-directors to indemnify them in relation to claims brought by Friends First.
- On 21 July 2009, the first respondent (Mr Finnegan) lent D, his brother-in-law, €200,000 (Finnegan loan). It was an express term of the loan that it was to be repaid within five weeks. The proceeds of the Finnegan loan were paid over by D to Friends First.
- The €200,000 was not repaid in accordance with the terms of the Finnegan loan and Mr Finnegan pressed for his money. Discussions took place about the loan being secured over an asset of D: his holiday apartment in Spain. Agreement in principle was reached around July 2010 and a draft charge was prepared but not put in place (for reasons set out below). »

> "A cynic, once they received the loan, might have said to themselves that they did not actually have to make the repayment, but these are all matters of fact and evidence, not principle."

- In early 2011, having not repaid or secured the Finnegan loan, D approached Mr Finnegan for a further loan of €200,000. Mr Finnegan was reluctant to lend more himself but arranged for the second respondent, Reethi Limited, an Irish limited company, which Mr Finnegan ultimately controlled (Reethi), to lend D €400,000 (Reethi loan).
- The Reethi loan was made on the understanding (in writing) that €200,000 of the Reethi Loan would be used by D to repay the Finnegan loan.

> To be a voidable preference under the section [340], a particular ("improper") desire must have been influential on the debtor.

- It was also a condition of the Reethi loan that this be secured, although because of the complexities of Spanish local law, the security for the Reethi loan (together with notarial and other costs of €14,000), was not in fact put in place until December 2012.
- The Reethi Loan was paid in two tranches: €350,000 on 4 May 2011 and €50,000 on 12 July 2011. D repaid the Finnegan loan to Mr Finnegan on 5 May 2011, ie the day following receipt of the initial tranche of the Reethi loan. The net effect was that D obtained the €200,000 of new money that he had wanted.
- On 4 December 2012, D's former Liberty co-directors also obtained judgment against D for €386,000 and €231,000 respectively.
- D was made bankrupt on his own petition on 18 March 2013 (six weeks before the end of the two-year maximum period allowed by the Act to attempt to impugn the repayment of the Finnegan loan as a preference).
- D fell seriously ill with cancer in the autumn of 2015 and ultimately died on 19 April 2016.

### First-instance hearing

It was the repayment of the Finnegan loan on 5 May 2011, using €200,000 of the Reethi loan, that the trustee sought to impugn as a preference. The trustee first asserted such a claim in June 2015 and ultimately issued proceedings in November 2016.

It was common ground that: (i) Mr Finnegan was a creditor of D; (ii) D was insolvent at the relevant time; and (iii) Mr Finnegan was an associated person for the purposes of section 340(5) of the Act; the effect of this being that, unless the contrary was shown, D would be presumed to have been influenced by a desire to prefer Mr Finnegan.

The respondents sought to argue that the Reethi loan was impressed by a *Quistclose* trust (requiring repayment of the Finnegan loan), which necessarily excluded the payment of the Finnegan loan from constituting a preference of fact. The trustee had also initially accepted that payment of the Finnegan loan was a condition of the Reethi loan but at trial argued that this was not the case. The court, looking at the terms of the Reethi loan (which referred to D's 'intention' to use the monies to repay the Finnegan loan, rather than this being an express term of the agreement), was not willing to accept that this was a binding legal obligation and concluded that repayment of the Finnegan loan remained subject to potential challenge as a preference of fact.

The key point in question therefore was under section 340(4), which refers back to section 340(3)(b): whether D was influenced in deciding to repay the Finnegan loan by a desire to put Mr Finnegan in a position, in the event of D's bankruptcy, which would be better than if he had not repaid the Finnegan loan.

The trustee advanced no positive case and relied solely upon the statutory presumption. The trustee had in fact never put the issue of the preference to D (despite the fact that D had indicated, even after falling ill, that he would assist him). The trustee initially, even after D's death, refused the respondents' solicitors' requests that he obtain copies of D's bank statements but the trustee did eventually do so and these were available at trial.

The court was left to decide whether D had had the necessary 'subjective' influence of a desire to prefer Mr Finnegan, based principally on Mr Finnegan's testimony and the facts of the case (including the payments made by D during the relevant period). In dismissing the trustee's case, DJ Salmon, concluded:

*'The lending was in part to pay creditors, in part to keep the ship afloat, in part to hope that business ventures would come good. I am satisfied that he was motivated by that desire rather than the desire to prefer Mr. Finnegan as against other unsecured creditors…*

*I am satisfied on the balance of probabilities that… he [D] was not influenced when he paid those monies by a desire to produce the effect that the result of his bankruptcy would put Mr. Finnegan in a better position than he otherwise would have been…*

*I have reminded myself that the requisite desire to influence a decision need not be the sole desire and there may be other factors that influence a decision that do not include the requisite desire. However, the requisite desire must have been one of the factors that operated on the mind of [D].'*

Following some additional submissions, DJ Salmon continued:

*'For the avoidance of doubt, my finding of fact is that [D] was insolvent and therefore of course it would have been possible potentially for any creditor to have sought his bankruptcy at any moment in time, but he had been able to keep the creditors at bay. He anticipated that his income and finances including property values would come right and that everybody would be paid and that the insolvency would not be the inevitable course… I came to the view that he had no desire to prefer as set out in the evidence.'*

### Appeal

The trustee initially appealed on four grounds. The first two were effectively that the family pressure applied by Mr Finnegan upon D to repay the Finnegan loan could not rebut the statutory presumption but he did not pursue these at the appeal hearing.

The remaining two grounds of appeal were that:

- The judge's finding that D's desire had been to receive the additional money, which he would have for his use if he entered into the secured loan of €400,000 from Reethi, did not justify a finding that D had no desire to prefer Mr Finnegan when he paid him out of the €400,000; and
- The judge was wrong to conclude that the purposes for which D wanted the balance of the €400,000 were within the range of 'proper considerations' by which a debtor might be actuated without having a desire to prefer the counterparty actually preferred as a result of the transaction.

> It is not advisable for office-holders to sit on the benefit of the statutory presumption; assert a claim; and effectively leave it to the defendant to 'prove its case'.

### First ground of appeal

Mr Justice Birss agreed that the relevant transaction (repayment to Finnegan not Reethi) amounts to the preference and that the desires which influenced the loan will not necessarily be the same as the desires that influenced the repayment. However, he rejected the suggestion that there was inconsistency in the judge's conclusions or that the desires were muddled up stating:

*'The Reethi [L]oan was obviously part of the context in which the preference arose and the judge was not just entitled to take it into account, he was required to do so.'*

*'[D's] subjective desires about the repayment did not necessarily have to change once he had obtained the money from Reethi. A cynic, once they received the loan, might have said to themselves that they did not actually have to*

*make the repayment, but these are all matters of fact and evidence, not principle.'*

Birss J further stated that DJ Salmon was clear in his understanding that he had to consider the matter on the footing that the repayment was not legally binding, referring to part of the original judgment in which the judge records:

*'The clear purpose in paying €200,000 to Mr. Finnegan in 2011 was, even if it was not a legally binding requirement, in effect, to get Reethi to provide €400,000 to [D]. Some of those monies were used to pay some creditors and a variety of professionals were paid. I accept that while there is limited evidence of business ventures that [D] had involvement in coming right, it seems to me that [D] was optimistic that he would be able to ride the storm and I accept that he was not telling things to Mr. Finnegan purely to hoodwink him. I find it was his genuine belief.'*

## Second ground of appeal

On the second ground, the trustee sought to argue that s340(4) might only operate to relieve the counterparty from the effect of a preference where there is 'good reason for it' and asserted that the judge ought to have concluded that D's strategy was speculative and improper seizing upon the words expressed by Millet J in *MC Bacon*:

*'It will still be possible to provide assistance to a company in financial difficulties provided that the company is only actuated by proper commercial considerations.'*

Mr Justice Birss gave this argument short shrift, describing it as being *'based on a fallacy… That is simply not what the words of the section say. The legislation is structured the other way around. To be a voidable preference under the section, a particular ("improper") desire must have been influential on the debtor. It is the presence and influence of that "improper" desire which means the preference falls into s340(4) and becomes voidable, rather than an absence of a "proper" desire.'*

## Lessons for IPs and advisors

While the benefit of the presumption is extremely useful, it is not a panacea; the burden of proof is seldom decisive in of itself. Accordingly, it is not advisable for office-holders to sit on the benefit of the statutory presumption; assert a claim; and effectively leave it to the defendant to 'prove its case' – however tempting that might be given the limited funds available to a trustee (or liquidator).

Before issuing proceedings, office-holders would be well advised to undertake a proper investigation of the facts surrounding the payment including (without limitation) ensuring: that they put the purported preference and basis for the payment to the debtor (and the beneficiary of the payment if possible); and that (ii) they look at what other payments were being made at the relevant time (and whether it might appear that the debtor was influenced more by the desire to keep the wheels on the wagon/the ship afloat in terms of 'business ventures coming good' or indeed otherwise).

Failure to undertake such rudimentary investigations might find them 'discovering' unfavourable facts and desires during the course of litigation, or at trial, by which time they are already exposed to potentially hefty orders for adverse costs.

If it can be shown that it was D's genuine and honest belief that he would avoid bankruptcy (or liquidation) altogether, this is a strong indication against being influenced by a desire to put the preferred party in a better position than he would otherwise be in, *in the event of bankruptcy*, because D obviously believed he would avoid bankruptcy altogether.

> "Advisers must dismiss what has become a relatively common myth among practitioners: that a preference can only be overturned if D's desires are considered to be 'proper commercial considerations'."

Advisers must dismiss what has become a relatively common myth among practitioners: that a preference can only be overturned if D's desires are considered to be 'proper commercial considerations'. This has been confirmed by Birss J to be a fallacy. D: might be influenced by many desires (many wholly uncommercial) or, indeed, no particular desire at all.

Having said that, however, all that is needed is to show that (just) *one* of the desires that influenced D: was the requisite 'improper' desire to put the recipient in a better position than he would otherwise be in, in the event of D's bankruptcy.

**SÉAMAS GRAY** is a partner in the restructuring and insolvency team at gunner*cooke*.

**JOSEPH CURL** is a barrister at 9 Stone Buildings.

# Further education administrations: the school of hard knocks?

**Neil Smyth** and **Helen Tringham** explain what IPs will have to get to grips with if they have to act as administrators for a further education institution.

Dwindling government funding and reducing student numbers have taken their toll on the further education (FE) sector. Financial distress is now a very real prospect for FE institutions, with an estimated one in every nine colleges in a poor enough financial state to merit some sort of financial intervention by the government.

As a majority of the FE providers are charities or statutory corporations, rather than companies, solutions under the insolvency legislation are limited. The problems have so far been dealt with by mergers in the hope that critical mass can overcome financial distress.

From the start of 2019, various provisions of the Technical and Further Education Act 2017 (TFEA) will come into force. Various column inches have already been devoted to those provisions so we only briefly describe them below.

The focus of this article is to highlight some of the legal and practical difficulties that IPs will face if they are asked to act as administrators of a FE institution.

### TFEA and the special administration regime

TFEA introduces a special administration regime for FE operators as well as applying corporate insolvency processes to statutory FE colleges, subject to restrictions. It also places some limit on the enforcement of fixed-charge security and applies the wrongful and fraudulent trading provisions to governors, as well as applying a disqualification regime.

The special administration regime restrictions include that an administration order or appointment cannot be made without the appropriate national authority (in England that is the Secretary of State) being given 14 days' notice; the 14-day period is intended to allow the option of the regulator stepping in.

Only the Secretary of State can apply for an education administration order and the application has to be made before the body is already in administration or liquidation. The main features are that:

(a) it can be used where a FE body is unable to pay its debts or is likely to become unable to pay its debts;
(b) the court appoints an education administrator on the application of the appropriate national authority; and
(c) the education administrator manages the body's affairs, business and property with a view to avoiding or minimising disruption to the studies of existing students.

> "TFEA introduces a special administration regime for FE operators as well as applying corporate insolvency processes to statutory FE colleges."

The objectives of an education administration are modified from a normal administration regime as it is to:

(a) avoid or minimise disruption to the studies of the existing students of the FE body as a whole; and
(b) ensure that it becomes unnecessary for the body to remain in education administration for that purpose.

The means by which the education administrator may achieve those objectives include:

(a) rescuing the further education body as a going concern;
(b) transferring some or all of its undertaking to another body;
(c) keeping it going until existing students have completed their studies; or
(d) making arrangements for existing students to complete their studies at another institution.

The focus of the administration is not just the creditors, but also the students – reflected in the administrator's statutory functions.

TFEA also provides that funding from the Education and Skills Funding Agency (ESFA) is given 'super priority' in the estate and gives the ESFA power to provide an indemnity to the education administrator (or his firm) if he or she suffers loss or damage carrying out these functions.

### What does this mean in practice?

The government's response to the various consultations has described the objective of avoiding/minimising disruption to students as the 'special objective' and talks about focusing on the best interests of the students as part of the special objective. At the same time, the education administrator must also carry out his or her function in a way that achieves the best result for the FE body's creditors as a whole.

There is clearly a tension between the best interests of the student body – where resources will have to be made available to minimise disruption to the students – and the best interests of creditors.

The government has said that 'it is for the education administrator to interpret and achieve that balance in their proposals' (in the response to technical consultation, June 2018).

The administrator's requirement to avoid disruption to the students' studies is likely to require the delivery of the courses to the same standard as delivered previously. It will also include minimising the disruption of examinations and assessments that could involve practical matters such as the employment of invigilators to supervise the examinations or making provision for the examinations to be held elsewhere.

As to what is deemed appropriate to minimise disruption could depend on *when* in the academic cycle the administration occurs and the proximity to any examinations. It is important to note that the administrator is not required to safeguard the interests of each existing student individually but to consider the existing student body as a whole.

> There is clearly a tension between the best interests of the student body and the best interests of creditors.

The special objective also only applies to 'existing students,' which includes students who have accepted a place at the institution but, importantly, does not apply to students who seek a place at the institution 'mid-cycle', due to circumstances that resulted in them leaving their previous institution.

The administrator is bound by the duties that apply to the institution in relation to special educational needs and disability (SEND) students, who may require special educational provisions to be made. The administrator must have regard to the government's SEND guidance (in particular the chapter on FE). This includes a duty to cooperate with the local authority on the arrangements for SEND students.

### What else should administrators know?

The administrator will also be under the obligation to comply with other legislative requirements with regard to running the institution including:

*Data protection legislation* – administrators will be aware of the distinction between their processing activities as a data controller of their own business and those processing activities where they are acting as a data controller of the institution in administration. In any event, the administrator should be aware of their responsibilities under the General Data Protection Regulation, in particular compliance with the data protection principles (including fair processing, data minimisation and the accountability principle) and the immediate steps that should be taken if there is a data security breach. This could involve reporting a data security breach to the Information Commissioner's Office within 72 hours of learning of the breach.

*Freedom of Information Act 2000* – the institution is likely to be covered by the provisions of the Act, which will require the institution to respond to requests made for information within 20 working days. This is of particular relevance as this legislation could be used by third parties (such as parents, journalists or those in the local community) to ascertain information regarding the appointment of the administrator and/or the running of the institution in administration.

*Safeguarding legislation and guidance* – this requires the institution to safeguard and promote the welfare of children (ie those under 18). The administrators must have regard to the government's rules on 'keeping children safe in education', which provides guidance to those in contact with children for the protection of the children. It also provides guidance on what administrators should do should a serious safeguarding incident occur while the institution is in administration, in particular in relation to matters concerning the abuse or neglect of children.

*Prevent duty* – this is part of the government's counter-terrorism strategy. In essence, those with the responsibility of running the institution have a duty to prevent people from being drawn into terrorism. In relation to children, there is a particular focus on protecting children at risk of radicalisation, the strategy for which is likely to be set out in the institution's existing safeguarding or other policy. Administrators should also be aware of the Channel programme, which provides a mechanism for the institution to make a referral regarding any particular concerns that they may have, and to support a multi-agency approach to protect children. This is set out in more detail in the government's 'channel duty guidance, preventing vulnerable people from being drawn into terrorism'. At the same time, the institution has to also balance this against any individual's right to freedom of speech, which can be a fine line to walk.

A further matter for administrators to consider is how to handle complaints from disgruntled parents or students, which could be more likely to arise given the context and purpose of the special education administration.

We anticipate that any administrator will need to take proactive steps to minimise the prospect of complaints that could otherwise detract significant resource from the running of the institution. Sensible steps to take at the outset could include understanding the most appropriate channel of communication with parents and providing a clear timetable as to when updates to students and parents will be handed out to try to minimise upset and disruption.

### What to watch for

Several points remain unclear regarding the application of TFEA, and we await further information from the government in respect of these areas. We expect this information to take the form of formal guidance and secondary legislation, in particular in relation to the delivery of the special objective.

> IPs considering FE appointments will need to be aware of the many challenges and risks that such an institution can bring with it.

The government has also said that it would be beneficial to update the *College Governance* guide that was first published by the Department for Business, Information and Skills (as it then was) in 2014. This updated guidance should set out to whom institutions are accountable and the means by which they are accountable, and should be updated to include guidance on insolvency.

While TFEA offers an opportunity of new assignments for IPs, the framework is still unclear. IPs considering FE appointments will need to be aware of the many challenges and risks that such an institution can bring with it. ◻

**NEIL SMYTH** is a partner at Mills & Reeve LLP.

**HELEN TRINGHAM** is a principal associate at Mills & Reeve LLP.

# Administration funding for law firms

**Steve Din** explains how IPs can work with law firms with access to administration funding to maximise recoveries for creditors.

IPs advising law firms are starting to see significant upfront payments being offered by buyers armed with very significant levels of funding. While the sight of a large cheque book is always welcome, what's more exciting is how IPs can now work with acquiring firms to stretch administration funding in a manner that accelerates and enhances distributions to creditors.

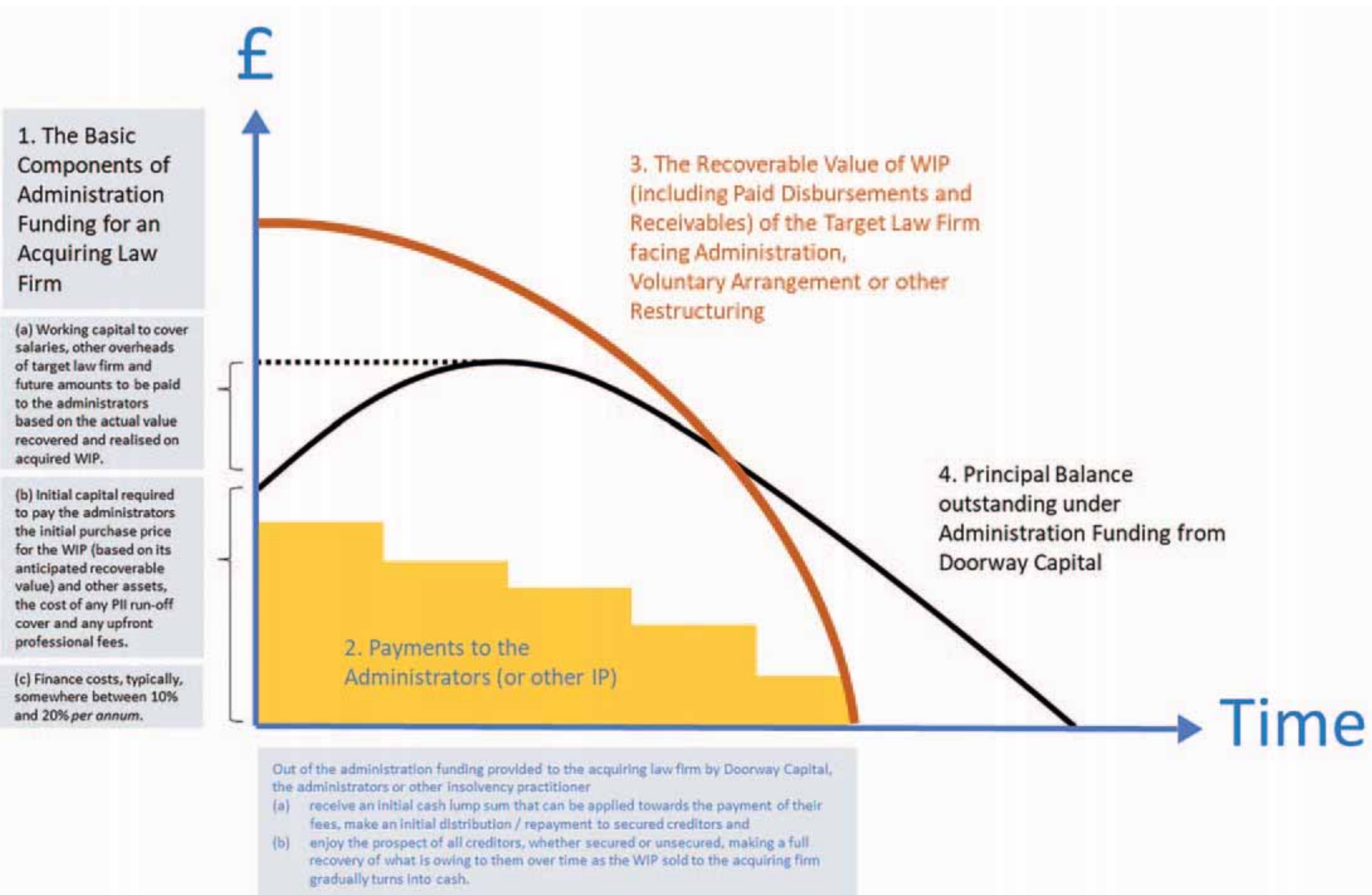
### A tale of two firms

In September 2018, as part of two separate pre-packs, Simpson Millar and AWH Legal each agreed to make substantial payments to IPs for their respective acquisitions of the assets of the law firms EAD and Roberts Jackson. Doorway Capital funds both firms and used its expertise in restructurings to structure an administration funding package that was designed to maximise recoveries for creditors. Unlike the traditional model offered by Recovery First, Simpson Millar and AWH were able to table offers to the administrators in the form of upfront cash, did not charge any ongoing monitoring or reading fees and assumed the archiving burden. Yet, at least in the case of Simpson Millar, the firm gave the secured and unsecured creditors of EAD the prospect of making a full recovery by preserving everyone's jobs. Simpson Millar then agreed to make future payments to the administrators based on the level of revenues the EAD assets generate for them.

> **Doorway Capital funds both firms and used its expertise in restructurings to structure an administration funding package that was designed to maximise recoveries for creditors.**

While the concept appears simple enough, the shape of administration funding needs to take account of the incremental working capital requirement created from preserving jobs, paying the ongoing overhead costs and, at least in the context of an administration, making significant ongoing payments to the administrators. This is done in order for them to continue making distributions to creditors up until the point they are, hopefully, fully repaid. This shape of funding is derived from Doorway Capital and/or its client:

(a) working closely with the IP to understand how a particular estimated outcome statement is affected, *inter alia*, by the periods of time over which distributions can best be made; and



(b) producing a detailed Excel spreadsheet model that calculates the level of funding required by the acquiring law firm (from Doorway Capital), ultimately, to finance these very distributions.

Recognising that time was of the essence, Simpson Millar worked closely with Julien Irving of Leonard Curtis and the funders, Doorway Capital, to shape a fully financed offer to acquire the assets of EAD in a matter of a few days. It wasn't just the upfront payment to the administrators that had to be found by the acquiring law firm but, of much greater importance, the ongoing working capital needs of the enlarged organisation to (at least) ensure recoveries to creditors were being maximised.

### Funding the administration

The administration funding Doorway Capital provided Simpson Millar comprised an immediate advance of £1m and, out of a receivables funding facility, a further £1m to finance the ongoing incremental working capital needs created by the pre-pack. The annual cost of this funding worked out to be about 15 per cent *per annum*. This cost is borne by Simpson Millar but to the ultimate benefit of EAD's creditors, all of whom are presently expected to be repaid in full.

> If a law firm is simply under pressure from its banks or other creditors to pay them immediately, they can sell part of their WIP for cash, today.

The diagram on this page shows how this type of administration funding works from the perspective of both the administrator and the acquiring firm.

### The need to negotiate

*RECOVERY* readers may have read in the press that the ultimate financial firepower of Simpson Millar and AWH could be measured in many hundreds of millions of pounds, so why such enormous amounts? These are two of a growing number of law firms that not only recognise the need to negotiate and document pre-packs, often inside of a week, but also recognise that the funding will more likely be applied outside of an administration. For instance, if a law firm is simply under pressure from its bank or other creditors to pay them immediately, they can sell part of their WIP for cash, today, knowing that there are firms like Simpson Millar and AWH able to complete the sale very quickly. Similarly, as part of a CVA or PVA, a law firm can consider offering creditors an upfront distribution of cash from a sale of all or part of their assets to a firm with an existing war-chest, in return for them compromising all or part of the balance owing to unsecured creditors.

There are an infinite number of permutations and combinations for IPs to restructure a law firm in financial difficulty, but the best results for the creditors and shareholders of these firms are likely to be achieved in circumstances where the IP works closely with the acquiring firm and its funders. ◻

To find out more, visit: www.doorwaycapital.com/our-expertise/turnarounds-and-restructurings

**STEVE DIN** is founder of Doorway Capital, an independent and specialist provider of risk capital to law firms.

# Your seat at the table

**Nick Cosgrove** and **Georgina Waite** explain how R3 shapes the public debate on insolvency and restructuring.

Promoting and defending the role and value of the insolvency and restructuring profession to politicians, the press and stakeholders is a vital part of what R3 does for its members. Without this work, our profession would almost certainly be subject to views and policies that do not fully or accurately portray the work of the profession, and which would ultimately create a more challenging working environment for all our members.

Below is a brief snapshot of how R3 members shape the public debate, lobbying success stories from recent years and information on how you can get more involved.

### How R3 members shape public debate

R3 members determine the issues R3 lobbies on and the stance that it takes. Whether it's ideas from members during networking events, discussions from one of our national committees, or the results of a member survey, all of these channels contribute to R3's public thinking.

R3 members determine the issues R3 lobbies on and the stance that it takes.

The issues R3 lobbies on are proactive and reactive. They come from member proposals for reforming the insolvency and restructuring framework, such as our successful campaign to extend essential supplies protections or our successful work to get the government to consider introducing a business rescue moratorium; or are triggered by policies put forward by government, such as the recent efforts to partially restore HMRC's preferential status. And, of course, issues are also based on public and political debate concerning the profession and its framework.

The list of issues that R3 lobbies on is extensive. R3 has lobbied on hundreds of technical and public policy issues over its 30 years.

### Current lobbying

There are four big issues that R3 has been lobbying on in 2018.

- R3 has been working closely with HMRC, through a number of working groups, to tackle practical tax issues members are facing on a daily basis.
- Our team has been in discussions with the Insolvency Service about the liaison between the Official Receiver and insolvency practitioners.
- R3 has been liaising to ensure that the government's corporate insolvency and corporate governance proposals are workable for the profession and business community.
- We have been calling on the government to seek a Brexit deal that ensures the continued automatic recognition of UK insolvency appointments and judgments across the EU.

In addition, there have been meetings with parliamentarians, reports launched, government consultations responded to and events held on assessing the 2015 pre-pack reforms; the role and future of CVAs; a review of, and recommendations for, the volume IVA market; the role and powers of the Pensions Regulator; the government's airline insolvency review; and the government's review of part 2 of the 2012 Legal Aid, Sentencing and Punishment of Offenders Act (LASPO – which has had a significant impact on insolvency litigation funding). It's a long list and it looks like 2019 is set to be just as busy.

### Lobbying success stories

There have been a number of success stories from R3's lobbying work over the last few years. The most notable ones include:

- the creation of a dedicated contact for insolvency issues at HMRC;
- convincing the government to promise new *guidance* on collective redundancies in insolvencies, rather than opting for new regulation for IPs;
- stopping the government from banning the ability of the profession to charge on a time-cost basis;
- reversing the government's original plans to ban *all* physical creditors meetings;
- extending the 2012 LASPO insolvency litigation exemption by two years to ensure that the profession had more time to adapt to the reforms;
- increases to the bankruptcy and debt relief order threshold; and
- persuading the government to make significant changes to its corporate insolvency and corporate governance reform proposals.

Without R3, it's entirely possible that none of these significant benefits to the profession would exist.

Our team has been in discussions with the Insolvency Service about the liaison between the Official Receiver and insolvency practitioners.

### Where can you find out more?

There are a number of ways you can stay up to date with R3's lobbying work. If you are a fan of social media, follow us on LinkedIn (R3 – Association of Business Recovery Professionals) and Twitter (@R3PressOffice) or you can check out the dedicated public policy part of our website, *R3 Thinks*. You could also read our regular update in the monthly R3 newsletter. You can hear more at our courses, conferences and regional events, as well as attend one of our new free member forum discussions on topical insolvency and restructuring issues.

We're always on the lookout for new ideas and issues to lobby on, so get in touch, get involved, let us know what you think and what you would like to see R3 lobby for in 2019 and beyond. □

**NICK COSGROVE** is head of communications at R3.

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Linda Farish chaired the SPG forum for its 225 attendees.

R3's Nick Cosgrove networks with delegates.

The speed networking event on day one was a roaring success.


The presentations were tailored to SPG members.

# Celebrating the smaller practice: the SPG Forum 2018

**Linda Farish** reviews this year's SPG Forum and what people took away from the experience.

The annual SPG Forum took place from 31 October to 2 November and I had the pleasure of being asked to chair the Forum this year. In order to make sure that it was relevant to the SPG community, I spoke to a number of my peers in the north east to ascertain what matters were currently of interest and whether there were any topics they would like to see covered at the Forum.

> We all learned to think about how GDPR affects our everyday work within the profession in a completely new way.

There was a change in location this year from Chesford Grange, Warwick, to Heythrop Park, Oxford. I have to admit to having reservations on the change to a location further south – somewhere that also appeared to be a little way from rail links. Interesting stories were heard of attendees being taken on very circuitous routes and directed to hotel entrances that had been closed!

Upon arrival at the venue any concerns were immediately dispelled. The facilities were excellent and we were very well looked after by the hotel team throughout. The Forum was held in a purpose built conference theatre, which was superb and comfortably hosted the 225 attendees.

## Down to details

The Forum programme included a diverse range of subject matter from the informative to the practical and the inspirational. On the first day we had a presentation from the Insolvency Service on directors' disqualification, public interest winding ups, cyber security and MVLs and statutory interest (including some practical guidance on reducing interest payable).

Our guest speaker for the day was Rugby Union star Will Greenwood, who gave a motivational talk on the teamwork strategy that saw the England rugby team win the World Cup in 2003, a lot of which could be taken forward in all our practices. Our headline sponsor, Manolete Partners Plc, took to the stage to give an insight into their recent successes – it was interesting to hear that these successes ranged from smaller DLA claims to large claims against multinational landlords. The work being done by R3 on behalf of the profession, together with an economic update and a slot on VAT bad debt relief claims, concluded the first day.

A speed networking event and the gala dinner followed, which was very well attended. While catering for large numbers is always difficult, the quality of service was excellent and certainly superior to offerings at other events I have attended. With the majority of delegates staying at the hotel, there was plenty of time to network and recount war stories from across the profession.

## Day two

Delegates arose bright and early for the second day as we welcomed talks from the Redundancy Payments Office in relation to the handling of directors' claims. This was followed by an engaging talk on the General Data Protection Regulation (GDPR). Who knew GDPR could be made interesting? We all learned to think about how GDPR affects our everyday work within the profession in a completely new way. HMRC (bravely) took the stage and discussed working with the profession and how HMRC regard the write-off of directors' loan accounts and loan account repayments in a liquidation. It was good to hear that HMRC are working closely with R3 to address the many frustrations affecting our members. The Forum concluded with a fascinating legal update on corporate insolvency and an interactive panel session on the proposals for corporate governance reforms and the effects of the reintroduction of HMRC preferential status.

Most people enjoyed the new venue and agreed that the slightly increased journey time was far outweighed by the facilities and organisation at the venue. There was something for everyone to take away, whether that be technical points of interest or practical matters to be used in practice.

## Always something to take away

I found all of the presentations extremely relevant to the work I undertake on a daily basis and would like to thank all those who took time out from their busy schedules to present. What really made the difference was the fact that our speakers were not only knowledgeable, but were clearly very passionate about the specialist areas on which they were presenting. This really came across in their enthusiasm which, in turn, ensured delegates were fully engaged throughout the conference.

> I found all of the presentations extremely relevant to the work I undertake on a daily basis and would like to thank all those who took time out from their busy schedules to present.

Organising an event of this magnitude is always challenging and it is only through the hard work of the SPG Committee members and all at R3 that it can be staged successfully. I would like to say a very special thank you to all those people who not only made it possible, but whose efforts resulted in an educational and most enjoyable conference. I would also like to thank the team at R3 who assisted in organising the event.

Here's to next year!

*An additional thank you must also go to our sponsors Manolete Partners PLC, IRS, Compliance on Call and Pantera Property.*

**LINDA FARISH** is director of restructuring and insolvency at RMT and was the SPG Forum Chair.

# Advertisers' index



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

## Interview with…

# Emma Lovell

R3's **CEO** is overhauling the entire association to make it work better for members. She speaks to *RECOVERY* to explain what you'll see happening soon.

**Q What do you want to achieve as R3 chief executive?**

**A** I want to implement a new strategy for R3, which ensures that R3 remains relevant to the insolvency profession and also embraces the restructuring and turnaround professions. The insolvency and restructuring profession performs such a vital role in the economy, so it must have an effective voice. I'm here to make sure R3 is that voice. I've worked closely with IPs and restructuring experts over the past decade, so I understand first-hand some of the challenges they face.

In 2017, we delivered a number of operational and strategic changes at R3 and this year we're really focusing on our strategic review – a root-and-branch review of what we do, how we go about it and how to serve our members. Underpinning all that is making sure that R3 is sustainable, and that we have the right operating and financial structure for a new strategy.

**Q How has R3 changed in the last 15 months since you took over?**

**A** We've done the operational review, which was looking at our business structure, how our teams are structured and how we use our resources efficiently.

One of the more tangible changes is that there are more opportunities for engagement with members. That stems from us looking at how we communicate and where we have successes or not, but also ensuring that if members want to be involved with R3's activities, then they absolutely have the ability to do that.

**Q What will be the most noticeable change for members?**

**A** There are more R3 people on the ground interacting with members. We introduced a new business development team this year, whose remit is to engage with members about what they see on the front lines, how the profession is developing, what market trends they see and feeding that back to R3 so we can adapt our services.

In the next 12–18 months, there will be more visible changes. We're working closely with a member-led taskforce, as part of the strategic review, to look at R3's membership options and member benefits, so there could be changes to come there, for example. We're also updating our IT platform, which will allow us to interact with members more effectively.

**Q Do you feel that R3's members' fees are good value for money?**

**A** The value of R3 and what members get for their membership is, understandably, a perennial question. Member value dictates everything R3 does. There are activities most members will see first-hand, like our courses or our technical help, but there's also huge value in having an organisation that gives the profession a voice to promote and defend itself in front of the public and key stakeholders.

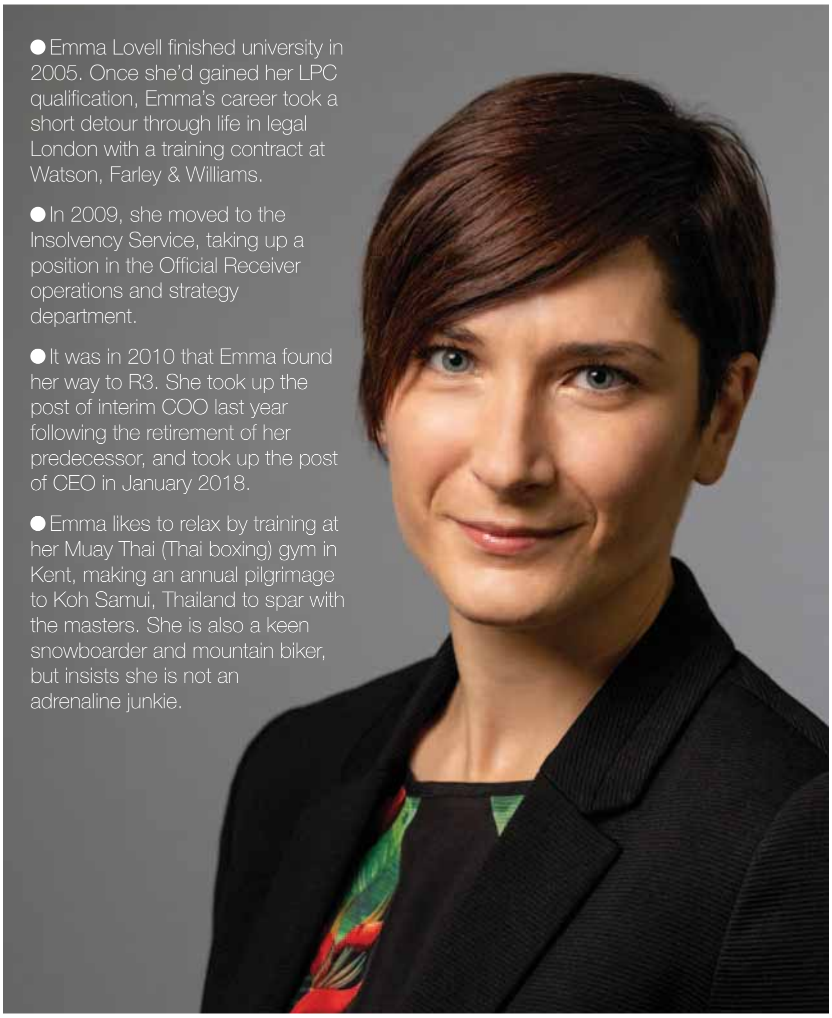
If R3 wasn't here to work with government and parliament on legislation, policy developments and regulation, and to educate others on the work of the profession, the insolvency and restructuring world would be a very different place.

> "We introduced a new business development team this year, whose remit is to engage with members about what they see on the front lines."

However, part of the strategic review is seeking 'warts and all' feedback from members. We know we need to deliver more value than ever before and are open to talking about what extra value members would like, including more work by R3 or activities in certain areas. »

## Emma Lovell biography

- Emma Lovell finished university in 2005. Once she'd gained her LPC qualification, Emma's career took a short detour through life in legal London with a training contract at Watson, Farley & Williams.
- In 2009, she moved to the Insolvency Service, taking up a position in the Official Receiver operations and strategy department.
- It was in 2010 that Emma found her way to R3. She took up the post of interim COO last year following the retirement of her predecessor, and took up the post of CEO in January 2018.
- Emma likes to relax by training at her Muay Thai (Thai boxing) gym in Kent, making an annual pilgrimage to Koh Samui, Thailand to spar with the masters. She is also a keen snowboarder and mountain biker, but insists she is not an adrenaline junkie.



**Q What's been your proudest achievement to-date at R3?**

A I don't think there is one defining moment. I could say 'becoming CEO', as I'm very proud of that, but actually I feel most proud when I think about the team here. Over the last 12–18 months they have really risen to the challenge and embraced what R3 is doing with so much energy and positivity.

**Q Diversity and inclusion (D&I) was high up on Stuart Frith's list of priorities for his term as president – do you think the insolvency and restructuring profession needs to become more diverse?**

A Achieving improvements in D&I in any profession is an ongoing and organic process – there's always more that can be done. On a personal level I'm proud to be the first female CEO of R3 and I hope that my work in this role can act as a further catalyst for, or a discussion point around, the profession's commitment to D&I.

Liz Bingham started R3 on the journey of D&I and how we as a trade association can support that when she was president, and our strategy going forward needs to continue this trend. We need to be looking at ways we can support D&I, and we also need to be more attuned to the needs of younger professionals. I'd like to work out ways that we can attract them at the start of their careers and make their journey through R3 worthwhile.

**Q Is this the sort of thing that's always in the news: the millennial generation entering the profession?**

A We have our younger professionals' committees within R3, but I think there is more we can do to give newer professionals more of a voice and to capture their enthusiasm and ideas. R3 has some way to go in updating its technology to make it more interactive and innovative so that we are attracting 'millennials' or the generation after. We will be exploring ways of doing that in 2019.

**Q What's surprised you most about your time with the profession?**

A It's not a surprise, but one thing that has always impressed me is the sheer amount of dedication and passion of the people who work in the insolvency and restructuring profession. Even after eight years at R3, there are still moments when I'm in a committee or council meeting and I'm just struck by the energy and enthusiasm – it motivates me to get out of bed in the morning.

**Q How do you think the insolvency and restructuring profession is perceived at the moment?**

A It's a mixed bag at the moment. On the positive side, I think that the messages that R3 continuously delivers about the value of the profession and its importance to the economy, and in assisting individuals and businesses, are getting through. On the flip side there are challenges. This year, the spotlight of press and parliamentary scrutiny has been and will remain on the profession, not least because of the very high-profile insolvencies that have occurred and the continued scrutiny on ethics and wider accounting practice – R3 and the profession need to work together to demonstrate why the criticisms are, in the large part, unfounded.

**Q What happens at R3 on the morning of a high-profile insolvency?**

A It gets very busy! There have been a few big cases this year. We don't comment on the specifics of cases, but we use newsworthy insolvencies to educate journalists on what the process and key issues might be. It can be as basic as explaining what a liquidator is, how redundancies are handled, or, for a big retailer, how vouchers are treated or what a CVA is. The comms team works hard during the year to make sure journalists know who we are and that we can help explain the insolvency process to them. When a big story breaks, the phones go a little bit nuts as our contacts get in touch. The team helps journalists improve their understanding of what's going on before they start writing it up.

> "I think there is more we can do to give newer professionals more of a voice and to capture their enthusiasm and ideas."

Another example was the government's announcement of its corporate insolvency framework and corporate governance reforms. It was all hands to the pump making sure that we had our comments and analysis ready to go, and that the executive team was fully briefed for a BBC Radio 5Live interview (live) at silly o' clock in the morning on a bank holiday Sunday.

**Q What key challenges are on the horizon for the insolvency and restructuring profession?**

A Well, Brexit. R3 has been working very hard with parliamentarians and the Insolvency Service to make sure that the cross-border recognition of insolvency appointments is maintained post-Brexit. However, as with every other profession and section of the UK economy, we're still in limbo while we wait and see what deal the government is able to get.

Creditor perceptions and concerns around particular insolvency processes have been coming to light, particularly around CVAs and their use on the high street. We also have the single regulator review, which the government will be working on over the next two to three years, and the spotlight is firmly on perceptions around conflicts and ethics.

There's lots of positive, proactive things for the profession, too. We're pleased to see the announcement on the corporate insolvency framework reforms, which we've been campaigning on for two years, for example. We do see opportunities to improve the toolkit for insolvency and restructuring professionals in the UK, which would make sure that we maintain London and the UK's presence as a global hub for restructuring and insolvency.

**Q What one thing would you like R3 members to know about R3?**

A I would like them to know how much work goes on behind the scenes. There's a dedicated and experienced team working here on a daily basis on behalf of members, but we can't always communicate all of the little things that happen. It's the bits that members don't see which can be really important. It could be speaking to MPs before a select committee inquiry, trying to make sure they know what they're talking about. It could be getting members to meet with government departments to discuss policy ideas before they become legislation. Or it could be passing members' technical queries onto the regulators or the Insolvency Service. You might not always be able to see R3's fingerprints on things, but the chances are that we – and our members – will have been involved at some point.

**Q What would you have done if you didn't enter the world of insolvency?**

A If I'd maybe started martial arts at a younger age, perhaps I would've been a professional Muay Thai fighter. ◻

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