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RECOVERY

Offshore
Near and far

Treasure Island
Tracing assets in Paradise

Corporate structures
Why a considered corporate structure may be important to the success of a group

Optimising recovery in the PRC
The challenges facing foreign IPs in the People's Republic of China

From ruin to recovery and retribution
The collapse of Weavering Capital

The bankruptcy squeeze
A blow to creditors and a boon to debtors

It's time to address this issue
Air your views on the effect that partial licensing will have on the insolvency profession

Smaller Practices Group
Advice regarding changes under the Insolvency (Amendment) Rules 2015

Interview with Phillip Sykes
The incoming R3 president on challenges to the insolvency profession

What do you think?

Readers' views are welcome. Got an opinion about a burning issue? Want to comment on articles or RECOVERY itself?

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From the editor

As I write, the new Business Secretary, Sajid Javid, is announcing another Enterprise Bill, saying, 'As part of our long-term economic plan, we will sweep away burdensome red tape [and] get heavy-handed regulators off firms' backs'. We may yet see some relief from the excessive regulation of his predecessor, even if it might be optimistic to hope that the minister will decide not to introduce the highly regulatory partial licensing regime provided for in the recent Deregulation Act. Stephen Allinson seeks input on JIEB's reaction to the previous government's partial licensing provisions on p16.

Another provision of the Deregulation Act is found wanting by Chris Umfreville of the University of Wolverhampton on p32. Inept drafting (and a lack of consultation) fails to allow abridgment by agreement of the notice period for prescribed persons prior to the out of court appointment of an administrator. A solution could be introduced in the forthcoming Insolvency Rules revision – let's hope it is!

Peter Whalley on p7 also considers the last government's legislative death throes, in this case in relation to the pre-pack pool. Doubting the pool's efficacy, he suggests that the profession might take the moral high ground (to avoid the connected party sale ban provided for in the Small Business, Enterprise and Employment Act, in case the pool does not have the 'desired effect') and argue to limit the size of an incumbent management's ownership stake for a period after a connected party sale.

Lastly on regulation, Gareth Limb on p38 draws our attention to some of the provisions about fee estimates in the Insolvency (Amendment) Rules 2015. Although guidance in the form of a revised SIP9 is needed before we can be clear about the new requirements, all IPs and their staff would benefit from reading and considering this article.

More constructively, Hamish Anderson, my illustrious predecessor, on p8 sets the scene for our offshore theme by considering the development of the principle of universalism to avoid competition between jurisdictions in cross-border insolvency proceedings. Several relevant common law jurisdictions are considered as we then explore the Weavering Capital fraud (p20), why offshore regimes are used (p17), features of those regimes in the British Virgin Islands (p22) and Jersey (p26) and their importance in PRC restructuring and insolvency (p24).

R3's technical updates focus in this issue on tax (p11 & 13) and, emphasising the commercial and practical nature of restructuring and insolvency, Rita Lowe's Legal Q&A (p15) reminds us that our world is one of uncertainty and pragmatism.

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

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One in six invoices paid late

Survey indicates the amount owed in late payments now stands at £41.5bn.

New research by R3 shows that almost one in six (15 per cent) invoices is paid late – an issue affecting half of all UK businesses. Given that previous research has shown that late payment is a primary or major factor in 20 per cent of all corporate insolvencies, R3 and the Federation of Small Businesses (FSB) are highlighting the practice. They are calling on the government to make a change to the culture of late payment, a particular issue for smaller suppliers awaiting payment from large companies.

Andrew Tate, R3 vice-president, said that late payment puts unnecessary strain on a business' cash flow, increasing the risk of insolvency and, despite previous campaigns, the practice remains all too common.

'Businesses know how much it costs others to chase down debts, and feel they can still get away with it,' he said, adding that some customers saw a business insolvency as an opportunity to further delay payments or avoid payment altogether.

'Doubts over cash flow caused by late payment can make it impossible to continue to trade a business in administration until a buyer is found,' he said. 'A year ago, the FSB found half of its members had been paid late in the previous year. Although the government is keen to make an impact on late payment, progress has been disappointingly slow over 2014 and 2015 with the number of businesses affected by late payment stubbornly high.'

Mr Tate's comments were echoed by John Allan, National Chairman of the Federation of Small Businesses, who said: 'The weight of evidence showing the damage poor payment practices are having on the UK economy grows greater each day with the amount owed in late payments now at £41.5bn. Once again we find it is sole traders and smaller firms that are facing the brunt of late payments, and this is putting viable businesses at risk of closure.'

He said that the UK's poor payment culture – particularly from large companies towards their smaller suppliers – must be a top priority for the new government.

'Small businesses see progress on payment practices as a key benchmark of success for the new administration,' he said.

To read R3's latest news updates visit: **www.r3.org.uk/news-room**

Sajid Javid MP

Government to cut £10bn of red tape

Secretary of State for Business, Innovation and Skills, Sajid Javid, has announced government plans to cut red tape for businesses by at least £10bn over the next five years. Under a new enterprise bill, the government's stated aim is to make Britain the best place in Europe to start and grow a business, with the expectation that two million more jobs will be created.

The government says it will look beyond Whitehall at independent regulators for the first time. The government also plans to create a Small Business Conciliation Service to help settle disputes between small and large businesses, especially over late payment practices.

Read Sajid Javid's speech here: **https://www.gov.uk/government/speeches/support-for-small-business-government-plans**

UK pensioners set to benefit from Nortel asset distribution

US and Canadian courts have ruled that former UK employees of Nortel Networks should receive an equal share of the company's assets in an unprecedented joint ruling. Pensioners could have lost out to bond investors in the US and Canada, who were arguing that they should receive the lion's share of the $7.3bn sum raised from the sale of the company's assets after it entered insolvency in 2009.

Jonathon Land, PwC pensions partner and adviser to Nortel's trustees, said: 'This is a fair decision for pensioners around the world. All too often the rights of pensioners, who have worked hard for a company all their lives, are given a lower priority than other corporate claimants. This decision sees pensioners treated fairly.

'We concluded that a pro rata allocation approach was the most appropriate in the circumstances. Despite opposition from the bondholders who were looking to receive interest on their original claim, we are pleased to see that the judges in both Canada and the US ruled that our approach to allocation was the most appropriate.'

Read more on the PwC blog here: **http://pwc.blogs.com/press_room/2015/05**

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President's column

Phillip Sykes sets out his vision for the year ahead.

I am writing this column from our 25th Annual Conference in Berlin where, among a host of other topics, we have been celebrating the achievements of the profession and R3 as an organisation.

The insolvency profession and regime are fundamental parts of UK plc. Just because the economy has returned we hope, to sustained economic growth, it doesn't mean insolvency issues will disappear: businesses will still need rescuing, creditors will still need their debts recovered, and indebted individuals will still need a fresh start. Indeed, the prime minister's post-election words to his party about 'repair, recovery, and renewal' closely echoes R3's 'Rescue, Recovery, and Renewal' credo. Insolvency matters.

> "Insolvency does not exist in a vacuum and we, as a profession, need to be aware of the changing expectations that others have of us."

It's true that, for the most part, new insolvency-specific legislative changes are probably not what the regime needs. With a raft of changes due to come in from October, a period of stability during which these changes can be implemented and reviewed is preferable. But what certainly should be avoided are changes to the insolvency regime as an unintended consequence of other legislation.

Insolvency is so stitched into the fabric of the economy and wider society that policy from across government can end up impacting the insolvency profession's work.

Take, for example, the Jackson Reforms introduced by LASPO Act, where there was inadequate consideration of the impact it would have on the insolvency regime, creditors, and negligent directors.

Due to strong lobbying we obtained an initial two year exemption and a lot of time has been spent since 2012 to persuade the government to re-think the Act and its impact on creditors. The campaign to have insolvency permanently exempted from the Act continues this year, and we will continue to push to get the government to recognise the value of giving insolvency special consideration.

And, thanks to those R3 members that took the time to take part in 2014's Value of the Profession survey, we have the facts and figures to back this up when we talk to ministers and the new cohort of MPs.

According to the research, carried out in conjunction with pollsters ComRes, launched at R3's annual conference in May, the UK's insolvency profession: rescued some 6,700 insolvent businesses (about 40 per cent of those we worked with); helped save 230,000 jobs; offered advice to 70,000 businesses; advised 135,000 people about their finances; set individuals on the path to repaying £5bn of debt to creditors in the next five years; and helped 60,000 individuals through an insolvency procedure.

There is, then, a lot at stake if insolvency is not considered in the development of new legislation across government.

While the profession is entitled to have our value recognised – and in the 25 years of R3, it's fair to say the organisation has played an important part in raising awareness of the value of the profession – this can't all be one-way traffic. We can't expect our value to be simply be recognised; we have to demonstrate continuously that value and ensure that what we consider valuable is actually considered valuable by others too.

As I have argued, insolvency does not exist in a vacuum and we, as a profession, need to be aware of the changing expectations that others have of us. While the profession might see its primary goal as getting a return to creditors, other stakeholders expect more. Likewise, the director community has gone through a similar change: once, delivering maximum value to shareholders was the ultimate goal to the exclusion of other objectives; now, there has been a sea-change in expectations. Environmental and social considerations have equal importance.

With regard to insolvency, part of the problem is communication. The more creditors engage with the insolvency process, the more they understand the reasoning behind the insolvency practitioner's actions and the more likely they are to see the value the IP is contributing.

However, given that many creditors are either apathetic or being exposed to a complex area of law for the first time (often, the latter issue contributing to the former), they are unlikely to engage unprompted. The profession needs to do more to shine a light on what we do, and as far as possible make creditors feel part of the decision-making process, rather than being kept at one remove. Insolvency shouldn't be a black box: increased transparency engenders increased trust.

A number of reforms this year should help in this regard, and they should be embraced by the profession even if they do add an element of red tape to what we do. The up-front fees estimate (which, in any case, is far preferable to the alternative of banning time-costs, as was originally proposed) and the pre-pack 'pool' should increase creditor understanding of how insolvency works. There is also the excellent new creditor insolvency guide produced by R3 (www.creditorinsolvencyguide.co.uk), which is a valuable tool for IPs to educate creditors about the insolvency process.

In my year, R3 will be working with government and other stakeholders to highlight the value of our work: understand better what others expect, and raise awareness of the insolvency profession's perspective and thinking. We will support legislation and reforms that increase trust and transparency in the insolvency regime, and oppose proposals that could shut the creditor out. With the new Insolvency Rules, much discussed at the R3 Berlin conference, and increased interest in insolvency – rest assured we will keep a close eye on developments.

> "The more creditors engage with the insolvency process, the more they understand the reasoning behind the IP's actions and the more likely they are to see the value the IP is contributing."

Insolvency matters. It is my goal that more than just the profession but all those we serve and support, recognise that. ▫

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

Should pre-pack sales to phoenixes be banned?

Peter Whalley offers a personal reflection of the latest developments.

In its spring newsletter, issued in March, The Insolvency Service published an article with the headline 'Cleaning up pre-packs' over a photograph of Vince Cable. It reported that the business secretary welcomed progress by the steering group of creditor and insolvency organisations in relation to increased transparency in pre-pack sales. The article went on to say that it expected Teresa Graham's recommendation of a pre-pack pool – to review pre-pack sales to connected parties – would start work this summer.

It is disappointing that, even in its final days, the last government continued to headline pre-packs as some sort of widespread abuse – despite Teresa Graham's own observation that there was a place for pre-packs. The reality, that most of the public resentment actually relates to 'phoenix' purchasers rather than pre-pack sales per se, is one that the government does not see any need to acknowledge, so there becomes a risk that the last government's intervention actually fuels the perception of abuse in cases where none exists.

The complaints gateway

One of the government's first initiatives to address perceived abuses – the creation of the complaints gateway – has failed to demonstrate much real concern about pre-packs. In its August report on the first year of the gateway's operation, The Insolvency Service revealed that just seven complaints (ie one per cent of the total) were about pre-pack administrations – to connected parties or otherwise.

Nevertheless, as part of the review of the insolvency regime within the Small Business and Enterprise Act there is a proposal to create a reserved power to prohibit pre-pack administration sales to connected parties (if certain criteria are not met) should the pool not have 'the desired effect'. Whatever the effect being looked for, it clearly may not be achieved. Although initially I welcomed Teresa Graham's proposal of the pool – and the fact that it targeted connected purchasers rather than administrators – with time to reflect I am more doubtful that it will have much effect.

The argument advanced is that this will provide greater confidence to unsecured creditors and other affected stakeholders that a pre-pack represents the best outcome for them. I question, however, whether connected purchasers will feel a need to secure a 'kitemark' from

> "Just one per cent of complaints were about pre-pack administrations."

the pool as a route to public acceptance of the terms of a purchase. Also, as a seasoned campaigner, I have an ingrained belief that an IP's objective is always to achieve the best possible outcome for creditors – though I remain to be persuaded that administration should be conducted with regard for 'other affected stakeholders'.

The unpalatable truth

We all understand that in any sale of an insolvent business, an incumbent management wishing to purchase will have an information advantage. The incumbents will not need to undertake any due diligence to obtain an understanding of the business that is for sale since they should be intimately acquainted with its operations. Consequently, they should not need to discount the sum that they might be prepared to pay to reflect the risk – that arm's-length bidders face – when the administrators do not provide any warranties, disclosures or indemnities. The unpalatable truth for some is that, subject to funding, a connected purchaser will often feel able and willing to offer more than an outsider. For an IP looking to obtain the best result for creditors, such a connected purchaser has to be taken seriously. For this reason, most IPs and R3 would argue that it is not in the public interest to restrict our ability to sell to connected parties.

It occurs to me, therefore, that instead of resisting restrictions on sales to connected parties we could adopt a more open–minded stance. If we accept that the public preference may be to curtail 'phoenixing' at the expense of creditor returns, we need to embrace this and work with it.

While we could still resist an outright ban, we might argue for restrictions about the size of ownership stake the incumbent management should be allowed to hold for a given period after purchase – say three years. This need not preclude, for instance, a venture capital trust (VCT) backed management buy-in, buy-out, which could incentivise management to turn the business around with a shareholding ratchet, or a trade purchaser wishing to retain some of the incumbent management team. Indeed, such limited restrictions might act more effectively than the pre-pack pool – relying on market forces to ensure that a purchasing entity was properly capitalised and had a robust and viable business plan.

Although there may need to be much more thought into the details of such restrictions and the manner in which they are enforced, by adopting such a position we might seize the moral high ground. Were limited restriction to gain sufficient support to be introduced we might preclude an outright ban that lies in wait if the pool does not meet the heavy expectations imposed on it. We might also reduce the preconceptions about what we do and curtail the activities of the small number of IPs (and ambulance chasers) who do not always remember who IPs are there to serve – ultimately reducing the regulatory burden that we carry. We might also find that a greater number of arm's length purchasers emerge – if they perceive the sales process will be a level playing field – which might still provide the competitive tension we need to conclude successful business sales. ◻

PETER WHALLEY is head of restructuring and insolvency at James Cowper Kreston.

Ebbs and flows of universalism

Hamish Anderson considers 21st century developments in universalism in English law.

Universalism is the principle of private international law that there should be one set of insolvency proceedings applicable to all the debtor's assets and liabilities instead of potentially competing proceedings dealing with local pools of assets and liabilities. True universalism could only be achieved by international treaty but 'modified' universalism is the unilateral pursuit of the same desirable goal as far as is possible having regard to local laws. It is immediately apparent that modified universalism has both inward and outward facing aspects. Naturally States find it easier to espouse outbound universalism for their own proceedings than to accord full inbound effects to foreign proceedings, and England is no exception.

> The Privy Council regarded the opposition to the plan as being both pointless and devoid of any merit.

Although universalism in English law, as a response to foreign insolvency proceedings, can be traced back to the 18th century, this *Legal Update* is concerned with 21st century developments in the Supreme Court and the Privy Council starting with the decision in *Cambridge Gas Transportation Corpn* v. *Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. In the light of the more restrained approach latterly adopted by the court (treating the Supreme Court and the Privy Council as one for these purposes), all earlier precedents must now be treated with caution. That is not to say that they are all necessarily wrong but, to the extent that they were based on the reasoning in *Cambridge Gas*, they may be found to be so.

This *Legal Update* will examine the direction of travel of the court, how its decisions have been affected by changes in its composition and the reasons for its evident discomfort in developing this area of the law.

Cambridge Gas

With the benefit of hindsight, *Cambridge Gas* can be seen to have been the high-water mark of inbound universalism. The case was decided by the Privy Council on appeal from the courts of the Isle of Man but it was decided according to principles that were equally applicable to England. The question was whether to give effect to a US Chapter 11 reorganisation plan that provided for the assets of an insolvent business to be taken over by its creditors, which entailed divesting the shareholders in a Manx company of their shares and vesting them in a creditors' committee. Opposition to the plan by the controlling interest in the shares gave rise to a technical issue about the classification and enforcement of foreign judgments. The Privy Council regarded the opposition to the plan as being both pointless (because the same result could have been achieved by a scheme of arrangement under Manx law) and devoid of any merit. In a visionary judgment Lord Hoffmann held that insolvency orders were outside the scope of the general rules on the enforcement of foreign judgments and that the court had a common law power, based on universalism, to provide assistance to foreign proceedings by doing anything that it could have done in a domestic insolvency. It was the sheer breadth of that conclusion that prompted differently constituted panels of the court to retrench in later cases. Little now remains beyond bare support for the principle of universalism with its practical application now being limited to the exercise of discretion.

HIH

Before the process of retrenchment began, Lord Hoffmann returned to the fray in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. This was a case before the House of Lords in which the Australian liquidators of an insolvent insurer sought remittal of reinsurance recoveries held by English provisional liquidators appointed in ancillary proceedings. The underlying issue was that Australian and English distribution rules were different so that the application of one or the other would materially affect particular creditors. Unlike *Cambridge Gas*, *HIH* was a case in which the Australian liquidators could invoke s426 Insolvency Act 1986 where the court has a qualified duty to act in aid of foreign insolvency proceedings and they presented their case on that basis, not on common law.

Despite having lost at first instance and before a unanimous Court of Appeal, the Australian liquidators' appeal was unanimously upheld in the House of Lords. Such cases are relatively rare and sometimes signify a seismic shift in the law. That would indeed have been the case in *HIH* if the Appellate Committee as a whole had endorsed the reasoning of Lord Hoffmann but, in the event, only Lord Walker agreed with him. Lord Hoffmann held that recourse to s426 was unnecessary because the court had the necessary power at common law. He described modified universalism as a 'potent' principle and as the 'golden thread' running through English cross-border insolvency law, which required the English court to co-operate with foreign main proceedings as far as was consistent with justice and UK public policy. Lord Scott and Lord Neuberger profoundly disagreed. They considered that, in the absence of s426, remittal could not have been ordered because to do so would entail an impermissible disapplication of the English statutory scheme. The final member of the panel, Lord Phillips, agreed with the result under s426 but expressly declined to comment on whether there was also a common law power. Fault lines had therefore begun to appear in the court.

> Lord Hoffmann described modified universalism as a 'potent' principle and as the 'golden thread' running through English cross-border insolvency law.

Rubin

The decision of the Supreme Court in *Rubin* v. *Eurofinance SA* [2013] 1 AC 236, that a default judgment in US transaction avoidance proceedings was not enforceable in England, has proved to be controversial but in the author's opinion the conclusion was correct even though some of the reasoning was regrettable.[1] The majority judgment was delivered by Lord Collins who approached the issue through the application of general rules of private international law on the enforcement of foreign judgments (contrary to Lord Hoffmann's approach in *Cambridge Gas*, which had been to treat insolvency orders as being outside those rules). Universalism was downplayed as 'only a trend'. It was held that avoidance judgments in insolvency proceedings are not materially different from other judgments under which defendants are ordered to make payments or return property and that the ordinary rules as to the enforcement of foreign judgments should apply. That meant that, unless there had been submission to the foreign jurisdiction or the defendant was present in that jurisdiction when the proceedings were commenced, the judgment was not enforceable at common law.

Although the defendants in *Rubin* deserve little sympathy (a point that emerges more clearly from the judgment of Ward LJ in the Court of Appeal), there are a number of objections to foreign transaction avoidance judgments being more liberally enforced. First and foremost, there is a constitutional objection that protection from foreign judgments is an aspect of UK civil liberty and its removal is a matter for Parliament not judges. Secondly, there are the practical difficulties of formulating an alternative set of rules to determine whether (in the eyes of English law) the foreign court had jurisdiction to make its order. Thirdly, the lack of certainty for defendants who would have the unenviable choice of defending and thereby rendering a judgment enforceable or allowing judgment in default to be obtained against them and still possibly finding that judgment enforceable. Lastly, there is the potential for injustice in that foreign transaction avoidance rules are not necessarily directed to restoration of the parties to their original (pre-transaction) positions.

> There is the potential for injustice in that foreign transaction avoidance rules are not necessarily directed to restoration of the parties to their original (pre-transaction) positions.

The majority went on, quite unnecessarily and apparently without argument, to hold that *Cambridge Gas* had been wrongly decided. This was the product of reconsidering it purely in terms of established rules on the enforcement of foreign judgments but the effect was to split the court. Lord Mance delivered a judgment concurring in the result but reserving his position on *Cambridge Gas*. Lord Clarke delivered a dissenting judgment (the first dissenting judgment in an insolvency case since the Supreme Court replaced the House of Lords). Lord Clarke did not agree that *Cambridge Gas* had been wrongly decided and, on the contrary, applied Lord Hoffmann's approach in both *Cambridge Gas* and *HIH* to conclude that the US judgment in *Rubin* should be enforced.

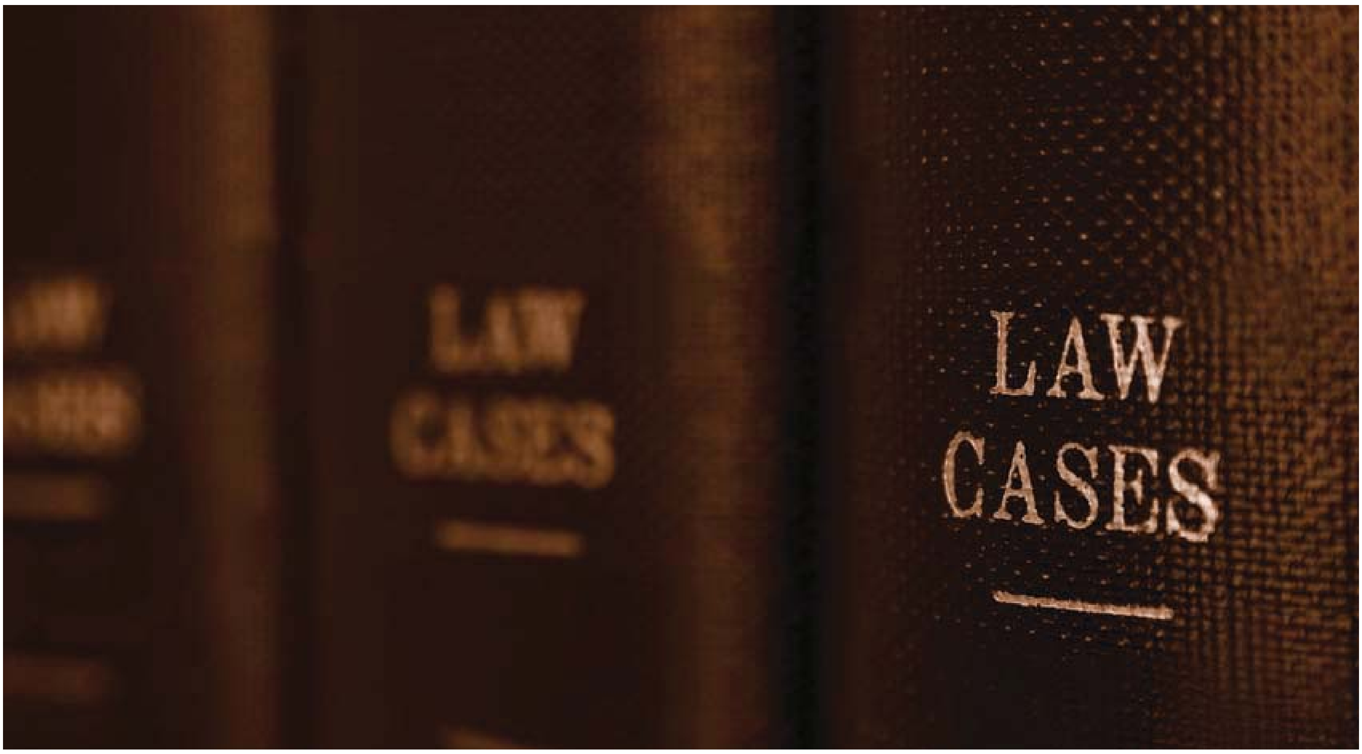
It is important not to exaggerate the significance of *Rubin* in terms of the ebbs and flows of universalism. It is true that, with the exception of Lord Clarke's dissenting judgment, there is a lack of emphasis on universalism as the starting point. However, the proposition in *Rubin* was a novel one and the Supreme Court merely declined to enlarge the scope of judicial assistance at common law. The retrenchment, such as it was, lay in the disapproval of *Cambridge Gas* by the majority, which was to presage other more serious reconsideration in *Singularis*.

Singularis

Singularis Holdings Ltd v. PricewaterhouseCoopers [2015] BCC 66 arose out of forum shopping by Cayman liquidators for the purpose of overcoming deficiencies in their examination powers under Cayman Islands law by using more extensive Bermudian powers. The Cayman liquidators applied to the court in Bermuda (where their prospective examinees were based) to exercise common law power to act in aid by ordering examination as if the Bermudian legislation applied.

> There is still an abiding question as to whether anti-suit injunctions are an adequate substitute for according statutory stays extra-territorial effect.

The case is not easy to summarise because it is an unusual example of a Privy Council decision being supported by five separate judgments. However, they were all agreed that the absence of any equivalent power under Cayman law was fatal, in other words that common law could not apply so as to enable a foreign liquidator to do abroad that which he could not do under the law pursuant to which he had been appointed. Unfortunately this short determinative point is not reasoned in any of the »



judgments. Lord Sumption, delivering the first judgment, appears to have regarded it as an obvious consequence of the relevant power being one of assistance. The other members of the panel simply agreed with his conclusion. There is an undeniable logic to limiting common law assistance in this way but the court nonetheless made new law. The question was one of policy. It is suggested that the Board could have considered the UNCITRAL Model Law under which there is no such limitation. That would not be to apply the Model Law as if it formed part of Bermudian law but rather to take it as illustrating an international standard that could properly be followed as a matter of policy. The consequence of the Privy Council's approach is that common law assistance is now confined to cases where the relevant power exists *both* in the jurisdiction where the proceedings have been opened *and* in the jurisdiction which is being asked to act in aid.

> It remains to be seen what part Lord Wilson, a recent appointee to the court, will play.

So far as the jurisdiction being asked to act in aid is concerned, the necessary power could be conferred either by legislation or common law. The Privy Council divided on this question. A majority was prepared to extend the law to recognise a limited common law power to assist foreign insolvency proceedings in the gathering of information but the minority disagreed.

Barely two weeks after delivering judgment in *Singularis*, a differently constituted Privy Council delivered judgment in *Stichting Shell Pensioenfonds* v. *Krys* [2015] 2 WLR 289. The issue was whether British Virgin Islands (BVI) liquidators were entitled to an anti-suit injunction to require a Dutch creditor to relinquish a conservatory attachment, over the debtor's credit balance on its account with the Dublin branch of a Dutch bank, which the creditor had obtained from the courts in the Netherlands. Two further facts are important: first, the conservatory order had not resulted in any pre-liquidation proprietary interest and, secondly, the Dutch creditor had submitted a proof of debt in the BVI liquidation. It was held that an anti-suit injunction is, in principle, always available where it is required to 'serve the ends of justice' and that preventing interference with the statutory scheme for distribution in an insolvency serves the ends of justice. The person to be enjoined must be 'amenable to the jurisdiction of the court' but, in addition to more general grounds for jurisdiction, any person who submits a proof submits to that jurisdiction. There is still a discretion to be exercised but, on the facts of *Stichting Shell*, an injunction was appropriate.

This was a strong endorsement of universalism, albeit in its easier outbound form. There is still an abiding question as to whether anti-suit injunctions are an adequate substitute for according statutory stays extra-territorial effect. In the author's opinion, the assertion of a robust anti-suit jurisdiction is to be welcomed but it remains an inferior solution because the default position is that foreign attachments are permissible.[2]

The way forward

There are evident difficulties in the court reaching a consensus on issues of cross-border co-operation and there is some force in the judgments in *Singularis* about this being the province of legislation and the limited role of judges in making new law. The court's decisions following *Cambridge Gas* have not been particularly clear or consistent.

Of all the judges who sat in *Cambridge Gas* and *HIH*, only Lord Neuberger now remains in the court (as its president). Lord Neuberger delivered one of the minority *Singularis* judgments to the effect that there is no power at common law to assist in the gathering of information. He also advocated a minimalist approach to what he described as a 'tricky topic' and expressed the view that further developments were a matter for Parliament. Lord Collins, whose judgment in *Rubin* severely damaged the Hoffmann vision, is no longer a member of the court but he is survived by Lord Sumption who supported him in *Rubin* and helped him to finish the job in *Singularis*. Lord Mance, who reserved his position on *Cambridge Gas* in *Rubin* but led the minority opposition to the extension of common law power in *Singularis*, remains as does Lord Clarke who dissented in *Rubin* but concurred in rejecting relief in *Singularis*. Although judgments of considerable erudition were delivered in both *Rubin* and *Singularis*, they represent a reassertion of orthodoxy. Lord Clarke's decision in *Singularis* appears to signal a retreat from his own dissent in *Rubin* and leaves the court with no member obviously supporting the more progressive approach. It remains to be seen what part Lord Wilson, a recent appointee to the court who sat in *Stichting Shell*, will play, but it is worth noting that he was one of the members of the Court of Appeal whose decision in *Rubin* was overturned by the Supreme Court.

It is important to appreciate that the *Singularis* approach to common law assistance is of limited relevance to how the English courts will deal with similar issues in the future because of the extent to which legislation in this jurisdiction – s426, the EC Regulation and the Cross-Border Insolvency Regulations 2006 – already makes provision. It is of much greater importance to those jurisdictions that still have the Privy Council as their final court of appeal and that have not enacted any comparable legislation. In the author's view, it is not the function of the Privy Council to fill the gaps in local legislation. Jurisdictions that do not enact the Model Law must be taken to have chosen not to do so.

> Jurisdictions that do not enact the Model Law must be taken to have chosen not to do so.

Of perhaps greater significance for English law were the decisions in *Rubin* that neither s426 nor the 2006 Regulations are concerned with the enforcement of foreign judgments (conclusions that seem entirely correct as a matter of interpretation). Despite the author's support in principle for the decision in *Rubin*, there may be scope for a more liberal approach to the enforcement of judgments where it can be seen that the same result will follow if local proceedings are instituted (as in *Cambridge Gas* and, as the Court of Appeal appears to have thought, in *Rubin* itself).

The difficulties appear to be more about the existence of jurisdiction than how to exercise jurisdiction once it has been found. One way to proceed would be to consider amending s426 to make it available to all jurisdictions instead of merely a prescribed list and to permit enforcement of foreign judgments where additional local proceedings would be pointless. That might entail diluting the qualified duty into a discretionary power but it would cut through the jurisdictional hurdles at a stroke leaving the courts to deal with the merits on a case by case basis applying English or the foreign law as they think fit. ◻

1 See further: H. Anderson, *Six of the Best: The Record of the Supreme Court in the Insolvency Cases decided in its First Four Years* [2014] JBL 194.

2 See further: H. Anderson, *The Extra-Territoriality of the Statutory Stay in an English Administration* (2014) 23 Int Insolv Rev 40.

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Technical update

The changing world of tax.

There are currently 99 consultations listed on HM Revenue and Customs' (HMRC's) website, an indication of the many tax changes that are currently being proposed and implemented. The good news is that HMRC is consulting. However, the concern is that it rarely considers the impact its measures will have on businesses and individuals in distress or subject to an insolvency process. Where these consultations impact our members, the R3 Tax Committee has been responding so that the concerns of our members are represented. In this article, we will focus on three recent issues that will affect those dealing with insolvencies.

A corporate rescue exemption for debt releases

In 2013, HMRC began a consultation to update and simplify the loan relationships legislation, but nearly two years later, while we have seen draft legislation that was released on 10 December 2014, the legislation was not included in the pre-election Finance Act. The consultation is still on-going.

> Who is qualified to say that the company would fail within 12 months if the restructuring had not taken place? HMRC?

The loan relationships legislation deals with how debt, and debt related items, are taxed and is one of the most complicated parts of the tax legislation. It also happens to be one of the most applicable to those dealing with distressed and insolvent businesses.

As the legislation currently stands, when debt between unconnected parties is released the credit arising in the debtor company is taxable; not ideal when the company in question is in financial distress. There are exemptions to take the credit out of the charge to tax and these include releases that are part of a formal insolvency arrangement, eg during a CVA. However, there is little to exempt companies that have to release or restructure debt to avoid insolvency, other than an exemption for debt for equity swaps, but this can involve steps that may not be commercially practical.

Members of R3 sit on the consultation committees with HMRC and have been instrumental in the introduction of a new 'corporate rescue exemption'. This exemption should result in the credit on a release of debt not being taxable if, 'immediately before the release, it is reasonable to assume that, without the release… there would be a material risk that at some time within the next 12 months the company would be unable to pay its debts'. It has been proposed that the exemption will be effective from 1 January 2015, but only when it has been enacted. Although it is hoped that it will be included in the second Finance Act of 2015, if there is one, it cannot be relied on until it has received Royal Assent.

While the exemption is to be welcomed, there are still unanswered questions as to its application. Who is qualified to say that the company would fail within 12 months if the restructuring had not taken place? HMRC? We would have concerns whether it has the expertise to opine on insolvency matters. Will directors be comfortable making such an assessment or will companies be forced to obtain a statement from an insolvency practitioner to certify that the 12 months condition will be met? Time will tell.

In addition, the proposed exemption does not go far enough. Currently, if a debtor and creditor become connected and the value of the debt is impaired, the debtor could be taxed on the amount of the impairment by way of a 'deemed release'. The corporate rescue exemption as currently drafted does not cover such a deemed release, although this issue is under discussion with HMRC.

Tax on interest rate hedging product (IRHP) compensation

The banks are having to make large compensation payments to those of their customers who, it has been deemed, were mis-sold IRHPs. The compensation is intended to put the customer in the same position had they not taken out the IRHP, or had they taken out a more suitable product. This compensation often consists of a refund of the payments made on the product, interest on these payments and potentially compensation for any consequential loss.

The tax implications of the compensation will depend on the tax circumstances of the recipient. The customer is likely to have taken out the IRHP for business purposes and therefore may have claimed a tax deduction for the interest payments they made. As a result, the repayment of those interest payments is likely to be taxable. The interest on the » repayments is also likely to be subject to tax and, as a result, the customer could be facing a higher than normal tax liability. While that additional tax may be taken into account when calculating the consequential loss, the situation can be complex for those who took out these products and are now in an insolvency process, especially if the compensation is set off against the debt owed to the lender.

HMRC and the R3 Tax Committee are in consultation to agree an approach to IRHP compensation received by those in an insolvency proceeding; R3 is seeking a complete exemption from tax for the compensation receipt if no monies are received. If the accrued amount is taxable in the insolvency then those losing out will be the other creditors, not the taxpayer, and this goes against the whole principle of compensation.

> "Compensation often consists of a refund of the payments made on the product, interest on these payments and potentially compensation for any consequential loss."

Determining the tax treatment of the IRHP post insolvency could take a long time and depending on how far back the compensation goes, the relevant information may not be available, resulting in delays to agreeing the tax affairs of the insolvent business and thereby the making of distributions and finalisation of the insolvency.

IRHP compensation is a 'one-off' event and not a complex plan by the taxpayers to avoid tax and therefore the only sensible way to deal with it for those subject to an insolvency process is to have an agreed approach with HMRC. This will provide the insolvency practitioner with certainty on how to treat the compensation and enable them to pass the benefit of the realisation to the creditors.

Operating real time information (RTI) post insolvency

RTI was introduced in April 2013 and from that date employers have to inform HMRC electronically how much they are paying each employee before or at the same time as they make that payment. The government's aim in introducing RTI was to enable HMRC to pass details of people's income to the Department for Work and Pensions in 'real time' so that it could calculate eligibility for Universal Credit (although this objective has been overtaken, as the introduction of Universal Credit has fallen behind its original schedule). While the introduction of RTI for many employers has been relatively smooth, it has caused issues for insolvencies, as HMRC did not consider them when it introduced the scheme, despite representations by R3 and others in the industry.

There are several issues in insolvency that make operating RTI difficult and, from a creditor's perspective, uneconomical. As members are no doubt aware, some insolvencies can take a very long time and, therefore, when the creditors are paid, details of their National Insurance number or current address can be hard to obtain. The dividends themselves may be small, so is it really worth the time and cost of setting up a payroll scheme to pay a modest one-off sum to the ex-employees?

The R3 Tax Committee is consulting with HRMC on this and is seeking a total exemption from the requirements of RTI when paying dividends to creditors in insolvency situations. This would not remove the obligation to fully operate RTI in trading insolvencies nor to deduct tax from payments where necessary, just the requirement to inform HMRC electronically of the dividend payments on or before they are made. So far, while seemingly sympathetic, HMRC has not committed either to grant an exemption or agree a *de minimis* amount under which RTI does not have to be operated. Payments to ex-employees who have, hopefully, gone on to other jobs, or retired, are unlikely to have much, if any, effect on the amount of Universal Credit they will be entitled to, notwithstanding the delays to its introduction and therefore the objective of RTI is barely impacted by creditor payments.

These are a few of the most topical tax issues but the general election (which is impending at the time of writing) makes further changes almost certain in the near future. Tax, and tax avoidance, have been at the forefront of the election manifestos

> "Is it really worth the time and cost of setting up a payroll scheme to pay a modest one-off sum to the ex-employees?"

for all of the major parties and with at least one more budget and another Finance Act expected this year, a whole host of new tax policies lie in store for us to digest. ◻

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Technical update Scotland

Heather Gibson details the Scottish approach to Land and Buildings Transaction Tax.

From 1 April 2015, Stamp Duty Land Tax (SDLT) ceased to apply to transactions involving land in Scotland and was replaced by the Land and Buildings Transaction Tax (LBTT). The Scottish government controls the tax base and the rates. LBTT is collected by Revenue Scotland, the new Scottish tax authority, working in conjunction with Registers of Scotland. The administrative arrangements for LBTT are different, for example LBTT has to be paid (or arrangements satisfactory to Revenue Scotland entered into) when the LBTT return is submitted. LBTT returns are simpler than SDLT returns, and the online system is more modern and user friendly.

LBTT is a progressive tax, slices of the price are charged at different rates on both residential and non-residential purchases. SDLT is still charged as a slab tax (ie the whole of the price is taxed at the same rate) on non-residential purchases. These differences mean it is not possible to compare the headline rates of SDLT and LBTT. Like SDLT, LBTT is chargeable on any VAT payable on the price.

> "This relief is claimed up front by the developer but clawed back if the development does not take place within five years of completion."

LBTT rates for commercial, agricultural and other non-residential properties are lower than the residential rates. The commercial rates will also apply to purchases of 'mixed' residential and non-residential property, eg a shop with a flat above, or a landed estate where some of the land is used for business purposes. The purchase of six or more residential properties is taxed at the non-residential rates, as are purchases of student accommodation, care homes and similar buildings.

LBTT applies only to commercial leases. The charge on leases is based on a net present value (NPV) calculation, and actual rents, rather than the highest rent in the first five years. Tenants are required to submit returns at the beginning of a lease and on a three-yearly basis throughout its duration. A return must also be submitted at the end of a lease and on assignation of a lease. The NPV will be recalculated when each further return is submitted and any additional LBTT paid, or overpayment, reclaimed. Increases in rents due to rent reviews or otherwise after the first five years of a lease are taken into account for LBTT.

For the most part the reliefs and exemptions under LBTT are the same as those under SDLT. However, there is no general sub-sale relief for LBTT causing a double charge on sub-sales. Instead regulations provide for a development sub-sale relief for developers involved in forward funding transactions and other transactions where there is a sub-sale of land and significant development (those requiring planning permission) is in prospect. This relief is claimed up front by the developer but clawed back if the development does not take place within five years of completion. The LBTT multiple dwellings relief (MDR) works differently from the SDLT equivalent. The LBTT payable on a purchase with MDR cannot be less than a minimum prescribed percentage of the LBTT payable without the relief. The prescribed percentage is set at 25 per cent.

The introduction of an LBTT means specialist advice should be taken in respect of structure, the tax consequences and the administration requirements of Revenue Scotland. □

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Further information

Commercial (including agricultural and mixed)

- 0% until £150,000
- 3% between £150,001 and £350,000
- 4.5% on the remainder of the price over £350,000

Residential

- 0% until £145,000
- 2% between £145,001 and £250,000
- 5% between £250,001 and £325,000
- 10% between £325,001 and £750,000
- 12% on remainder of the price over £750,000

For purchases below £333,000, the LBTT cost is lower than SDLT, but at higher prices LBTT is more.

Based on these rates, the LBTT on a £70m purchase of a non-domestic property would be £3,140,250 as compared with SDLT at £2,800,000, an increase of £340,250. On a £15m purchase, the LBTT would be £65,250 more than the SDLT and at £10m it would be £40,250 more.

Recent case summaries

Latest insolvency update from **Amit Gupta**.

CORPORATE INSOLVENCY

***Re BW Estates Ltd* [2015] EWHC 517 (Ch)**

Facts: A creditor challenged the administrators' fees pursuant to R2.109; the creditor accepted that the appointment of the administrators was valid, however, contended overall there was no good reason for the company to enter into administration because:

a) the company could have continued to make payments to a secured creditor, who had already appointed LPA receivers over the major assets;
b) sale of these properties would leave a surplus (subject to a dubious creditor claim);
c) no creditors were pressing for payment; and
d) there was sufficient cash at the bank to discharge all other outstanding debts.

The creditor argued that post-administration the company's position had not been improved but instead the assets had been depleted by the costs of the administration. The creditor urged the court to accept the administration was designed to frustrate the creditor or reduce assets by incurring costs.

Decision:

HHJ Cooke found that where the assets of a company are managed while its (potential) liabilities are being investigated, that can be described as rescuing a company as a going concern pursuant to paragraph 3(1)(a) of Schedule B1 to the IA 1986. He went on to say that *'I do not consider…the word "rescue" implies that the administrators must themselves do or achieve something which could not otherwise happen, but only that the administration should enable a going concern to be preserved when it otherwise would or might not be…'*.

Further, the court held that it did not matter that *'the administrators had no clear idea of how this process would unfold at the time of their appointment…or that they would in all probability play no part in the management for realisation of the properties in the hands of the LPA receivers…'*.

In considering the director's motives the judge asked *'does it matter that the director…may have acted for the improper motive…in my view it does not…'* so long as the administrators *'could properly have made the statement that the statutory purpose of administration was reasonably likely to be achieved…'*.

If directors have acted for an improper purpose or otherwise breached their duty to the company in appointing an administrator that may give rise to a separate claim, however, a *'prospective administrator considering whether the administration purpose (s) can be achieved is to look headlong and not at the motives…'*.

HHJ Cooke did not, however, absolve administrators completely: when directors have taken advice in coming to their decision to enter administration then the advisers, including prospective administrators, have a duty to the company.

The corollary is that while an administrator must be able to ascertain what the purpose(s) of the administration is, and have some viable basis for asserting this, the administrator does not need to know precisely how an administration might unfold.

> The crucial point is that the statutory purpose is assessed at the time a company is placed into administration and not assessed after the event.

This is an IP-friendly case and has the hallmarks of a court trying to avoid disgruntled creditors from attacking administrators who set out to serve a purpose in what might be a murky environment and in which ultimately nothing changes as a result of an administration; the crucial point is that the statutory purpose is assessed at the time a company is placed into administration and not assessed after the event.

PERSONAL INSOLVENCY

***Re John Cahillane* [2015] EWHC 62 (Ch)**

Facts: The petitioner served a statutory demand on Mr Cahillane; an application to set aside the demand and for an extension of time to adduce further expert evidence on valuation was dismissed as it did not go far enough to demonstrate that the value of the security held by the petitioner was equal to, or exceeded, the debt. HHJ Pelling QC rejected an appeal from that decision finding the expert evidence was insufficient and should have given a view on the current (not projected) value.

Mr Cahillane made an application pursuant to s375(1) to vary or rescind the order of HHJ Pelling QC on the basis that his expert could produce a schedule with a current valuation. Registrar gave directions on the application but gave permission to the petitioner to appeal.

Decision:

On appeal the court reiterated that the s375(1) jurisdiction ought to be exercised sparingly and is not a review of the previous order but consideration of whether the previous order ought to remain in light of changed circumstances or fresh evidence, but it is ultimately discretionary.

The judge considered the well-known comments in *Appleyard* v. *Wewelwala* [2012] EWHC 3302 (Ch) and found the comments were not only obiter but wrong. The judge then considered the very recent decision in *Sands* v. *Layne* [2014] EWHC 3665 (Ch), which was not obiter, but found that he was not bound by this decision as it wrongly considered *Wewelwala* was binding. He was therefore free to make his own decision.

The judge said *'I do not see why the fact that the order was made on appeal should prevent it from being varied or rescinded…I hold that s375(1) does give the court jurisdiction to review, vary or rescind the appellate orders of HHJ Pelling QC'*.

The jurisdiction under s375 is an important one (particularly for bankrupts) – the jurisdiction can be exercised by a judge at first instance (without referring the application to a senior judge) even if the underlying decision was one on appeal. There is an outstanding appeal in *Sands* but until then *Cahillane* is the leading authority giving first instance judges a broad discretion.

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

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Legal Q&A

Rita Lowe answers your insolvency queries.

Q I am advising a creditor in relation to its security. A company incorporated outside the EU (X) has granted my client a share charge over the entire issued share capital of its English subsidiary. The share charge is governed by English law and there is an exclusive jurisdiction clause in favour of the English courts. It seems that X is insolvent and is about to go into an insolvency process in its home jurisdiction. Is there anything a foreign office-holder could do in England to prevent my client from enforcing the share charge?

A Assuming X's centre of main interests is not in the EU, the EC Regulation on Insolvency Proceedings will not apply. However, the UK has implemented the UNCITRAL Model Law through the Cross-border Insolvency Regulations 2006 (CBIR). As the CBIR do not require reciprocity of implementation, the English courts would

> "Relief cannot be granted where it would interfere with the rights of a collateral taker."

apply these where a foreign office-holder seeks assistance regardless of whether the office-holder's home jurisdiction has implemented the Model Law. As the share charge is governed by English law and there is an exclusive jurisdiction clause, the foreign office-holder would need to apply to the English courts in order to prevent the charge from being enforced.

You may wish to take local law advice regarding the relevant foreign insolvency proceedings and the office-holder's powers, but even if under the applicable insolvency law a moratorium on creditor action would apply on X's insolvency, this moratorium would not be automatically recognised by the English courts. The foreign office-holder would need to apply to the English court for recognition of the insolvency proceedings as foreign main proceedings within the meaning of Article 2 of Schedule 1 to the CBIR. Upon recognition of main proceedings, an automatic stay would usually follow, but this automatic stay does not restrict secured creditors enforcing their security. The foreign office-holder would therefore need to request discretionary relief under Article 21 of Schedule 1 to the CBIR in the form of a stay. As relief is discretionary, the court may refuse to grant relief, although normally the courts are willing to assist where they can unless there are policy reasons not to.

A further potential difficulty for a foreign office-holder is that the CBIR clearly state that relief cannot be granted where it would interfere with the rights of a collateral taker under Part 4 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (FCA Regulations). It is arguable that the share charge would fall under Part 4, in which case the court could not grant relief in the form of a stay that would prevent the exercise of appropriation rights pursuant to the FCA Regulations. However, financial collateral (in this case the shares charged) is defined in the FCA Regulations as being *'delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker'*. It would need to be established that the requisite level of control existed over the shares in order for the FCA Regulations remedies to be available.

Finally, the foreign office-holder may seek an injunction preventing your client from appointing a receiver over the shares. To do this, the office-holder would need to show an underlying cause of action or claim against your client. However, in the absence of wrong-doing, it is unlikely a court would be willing to grant an injunction.

Q I am advising a supplier to an oil exploration and production company. The company has just received a letter telling them that they are reducing payments by 20 per cent effective immediately. What should I advise?

A Supply chain companies providing assets and services to oil exploration and production companies are suffering hugely in the current volatile oil market, as are the oil companies themselves. Advisers to oil companies have (rightly) identified the need to make quick reductions in costs. Consequently requests to suppliers to reduce payments or even attempts to get out of a contract altogether are not unusual. Restructuring professionals will be aware that a similar approach was taken by retailers with landlords in the post-2008 recession: unilaterally reducing rental payments, knowing that many landlords would rather receive some income than risk a tenant entering insolvency and losing that income stream altogether.

Legally, in most cases the oil company will have no right to reduce payments and the supplier will be under no obligation to accept the proposal. The supplier may have rights to terminate the contract based on the notification (if for example the oil company admits insolvency); the supplier may also have a right of termination based on repudiation of contract. In either case, if the supplier decides to terminate, the supplier should take advice on how to proceed as the basis of termination can determine what level of damages can be claimed and whether there is an obligation on the non-defaulting party to mitigate loss.

However, in practice, the supplier (like those landlords) may have little choice but to negotiate with the oil company and agree a reduced rate, in order for the contract to continue. If that is the case, the supplier should consider how it can make sure it is being treated fairly compared with other suppliers. If the supplier agrees to a reduction, it should try to ensure that the oil

> "The supplier should consider how it can make sure it is being treated fairly compared with other suppliers."

company's improved cash flow is not being used to pay other suppliers who refuse to agree. The supplier may also wish to consider a deferral or temporary reduction, rather than a permanent contractual change, so that when oil prices improve it is not locked in to a reduced price contract. Of course, if the supplier's services are critical and not easily replaceable, the supplier may have a better negotiating position.

Like any distressed scenario, much of the answer will depend on the commercial leverage of each party, as much as (if not more than) contractual rights. ◻

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It's time to address this issue

Stephen Allinson calls on IPs to air their views on the effect that partial licensing will have on their profession.

It has certainly been an interesting time for the insolvency profession. Whereas, and perhaps understandably, much has been written about the proposed set of new Insolvency Rules; the brave new world of fees that the profession will soon have to embrace and the insolvency provisions in the recently passed Small Business, Enterprise and Employment Act 2015 (not to mention the ongoing pre-packaged administration saga); the Deregulation Act 2015 also has some very relevant provisions for all those involved in the personal and corporate recovery worlds.

This particular piece of legislation, which was passed on 26 March 2015 as part of the rush before Parliament was dissolved, is described as:

'An Act to make provision for the reduction of burdens resulting from legislation for businesses or other organisations or for individuals; make provision for the repeal of legislation which no longer has practical use; make provision about the exercise of regulatory functions; and for connected purposes'.

At first blush, as perhaps gleaned from the above preamble to the Act, this is a totally bizarre piece of legislation. It covers a myriad of different areas of life, ranging from workplace measures; business measures generally through to alcohol, sport and entertainment issues (as the popular newspapers like to tell us, it seems 'all human life is here')!

Many would feel that as a profession we would cover all these matters anyway through our various assignments, but tucked away in this Act, at ss17–19 are some interesting company and insolvency law provisions, which are also cross-referred to in Schedule 6.

Any reader wishing to find those provisions, should look immediately after s16, which concerns the sellers of knitting yarn, and among other things, revokes the well-known Weights and Measures (Knitting Yarns) Order and then stop before s20, which gives additional protection for rights of way in the Countryside and Rights of Way Act 2000!

However, whereas those provisions may be of little interest, s17 itself, which is the one that deals with the authorisation of insolvency practitioners, has caused a lot of debate in our profession and introduces into law, for the first time, the concept of Partial Insolvency Licences.

As the press release accompanying the Act from The Insolvency Service states, *'A new regime will allow for the partial authorisation of insolvency practitioners. In future, insolvency practitioners will be able to be authorised in relation to companies, individuals or both (as is currently the case).'*

And further, *'The secretary of state will no longer directly authorise insolvency practitioners so, in future, all insolvency practitioners will be authorised by Recognised Professional Bodies'.*

There are also other miscellaneous insolvency provisions, including new provisions around the appointment of administrators and bank accounts for bankrupts, but those are not the subject of this article.

The relevant partial licence provision, s17, can be found at http://www.legislation.gov.uk/ukpga/2015/20/section/17/enacted/data.pdf and is well worth downloading and studying.

It is important to remember though, that this provision is not yet in force, and the Act stated that except as provided by specifically as to dates, the provisions of this Act come into force on such day as the secretary of state may by order made by statutory instrument appoint. At the time of going to press, we are still awaiting a commencement date for this section, but it is anticipated it will happen in or after October 2015.

As the chairman of the Joint Insolvency Examination Board, I have written in *RECOVERY* magazine, and stated publicly, that if and when these provisions came into force, then the board would have to act proactively to ensure that the qualification process to become a licensed IP reflected the changes.

At present, it is a necessary part of qualification acceptance as an IP that the Joint Board examinations are passed, and as many in the profession will know, although they do not all have to be passed at one sitting there are strict rules of ensuring that an overall pass in all papers is obtained in a time limited period.

So, how is the profession proposing to adapt its qualification process to reflect that some may only want to qualify for personal (or indeed corporate) work and solely practice in these discreet areas?

At the risk of laying myself open to criticism, I have decided, with my board's approval, that we should take the lead on this issue and I want to announce through *RECOVERY* magazine that I will be inviting representatives of the relevant RPBs together with other interested parties (for example examination tutors and technical personnel from firms and R3) to meet and work through issues and proposals to assist all in ensuring that we are ready for these changes, and our examination and qualification process is still fit for purpose. I realise that this is a difficult issue and the concept of partial licences has been a hotly contentious issue for many. However, the die is cast and so now we must move forward.

Perhaps I could start the debate by putting forward some initial thoughts:

1. Would it be enough to have a single paper for either a personal or corporate licence, or should a core paper also be taken by all candidates?
2. If the answer above is in favour of a core paper, what should that cover?
3. Would practitioners envisage that partial licences would effectively apply only for personal work, or is it possible that some may seek a licence for corporate work alone?
4. What is the view of 'transitional' licensing? For example, there are some candidates who have already passed a personal paper of JIEB as it stands now? What further examinations should they take (if any) to obtain a partial personal licence?
5. Given that JIEB exists through a memorandum of understanding with RPBs, how should that be redrafted or reconsidered?
6. What are practitioners' views on the interesting new provisions on partnership work? How should we reflect those in an examination process?

Therefore, in summary, I believe we have a lot of work to do in this area, and it is imperative that we begin the process now, so we are not 'caught out' on timescales.

Any reader who has an interest or observations on these issues should please contact me through the email address below.

I hope that by working together we can enhance the qualification process to become a licensed IP, which remains a very prestigious professional qualification.

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Corporate structures

Why a considered corporate structure may be important to the success of a group.

International market expansion, access to global funding and centralisation of business functions are increasingly areas of focus for businesses seeking to maximize growth and market share. This remains equally so regardless of whether a business is in a start-up phase or an established market force.

Against this backdrop, and in a fluid market, an ambitious business needs to continually assess its commercial and strategic objectives and refine its business plan to gain competitor advantage. Part of this requires a business to consider how it should be internally organised to augment opportunities for efficiency and cost savings.

“A business's corporate structure may evolve over time through organic growth as the territories in which it operates change and expand in light of consumer demand.”

A business's corporate structure may evolve over time through organic growth as the territories in which it operates change and expand in light of consumer demand. It may also inherit a corporate structure through acquisitions. This can often create a very expansive and complex group structure that may not best serve the commercial needs of a dynamic business.

When a business operates in multiple jurisdictions some consideration needs to be given by management to which of these jurisdictions, or indeed another, may best serve the needs of the business, strategically and commercially, as the jurisdiction from which to run the business.

In this regard, management may have a preference for a jurisdiction that maximises flexibility, facilitates ease of expansion and aids in the efficient operation of the group. Management may also be influenced by where they are based and whether the global business is managed on a territory by territory basis or on a divisional basis, requiring multiple holding companies.

As a consequence, this can be a complex decision and each commercial driver needs to be carefully thought through, as the end result may have a material impact on the operation of the business.

Commercial needs of a business

The commercial drivers will vary from business to business but management's preferred group structure, and where to run the business from, is likely to rest on the specific business objectives relevant to the particular business, taking into account the stage of the business life cycle and growth potential.

Typically, the following may be considered by management and guide their decision, albeit this is not an exhaustive list:

- the location of the business's markets
- the location of the investor base
- availability of certain skills in a particular jurisdiction
- the supplier base
- the stability as well as flexibility of the business
- the political environment and stability of the jurisdiction
- considerations relevant to specific sectors or industries.

When a holding company jurisdiction is identified, factors such as the regulatory, legal, accounting and tax frameworks in that jurisdiction, together with the way in which that territory interacts with other jurisdictions, may then be examined by management in helping to supplement their knowledge of a given territory.

We have explored below some of the generic legal, accounting and tax considerations that may be of relevance.

Legal considerations

There are various legal considerations to be taken into account when reviewing a jurisdiction in which to set up a new company in a group to act as either a holding company or an active company. These include the following:

- The speed and cost of incorporating new entities – jurisdictions that are keen to attract businesses generally make it easy to incorporate and form legal entities and, while some jurisdictions such as the UK are relatively quick and inexpensive, this is not the same in all jurisdictions.

“Management may have a preference for a jurisdiction that maximises flexibility, facilitates ease of expansion and aids in the efficient operation of the group.”

- The choice of service providers and ongoing operation costs – ongoing operation costs can be a major drag on return. Where required, high-quality service providers will be needed to support the operations and the business will need to balance the investment cost and quality of service to be provided.
- Choice of entity – each jurisdiction has its own choice of entities and in some the choice is far wider than others. For example, it is possible in some jurisdictions to establish companies with no equity shareholders.
- The ease with which capital can be raised and returned to investors – some jurisdictions may be more flexible when »

it comes to returning capital and making dividends and other distributions. As noted, the location of potential investors is therefore a key consideration.

- Legal flexibility – on some occasions, a business may need a very particular entity for a particular commercial purpose. In some territories the law enables businesses to design new forms of commercial vehicles where there is no suitable off-the-shelf vehicle.

> Certain investors strongly prefer to invest through a limited number of jurisdictions they are familiar with.

- Regulatory flexibility – if an entity is being established to operate in a regulated market (such as an insurance company), the cost and speed of process for obtaining the necessary regulatory approvals to commence business with the flexibility afforded by the approval needs to be considered.
- Passporting rights – throughout the European Union (EU) it is possible to 'passport' certain documents required by listing regimes that have been approved by one member state into another member state without them having to be re-approved. This opens up the whole of the EU as a base for listed companies as, for example, there is no requirement to be registered in the UK in order to be able to list on the UK Listing Authority.
- Convenience – an important factor is where the majority of the directors, or at least the key individuals, are located and the ease with which directors and others can attend board meetings.
- The attitude of counterparties and funders – in certain parties (for example, parties who contract regularly with public sector entities), the use of certain jurisdictions may be unacceptable to their counterparties. Likewise, certain investors strongly prefer to invest through a limited number of jurisdictions where they are familiar with, and have experience of, the way in which the jurisdictions operate.

Accounting considerations

Businesses may need to consider whether the accounting methodology applied in the jurisdiction is sufficiently flexible for their needs. For example, some businesses may prioritise having a choice of accounting framework and a choice in the basis on which the ability to make distributions is determined.

Accounting framework

- Companies incorporated in the EU are bound by laws driven by EU directives that generally require accounts to be drawn up under EU-endorsed International Financial Reporting Standards (IFRS) or local Generally Accepted Accounting Principles (GAAP) that compliant with EU-wide principles. While for most groups this presents no specific challenges, there are situations where a degree of flexibility can lead to benefits for individual companies or groups.

> Companies incorporated in the EU are bound by laws driven by EU directives.

- The benefit of this flexibility depends on the function of the company in question. Non EU-registered companies listed on regulated exchanges in the EU may benefit from the ability to apply an accounting framework other than IFRS

(for example US GAAP or Japanese GAAP). Such companies may be issuing equity instruments (ie ultimate group holding companies), or debt (eg a euro or sterling financing vehicle issuing listed bonds). Consider the case of a group from outside of the EU that has never before prepared IFRS accounts, but prepares accounts under an established GAAP, seeking a new listing on, for example, the London Stock Exchange. Such a company may seek to use a Jersey company as the listing vehicle so that it can continue to prepare accounts on the same basis, but obtain access to European capital markets. In our experience, some groups value having a 'plc' suffix when accessing capital markets without needing to incorporate a UK top company.

> “In some jurisdictions, solvency frameworks predominate.”

- Similarly, a US-listed group, preparing and filing accounts under US GAAP in respect of a US listing, may wish to raise funds on EU debt markets to finance EU operations using a local debt issuing company. Using an EU-registered company will likely mandate the preparation of an IFRS consolidation for the finance company and any subsidiaries, effectively leading to parallel ledgers being required under US GAAP and IFRS (and potentially a third, local, GAAP). The use of an offshore company as the issuing company may reduce the compliance burden for such a group significantly.

Distributions

- Distribution frameworks vary significantly across jurisdictions, but are broadly divided into two categories: *capital maintenance* frameworks, where the determining factor for distributions is usually the balance sheet, and there is a general principle that distributions cannot be made out of capital, and *solvency* frameworks, where the directors usually have greater freedom to make distributions, subject to demonstrating the solvency of the company.
- In the EU, and many jurisdictions globally (in particular in Southeast Asia), capital maintenance frameworks dominate. In the case of the EU this is enshrined in EU directives, and so while some solvency-based procedures exist for reducing capital – in the United Kingdom for example, and in draft legislation in the Republic of Ireland – in general there is a restriction on making distributions out of anything other than profits.
- In some jurisdictions, solvency frameworks predominate. These can take a number of forms, but there is often no specific requirement for profits in order to make a distribution. This can help repatriate cash more effectively.

Tax considerations

A jurisdiction's tax regime, including the overall complexity and stability of the tax legislation, may make operating in some territories more challenging than others. For each territory that a business operates in, including its holding company, the following may be areas that a business would want to reflect on as part of the management of its group.

- Income attribution rules – in some jurisdictions there are tax rules that seek to bring into the charge to tax profits that arise outside the jurisdiction in question. For example, under the UK controlled foreign company rules (CFC) it may be possible for an apportioned amount of profits earned by subsidiaries outside the UK to be taxed where these are resident in a jurisdiction with a lower tax rate than the UK.
- Taxes on repatriation of profits:
  - Dividend payments – it is important to understand whether a tax exemption or credit system, under local law or any applicable double tax treaty, exists for dividend payments or other income distributions received by the holding company.
  - Withholding tax (WHT) – WHT on dividends, interests and royalties, taking into account the relevant double tax treaty, are key tax considerations on repatriation of profits to investors. Some jurisdictions have wider double tax treaty networks than others.
  - Clearly the type of investor, and where they are located, should be considered.
- Taxes on exit:
  - Capital gains tax – on a future exit, some jurisdictions tax capital gains; however, other territories may either exempt these or do not have taxing provisions covering gains.
  - Transaction taxes or transfer duties – these vary in different jurisdictions. For example, there is no capital duty in the UK but stamp duty is payable on the acquisition of shares and stamp duty land tax applies to land transactions.

Other key tax considerations include:

- Loss utilisation rules – if an investment is not profitable, it will be necessary to consider whether and how relief may be obtained for losses arising in the company: for example, whether a loss-making company can be grouped for tax purposes to offset the taxable profits of a profitable group company, and the extent to which losses can be carried forward or back.
- Relief for finance costs – how different tax reliefs for funding costs apply in different jurisdictions.
- Advance agreements and rulings – whether it is possible to gain clarity upfront from a jurisdiction's tax authority and obtain advanced rulings.
- Tax incentives – any incentive schemes or reliefs available in the jurisdiction including for R&D and innovation.
- The tax compliance regime – complexity of tax legislation and the administrative burden required to be tax compliant in a jurisdiction.

> “The business does need to consider the broader impact of the legal, accounting and tax factors that may apply in the jurisdictions in which it operates.”

Summary

Whether a business is reviewing its existing group structure or looking to expand internationally and establish in other jurisdictions, management's commercial drivers will be the primary navigator in considering how best to structure the group, including the preferred jurisdiction of its holding company.

However, alongside this, the business does need to consider the broader impact of the legal, accounting and tax factors that may apply in the jurisdictions in which it operates, including its holding company, to allow management to be best placed to understand and address any associated challenges. □

The authors would like to thank the following for their contribution: Scott Brady, Graham Roberts and Rachel Hossack.

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From ruin to recovery and retribution

Sion Richards and **Barnaby Stueck** examine the collapse of Weavering Capital.

Rock musicals with explicit content and films about Hitler's escape to Argentina after WW2 are not the kinds of investments most of the institutions, charities and pension funds thought their returns depended upon when they invested into a Cayman Islands fund managed by one of the UK's oldest hedge fund managers. Yet liquidators (formerly administrators) appointed over the investment management company, Weavering Capital (UK) Limited, in March 2009 quickly uncovered a range of investments far removed from investors' expectations.

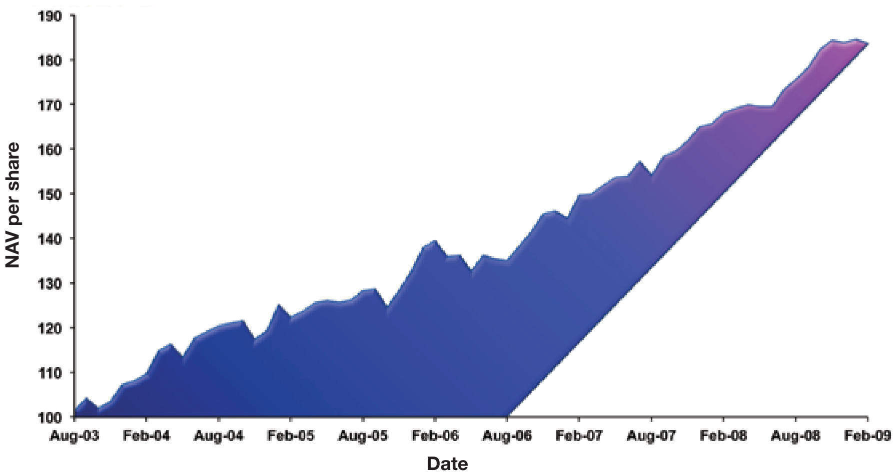
Weavering's founder and chief investment officer, Magnus Peterson, promised an investment strategy that was low risk, carefully hedged and highly liquid. Yet Weavering's flagship Cayman Islands fund held over $600m of interest rate swaps with one counterparty, a British Virgin Islands (BVI) entity called Weavering Capital Fund (WCF), whose limited assets included investments in a short-lived English production of the musical *Spring Awakening*. Not only that, WCF was Magnus Peterson's private investment vehicle, presenting something of a conflict of interest.

Finally, on 23 January 2015, nearly six years after his fraud was uncovered, Magnus Peterson was sentenced at Southwark Crown Court to 13 years' imprisonment. It is one of the longest sentences handed down in recent years, outstripping those of other recent high-profile convictions, including that of Asil Nadir, Polly Peck's founder, and Kweku Adoboli, the UBS rogue trader.

Mr Peterson

In light of the fact that Mr Peterson's victims had lost $530m, full recovery was not on the cards. Ensuring that Mr Peterson was brought to justice was, therefore, a high priority for creditors. Given the scale of Mr Peterson's fraudulent scheme, a criminal prosecution should never have been in doubt but the reality was very different. In fact, the Serious Fraud Office (SFO) controversially dropped its investigation into Weavering in September 2011, just weeks before the start of the trial of English civil proceedings brought by Weavering's liquidators, citing a lack of evidence and insufficient public interest. Indeed, had it not been for the total commitment of Weavering's creditors to the pursuit of civil claims against Mr Peterson and their willingness not only to give evidence in criminal proceedings but also effectively to fund much of the complex forensic investigation that was necessary to bring about both civil and criminal trials, a prosecution would likely never have happened.

Macro Fund's reported NAV per share



It all began in August 2003. With two failed hedge funds under Mr Peterson's belt, the Weavering Macro Fixed Income Fund Limited (referred to as the 'Macro Fund') needed to be a success. Marketed as a low-risk fund, with a 'collared' trading strategy, its offering memorandum boasted that losses would never be more than 5 per cent of the portfolio in any one month. Except that the Macro Fund lost 20 per cent in its first month of trading. Facing personal financial ruin and professional embarrassment, Mr Peterson covered up that initial loss (of $100,000) with an OTC (over the counter) trade with his personal investment company, WCF. It worked: no-one complained and Mr Peterson planned to recover the 20 per cent and get back to positive returns. That was the theory. In fact, the story thereafter is a familiar one: further losses entrenched the problem and the cover-up became systemic. Then the losses escalated dramatically as bigger and bigger bets went against Mr Peterson.

In the meantime, investors piled into the Macro Fund, attracted by its fantastically consistent (and, it turns out, fabricated) trading record. Within five years, assets under management had climbed to over $600m.

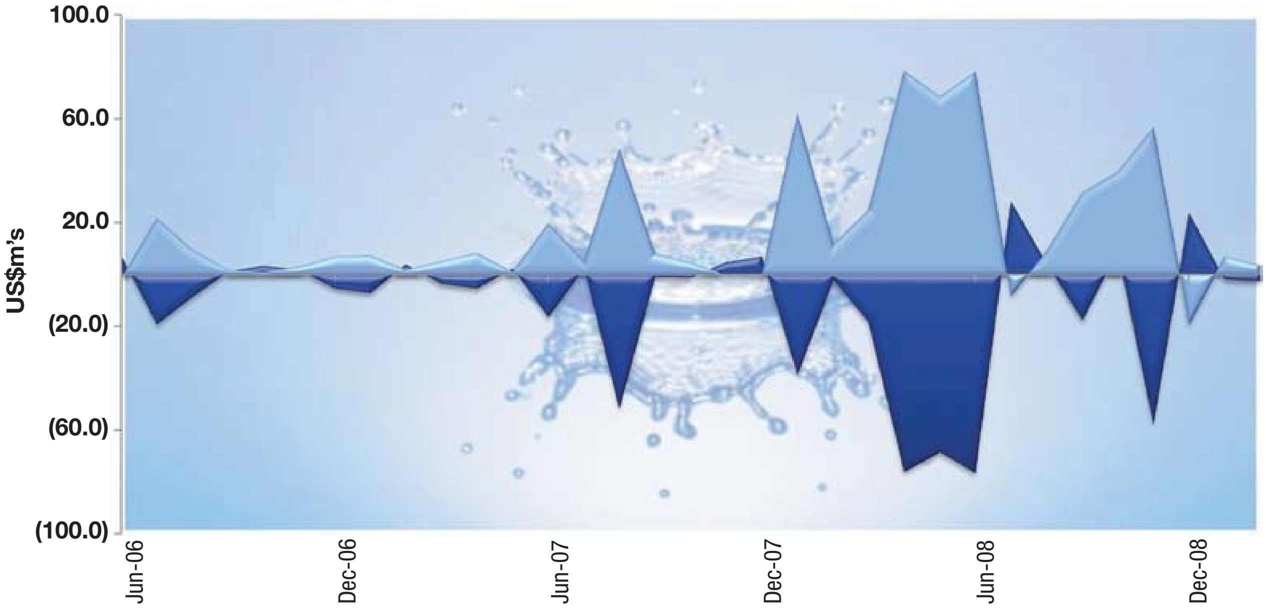
By the time the music stopped in March 2009, $536m of investors' money had been lost on options and futures trading and covered up with sham interest rate swaps, all of which had been entered into with WCF. Indeed, when represented graphically for the civil trial, the use of sham swap trades to cover up losses on real trading could not have been more obvious.

In the two weeks following Duff & Phelps' appointment as liquidators of Weavering Capital and PwC Cayman's appointment as liquidators of the Macro Fund, investigations revealed a litany of defects with the swap trades: signatures had been forged, trades had been back-dated, interest payments had not been made, trades had been put on at off-market values and valued incorrectly, and half the ISDA documentation was missing. Mr Peterson's brother and step-father, who were the directors of both the Macro Fund *and* WCF, also claimed to be completely unaware of the swap trading between the two entities.

The English liquidators quickly recognised that the management company was liable to indemnify the Macro Fund in respect of its trading losses so they immediately commenced proceedings against Mr Peterson for fraud and negligence, obtaining a freezing and passport delivery up order in support. At the same time, the SFO moved in to raid both Weavering Capital's Mayfair offices and Mr Peterson's Maidstone home.

From that point on, however, the civil and criminal paths diverged: further investigations, including arising from

The reality. June 2006 – February 2009 monthly P&L: key trading accounts



Mr Peterson's asset disclosure pursuant to the freezing order, led to the addition of numerous defendants to the proceedings, including former directors and employees. The latter were sued in negligence for not spotting and acting on Mr Peterson's fraudulent activities (claims that would not have been available to the Macro Fund's liquidators had they sued directly). Despite the usual defence tactics, the civil proceedings moved forwards at a reasonable pace. As set out below, the same cannot be said for the criminal proceedings.

Civil proceedings are of course about recoveries. Unfortunately for Weavering's victims, none of the defendants had anything like the level of assets that would ensure substantial recoveries even if the liquidators achieved total success at a civil trial. Glimmers of hope of recoveries from other sources came and went.

WCF held shares in a music and video technology company, which were valued in its accounts at \$37.25m. Investigations revealed that they had been acquired months earlier for only \$50 and that 745,000 per cent returns were as unlikely as could be predicted.

Then an unsolicited source in Canada, a Mr Saed, contacted one of the liquidators, calling himself 'A.S.' with a message headed *All roads lead to Dubai*, stating that, as a former employee of a major bank in Dubai, he was aware that Mr Peterson and several other protagonists held *'numbered bank accounts'* there containing over \$100m. He agreed to assist the liquidators with their enquiries but would need to meet them in Dubai. He said he would not charge for his information, but did expect his travel expenses to be paid (business class, of course). Investigations quickly revealed that Mr Saed was not quite who he seemed to be and the liquidators politely declined Mr Saed's offer. It turns out that Mr Saed was not deterred. Indeed, using exactly the same pretext, he appears to have got his free ride to Dubai from a Jamaican insolvency, disappearing as soon as he landed (as reported in DIFC proceedings relating to the liquidation of Cash Plus Limited).[1]

In those circumstances, many creditors' committees might have decided to cut their losses, avoiding the substantial costs and time commitment of civil proceedings to let the criminal proceedings run their course. Instead, and despite the absence of a major financial carrot, Weavering's creditors supported the English liquidators in ploughing on with the civil proceedings, taking the view that meaningful returns were still achievable and that a criminal prosecution of Mr Peterson was far more likely if a thorough investigation had already been carried out. Notwithstanding the blatant nature of the fraud, the preparation of the civil proceedings was extremely complex and expensive, involving a massive disclosure exercise, numerous witnesses and extensive expert evidence to rebut the complex arguments relating to trading strategies raised by Mr Peterson in order to cloud the issues.

Then, in September 2011, on the eve of the civil trial, Richard Alderman, the then director of the SFO, decided to drop the criminal investigation, leading to widespread press coverage and intense criticism of the SFO.

The civil proceedings continued and, following a six-week trial in the autumn of 2011, the English High Court entered judgment in May 2012 against Mr Peterson and his fellow directors in the sum of \$450m.

With that result in their pocket, the liquidators threatened to instigate a judicial review of the SFO's decision to drop its investigation and the creditors expressed interest in a private prosecution against Mr Peterson. Even with the full support of the creditors' committee, expending a significant proportion of the estate's resources on such actions (which would ostensibly lead to no additional returns to the estate) presented the liquidators with some complex questions as to the nature of their duties. Those questions were examined but, in the event, never tested because the new director of the SFO, David Green, elected to re-start the criminal investigation following the outcome of the civil proceedings, ultimately securing the first criminal conviction arising from the 2008–2009 financial crisis and drawing widespread media interest.

After two appeals, the liquidation of six companies, four personal bankruptcies, and asset tracing claims in the BVI, Isle of Man, Sweden, Guernsey and Jersey (to name but a few), substantial recoveries have already been made for Weavering's creditors. Civil recovery efforts continue, as do the Macro Fund liquidators' claims against service providers in Ireland and the Cayman Islands, and the total returns to Weavering's creditors will not be known for a number of years.

Jones Day continue to act for Geoffrey Bouchier and Paul Williams of Duff & Phelps in their capacity as liquidators of Weavering Capital (UK) Limited. PwC Cayman continue to act as liquidators of the Macro Fund. Grant Thornton Cayman Islands and Grant Thornton Ireland act as conflict liquidators of the Macro Fund, pursuing claims against the Macro Fund's former fund administrator and auditor in the Cayman Islands and Ireland. PwC BVI acted as liquidators of WCF.

Mr Peterson has appealed against the length of his sentence. ◻

[1] CFI 024/2009 *Trustee in Bankruptcy and Liquidator of Cash Plus Limited and Receiver of Cash Plus' Subsidiaries and Affiliates* v. *Carlos Hill, Bertram Hill, Hill Group Limited and Bank Julius Baer (Middle East) Limited.*

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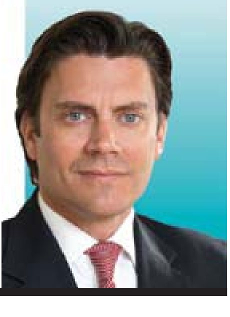

Treasure Island

Tracing assets in Paradise.

The British Virgin Islands (BVI) are known as nature's little secret: beautiful sandy beaches and turquoise seas. In days gone by these islands were a favourite haven for pirates and privateers and their buried treasure. In recent times, the BVI has become more famous for being an offshore financial centre and a low/no tax jurisdiction.

The BVI's unique selling point as an offshore jurisdiction has been low-cost company incorporation and management. There are over 600,000 active BVI companies and in 2013 according to figures compiled by the UN think-tank, UNCTAD, £55bn of foreign direct investments flowed through BVI companies. To put that in perspective,

> National treasures including comedian Jimmy Carr and some members of band Take That have all been publicly pilloried for their use of offshore tax avoidance schemes.

BVI was the fourth largest foreign investor after the USA, China and Russia. Some would say that the pirates never left and the treasure is still being buried in BVI; however, this is something of a misapprehension. While for most onshore countries, foreign direct investment will consist of international acquisitions and new projects by onshore entities, in offshore jurisdictions this means onshore investors investing through offshore vehicles.

BVI, along with other offshore financial centres such as Cayman and Bermuda, have come under increasing scrutiny, both in the UK and internationally. With the UK general public bearing the brunt of austerity measures, there is consternation at the use of tax havens by the super-rich and big business to avoid their fair share of taxation. National treasures including comedian Jimmy Carr and some members of band Take That have all been publicly pilloried for their use of offshore tax avoidance schemes. This year, the disclosures coming from the HSBC scandal have heightened the tensions further. Even the former Conservative Party treasurer Lord Fink was reported as saying 'everyone does tax avoidance at some level'.

In 2013 David Cameron, during the UK's leadership of the G8, made loud noises about the introduction of public beneficial ownership registers in a bid to placate public concerns over those who have investments in tax havens. However, his attempts to introduce these to UK dependent territories such as BVI faced stiff local resistance and ultimately stalled.

Given this backdrop it is worth considering what information is already available for would-be treasure hunters of BVI assets.

As IPs, as you endeavour to bring value into an insolvent estate, you may come across an avenue of investigation that leads you to the offshore world; more often than not this will be a UK dependent territory. Aware of the dirty reputation of these 'secrecy havens' you may understandably assume that these are jurisdictions where the normal rules and regulations simply do not apply and quickly determine that your trail of investigation has come to an abrupt halt. This is not necessarily the case, as there is significant information out there if you know where and how to look. Invariably, the investigation will not uncover assets in BVI but what these inquiries can do is allow you to 'follow the money' back onshore where a recovery strategy can then be employed.

Seeking the assistance of a local licensed IP or lawyer will ensure that you get the information available; however, to start with let's consider what information is available, without a court order.

While we focus on the BVI jurisdiction during this article much of the content is applicable to the other UK dependent territories.

Companies must file certain information with the BVI Registry of Corporate Affairs, which is the local equivalent of Companies House. Articles of association and memorandum of association together with the certificate of incorporation and any certificates of name change are all publicly filed and available electronically through the VIRRGIN system. A certificate of good standing is also available: this document indicates whether the company continues to legally exist and that all administrative requirements (such as payment of annual government registration fees) have been met. The certificate will state if any strike-off proceedings have been instigated; if the company is subject to insolvency proceedings; if articles of association have been filed and whether any articles of a merger or consolidation have been complied with.

Admittedly, certain of the most interesting information is not publicly available such as the register of directors, the register of shareholders and the register of charges (there is an option to file these but companies are not obliged to). Since 2005, BVI companies are no longer permitted to have issued bearer shares, making the process of tracking down beneficial owners significantly more straightforward.

Shareholders are entitled to inspect the memorandum of association and the articles of association, the register of members, the register of directors and any minutes or resolutions of members meetings that are held by the company's registered agent. The registered agent is a fiduciary that performs a role akin to a company secretary and registered office. Registered agents are licensed and regulated by the

> BVI companies are not required to be audited, nor make annual returns nor file financial statements.

BVI Financial Services Commission and are obliged to be situated in the BVI and to hold the prescribed records as well as the usual KYC/CDD documents for directors and shareholders.

BVI companies are not required to be audited, nor make annual returns nor file financial statements. However, the BVI Business Companies Act 2004 does require the registered agent to keep records that are *'sufficient to show and explain the company's transactions and… will, at any time, enable the financial position of the company to be determined with reasonable accuracy'.*

In the same way as the UK, insolvency appointments are required to be advertised in the Virgin Islands Gazette.

Available from the court are claim forms, notices of appeal and court orders and judgments. In addition, significant court decisions can be found on the court website.

It is also possible to search the BVI Land Registry either by name or by location for confirmation of ownership. Certain vessel information is available from the BVI Shipping Registry.

Since 2009, the BVI has had a dedicated Commercial High Court that deals with large disputes (where the value of the claim is in excess of $100,000). It is a highly effective and busy court that regularly determines huge international litigation. BVI, as with other UK dependent

Publicly available information

	BAHAMAS	BVI	BERMUDA	CAYMAN	GUERNSEY
Annual filings	✔	✘	✔	✔	✔
Articles of incorporation	✔	✔	✔	✔	✔
Memorandum of association	✔	✔	✔	✔	✔
Directors & officers	✔	✘	✘	✘	✘
Company status	✔	✔	✔	✔	✔
Fee payment history	✔	✔	✘	✘	✘
Registered office details	✔	✔	✔	✔	✔
Registered assets, obligations, mortgages and charges	✔	✘	✔	✔	✘
Real estate ownership	✔	✔	✔	✔	✔
Litigation history	✔	✔	✘	✔	✔

territories, is a common law jurisdiction, with much of its laws and precedents based upon UK laws. The BVI benefits from a world-class standard bar and the legal fraternity is well used to helping clients in complex, international disputes.

Further assistance can be sought from the court through numerous different types of applications and remedies:

Mareva injunction: A freezing order that prevents defendants from dissipating assets from beyond the jurisdiction of a court in order to frustrate a potential judgment

> Since 2009, the BVI has had a dedicated Commercial High Court that deals with large disputes.

Anton Piller: A court order that provides the right to search premises and seize evidence without warning. This prevents the destruction of evidence and is often combined with a Mareva injunction.

Norwich Pharmacal: Where an innocent party (such as a registered agent) has information relating to unlawful conduct, a court order can compel them to disclose that information for the purpose of facilitating an ongoing or potential litigation. In addition to obtaining registers of directors, members and mortgages, and the KYC/CDD information it is worth inquiring as to the source of payment for the registered agent's fees, which often identifies the location of a previously unidentified bank account.

Bankers trust: A type of disclosure order that can be used in clear cases of fraud. It requires a bank to provide details ordinarily protected by the bank's duty of confidentiality. Useful for tracing and usually involves disclosure of bank statements, copy cheques and debit notes.

Black Swan – freezing orders: These are available to aid foreign proceedings where there is no right or intention to bring any claim against the defendant in the BVI. This is a helpful protective tool in preventing the dissipation of assets before trial and means you can still freeze assets in the BVI without substantive litigation in the BVI.

Recognition in BVI: While it is not currently possible for foreign office-holders to obtain general recognition of their appointment (and associated powers of investigation) in BVI, the (BVI) Insolvency Act 2003 (the Act) does provide for such office-holders to apply to the Commercial High Court in BVI for specific cooperation to obtain information. General fishing expeditions are not possible, but office-holders can seek specific information (and once they do so they can always re-apply for additional requests as they dig deeper in their investigation) via the court. It's worth noting that while the UNCITRAL model law provisions appear on the Act, along with the administration procedure, these parts of the Act are not currently in force. The Act is largely modelled on the English Insolvency Act 1986, and UK IPs will find it a familiar document to navigate. Insolvency appointments require that a locally licensed BVI IP is appointed but also allows for the joint appointment of suitably qualified foreign IP. We see this frequently because it is the nature of offshore entities that the location of its assets and liabilities are onshore. The BVI IP and foreign IP will agree a protocol at the outset of appointment setting out their requisite areas of responsibility and work collaboratively to employ a cross-border strategy to maximise returns to stakeholders.

Judicial assistance: Letters of request or *letter rogatory*, are when courts write to each other for the release of information or assistance with regard to particular investigations being undertaken.

There are in addition to the above, tools that IPs can apply outside the BVI. These are usually more relevant as in most cases the important document and more significant assets reside outside the BVI. We mention above the judicial assistance that can be sought. Here are some other tools that BVI IPs utilise:

Recognition orders: Because the court in BVI is recognised worldwide and the laws of BVI are measured and proper, BVI IPs have had great success in seeking recognition in other jurisdictions. In the US, this is done through Chapter 15 of the US Bankruptcy Act. Recognition in the UK, Ireland and other Commonwealth jurisdictions have occurred as well.

Title 28 US Code Section 1782: This is a little known federal statute in the US that allows a litigant to a legal proceeding outside the US to apply to an American court to obtain evidence for use in the non-US proceeding. Evidence is broad but includes bank records. It can also include information on assets or persons in the US.

> BVI IPs have had great success in seeking recognition in other jurisdictions.

Time will tell what further action the UK government takes to shine a light on the secrets of these paradise islands; however, in the interim, practitioners should not assume that the ship is sunk simply because it is 'docked' offshore: there is already a large reservoir of information out there and many ways to obtain more, ultimately enabling the successful tracing and recovery of assets. □

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Optimising recovery in the PRC

Jocelyn Chi examines the challenges facing foreign IPs in the People's Republic of China.

The implementation of World Trade Organisation (WTO) commitments, a relaxed investment environment and rising Chinese consumer demand mean the People's Republic of China (PRC) remains a popular destination for foreign direct investment (FDI). With inflows at an estimated US$128bn, PRC was the largest recipient of FDI in 2014. A wide range of industries are open to foreign investment, including media, construction materials, resources and water/waste management, and from January to February 2015, there were 3,831 newly approved foreign-invested enterprises, an increase of 38.6 per cent year on year; and the actual use of foreign investment reached US$ 22.48bn, up by 17 per cent year on year.

Top foreign investors in PRC today include Hong Kong, Singapore, Taiwan, Japan, South Korea, USA, Germany, the UK, France and the Netherlands. There are several types of business vehicles available to foreign investors – representative offices, incorporated wholly-foreign owned enterprises (WFOEs) and joint ventures (JVs). WFOEs are the most common and a large majority of foreign investments are made through entities incorporated in the British Virgin Islands (BVI), Cayman Islands and Bermuda. The primary reasons for an offshore holding company structure are associated with investors' preferences for offshore regimes and processes and unfamiliarity with, or a wish to avoid, PRC's legal and regulatory systems. Operational and structural considerations, such as tax planning, also play a role.

> "PRC was the largest recipient of foreign direct investment in 2014."

Not all investments in PRC are successful and much distress originates from imprudent lending and/or limited access to capital markets. Although there are many challenges in dealing with distressed investments in PRC, our experience shows that recoveries are usually optimised by gaining control over the PRC company through the offshore holding company, rather than relying on a formal insolvency process in PRC.

The recovery remedies for distressed investments in PRC

When a distressed situation arises, the main concern for foreign investors is typically to secure control over PRC companies and their assets. The remedies available to do this will usually depend on the contractual rights given to the investors. The investors may be able to appoint a receiver over the shares or assets of the offshore holding company if they hold the requisite security, or they may need to file a winding-up petition for appointment of provisional liquidators (PLs) or liquidators.

Other protective measures that facilitate the taking control of a PRC company in the event of default are available to investors and lenders and should be considered before making an investment or loan. These include, but are not limited to, the following:

a) pre-signed shareholder and board resolutions of the PRC company for the change of legal representative and directors;
b) put option over the shares of the PRC company; and
c) entrustment possession of the company's records (including business licence, company chop, and financial chop etc) to a neutral law firm.

An important consideration is that an order of appointment of PLs or liquidators will not be readily recognised on its own in PRC as there are no reciprocal treaties and current legislation does not address the recognition of the appointment of PLs or liquidators of an offshore company. However, in practice, the capacity and the rights of the offshore PLs or liquidators will be recognised if the order has been notarised. This is the common route for a foreign insolvency practitioner wishing to participate in proceedings involving the shareholder's rights of the offshore company in seeking control over its investment in PRC. A PRC legal opinion in respect of the appointment may also be required. Article 184 of the Opinions on Certain Issues Concerning Implementation of the General Principles of the Civil Law provides that the liquidator's capacity shall be subject to the laws of the country where the offshore company is incorporated. The liquidator also has the right to participate in the legal proceedings in PRC.

Removing the legal representative and directors of the PRC company

Once the receiver, PLs or liquidators are appointed, the next step is to remove the incumbent legal representative and directors and appoint its own legal representative and directors.

Article 43 of PRC Company Law provides that the legal representative of a company, including WFOEs and JVs, has a wide-ranging power to act on behalf of the company in any matters within the business scope of the company. In short, the legal representative controls the PRC company and is able to manage and access the company's assets. Hence, appointing or changing the legal representative is often the key to any successful PRC-based asset recovery or restructuring.

> "Not all investments in PRC are successful and much distress originates from imprudent lending and/or limited access to capital markets."

To successfully replace the legal representative and directors of the PRC company, a shareholder's resolution must be passed. Thereafter, the necessary prescribed forms issued by the Administration for Industry and Commerce (AIC) must be completed. In certain circumstances, prior approval of the Local Commerce Ministry may also be required. The forms, together with the company's business licence, the certificate of approval for the establishment of the enterprise with foreign investment and the shareholder's resolution need to be submitted to the AIC where the company was incorporated. The change of a company's legal representative is considered effective only when the AIC approves the change of legal representative and issues a new business licence bearing the name of the new legal representative.

These procedures and requirements require access to the company's records and a reasonable level of cooperation from the incumbent legal representative. Unfortunately, in a distressed situation, such cooperation is rare and in such circumstances, an application to AIC and/or commencing legal proceedings in PRC to seek confirmation will be necessary.

> "An order of appointment of PLs or liquidators will not be readily recognised on its own in PRC."

This is an effective process but requires patience. In the interim, for the purpose of protecting assets at risk, it may also be prudent to notify the banks and local land and other bureaus to prevent any shares and/or property transfers without shareholder consent.

Insolvency and enforcement remedies

In some cases, the dissolution or bankruptcy of a PRC company may be necessary or beneficial to realise its assets.

A PRC company can be dissolved when, *inter alia*, its shareholders decide to bring the life of the company to an end due to difficult operating conditions. The PRC company and/or its shareholders must settle all outstanding debts of the PRC company before applying for deregistration with the various bureaus and government departments. If the liquidation committee, which is set up by the shareholder(s) to handle the dissolution process immediately prior to the commencement of the process, subsequently forms the view that assets of the PRC company are insufficient to cover its debts, and the liquidation committee fails to reach a compromise agreement with the creditors, the dissolution of the PRC company shall be converted into a bankruptcy proceeding.

A shareholder who holds more than ten per cent of the registered capital can apply for bankruptcy of a PRC company that is insolvent or manifestly lacks the ability to repay its debts. The bankruptcy of the PRC company shall be subject to the jurisdiction of the local court where the company is registered.

Under the Bankruptcy Law, the relevant court will lead the bankruptcy, including appointing an administrator, approving the reorganisation plan (even if the reorganisation plan is rejected by the shareholder or the creditors' meeting) and approving any compromise plan. The administrator appointed by the court will be responsible for managing the company's assets and business during the bankruptcy proceedings, subject to the supervision by creditors' meeting and creditors' committee.

After the court accepts the bankruptcy petition, all assets of the PRC company are frozen, but can be used for normal operation and expenses at the discretion of the administrator. All other enforcement procedures are suspended and any civil proceedings or arbitration relating to the PRC company, which have been commenced but not concluded, shall also be temporarily suspended until the administrator makes a decision in relation to them. In addition, any asset preservation orders over the PRC company's assets, such as seizures or freezing orders obtained outside the bankruptcy process, must be released.

Challenges in practice

Foreign investors and insolvency practitioners have long encountered legal and other challenges brought by existing management or PRC regulatory bodies when seeking to recover assets in PRC. These legal challenges are often focused on the power and authority of foreign investors and insolvency practitioners to change the legal representative of companies incorporated in PRC and thus secure control of its affairs and assets. As discussed above, the change in legal representative needs the cooperation of the incumbent legal representative, which, in a contentious or distressed situation, is rarely forthcoming or often delayed as there may be different requirements between different AIC branches. This means that the incumbent legal representative remains in control of the company and its assets with all the risks that this entails.

As is the case in many other jurisdictions, a shareholders' resolution takes effect once it has been passed (provided it complies with the prevalent law and the company's articles of association). However, where the parent or holding company is in liquidation and controlled by insolvency practitioners, the validity of the shareholders' resolution is often challenged by existing management who will typically allege that it derives from the power of insolvency practitioners of the holding company, rather than the right of shareholders.

Thankfully, the Supreme People's Court (SPC) judgment obtained in our Sino-Environment Technology Group Limited matter seems to have delivered a solution.

On 11 June 2014, the SPC made a final judgment confirming that a shareholders' resolution passed by foreign insolvency practitioners in relation to its subsidiaries in PRC is effective in PRC. Upon the passing of a shareholders' resolution to remove the existing legal representative, the existing legal representative no longer has the authority to represent the company or conduct the affairs of the company. The change of legal representative is binding upon the company internally, despite not being registered with the AIC.

Although this judgment is a breakthrough for foreign investors in changing the legal representative in PRC, it is not deemed enforceable in other similar cases, as the PRC's legal system is not based on case law. However, it still provides an authoritative guideline for local courts when dealing with similar situations.

Conclusion

On 19 January 2015, PRC's Ministry of Commerce published a draft Foreign Investment Law (draft FIL) that will reform the country's foreign investment regime. The draft FIL, once issued, will replace the current legal scheme regulating foreign investments and will have major implications for overseas investors looking to commence, continue or expand operations in PRC.

> "The validity of the shareholders' resolution is often challenged by existing management…"

Despite the uncertainty and risks associated with foreign investment in PRC, it remains an attractive and lucrative focus for many foreign investors. Enforcing shareholders' rights over a PRC company in a distress situation will remain a challenge for foreign investors and insolvency practitioners. However, we are optimistic about the changes and developments that will come as a result of the SPC judgment and the Foreign Investment Law, when it is implemented. ◻

The author would like to acknowledge the contributions of **Cosimo Borrelli**, managing director, and **Kevin Song**, director, of Borrelli Walsh.

JOCELYN CHI is a director of Borrelli Walsh.

Jersey – a new security regime

Mark Dunlop gives an overview of reforms to Jersey's security laws.

The Security Interests (Jersey) Law 2012 (the Law) came into full force on 2 January 2014. The Law significantly reforms the way in which security may be taken over Jersey intangible movable property (such as shares in a Jersey company, bank accounts maintained in Jersey, contracts with Jersey obligors and units in a Jersey property unit trust). The Law is designed to be modern and flexible and to meet the expectations of banks and other financiers who enter into secured transactions.

The previous law

The previous law that governed the taking of security over Jersey intangible movable property was the Security Interests (Jersey) Law 1983 (the 1983 Law). The 1983 Law has served its purpose well. It has facilitated numerous secured transactions and allowed security to be taken over a range of Jersey intangible movable property.

The reform process

While the 1983 Law has enabled many secured financings to be successfully concluded, the 1983 Law had certain practical and structural limitations. This generated a desire within Jersey's finance industry to reform Jersey's security laws. The Jersey government turned to a leading English academic and expert on security law matters, Professor Sir Roy Goode QC, to advise on the drafting of the Law.

The Law is based on the Personal Property Security Acts (PPSA) of Canada and New Zealand (which are in turn influenced by the American Uniform Commercial Code). This PPSA security law model has also recently been adopted by Australia. Jersey has therefore adopted a PPSA model but the Law has been simplified and adapted to meet the particular needs of Jersey's finance industry and economy.

A dual security regime

Under the Law, it will only be possible to take new security in accordance with the Law. However, the 1983 Law will continue to govern all security interests taken before the Law came into force (with some limited exceptions). The 1983 Law will therefore continue to govern 'old' security agreements and the Law will govern 'new' security agreements. In this regard, there is a dual security law regime in Jersey that will continue for as long as there are 1983 Law security agreements in place.

Fundamental features of the Law

The fundamental features of the Law include the following:

- The Law establishes a simplified concept of what constitutes a security interest. It is possible to simply create a 'security interest' in the collateral (without having to specify any particular method of creation).
- It is possible to take security over all of a company's present and future Jersey intangible movable property.
- The Law confirms that the attachment of a security interest (ie the enforceability of a security interest against the grantor) is not affected if the grantor retains the right to deal with the collateral. This will have particular significance as regards bank accounts where it is common to allow the account holder to make withdrawals from the account unless there is an event of default.
- The Law establishes a clear set of statutory priority rules. A secured party will therefore have certainty as to how security interests will rank against competing interests.
- The Law introduces a security registration system. The registration system is a fully automated real time system that is available online (see below).
- The Law significantly extends the enforcement remedies available to a secured party (see below).

Perfection

A secured party should always ensure that its security interest is perfected under the Law. The concept of perfection describes the steps that need to be taken to ensure that the security interest is binding against third parties and on the bankruptcy of the grantor.

The failure to perfect a security interest brings significant risks to a secured party:

- an unperfected security interest will be subordinate to a perfected security interest;
- an unperfected security interest will be void against the Viscount, the liquidator and the grantor's creditors on the bankruptcy of the grantor; and
- a third party who acquires the collateral for value will take the collateral free of an unperfected security interest.

Registration and other methods of perfection

The Law introduces a system of security registration. The general rule is that most security interests under the Law may be perfected by registration. In addition to registration, the Law allows certain security interests to be perfected by the secured party having possession or control of the collateral. Despite these alternative methods of perfection, it is likely that secured parties will still look to register as a belt and braces approach.

It is important to appreciate that the security register cannot be seen as being definitive as it may not disclose all security interests granted by a particular person. For example, as a general rule, security interests created under the 1983 Law are 'grandfathered' and so therefore will not be registered on the security register. By way of further example, the security register will not give details of any security where the secured party is relying exclusively on possession or control to perfect its security interest. In addition, the security register only relates to security interests under the Law and will not catch foreign law security interests granted over foreign property.

The power of enforcement

A significant advantage of the Law (when compared with the 1983 Law) is the enhanced scope of enforcement remedies that a secured party may exercise on default. Under the 1983 Law, the secured party's only statutory remedy is to exercise a power of sale. Under the Law, the power of enforcement may be exercised in any of the following ways:

- by the secured party appropriating the collateral;
- by the secured party selling the collateral;
- by the secured party taking any of the following ancillary actions: (i) taking control or possession of the collateral; (ii) exercising any rights of the grantor in relation to the collateral; and (iii) instructing any person who has an obligation in relation to the collateral to carry out the obligation for the benefit of the secured party; and
- by the secured party applying any remedy that the security agreement itself provides for as a remedy (but only if this remedy is not in conflict with the Law).

The remedy of appropriation may be particularly attractive to a secured party depending on the circumstances. Under this remedy, the secured party takes title in and to the collateral and sets off the value of the collateral against the secured liabilities. The secured party therefore becomes the absolute owner of the collateral. This is similar to the English remedy of foreclosure although there is no need to obtain any court order before appropriating the collateral.

The Law sets out a comprehensive statutory code relating to the enforcement of security interests – it sets out when the security interest may be enforced, the duties that are owed on enforcement and way in which the proceeds of enforcement must be applied.

Chattels – meaningful security in the future

The Law does not currently apply to chattels. Under the current law of Jersey, security over chattels can only be taken if the secured party is given possession of the relevant chattel. This limits the ability of banks to take security over the plant and machinery of local businesses. The local business will need to retain possession of the chattels in order to trade. However, the Law is expected to be amended to enable security to be taken over chattels. When the Law is extended to chattels, this will benefit banks lending to local trading entities as they will be able to take security over all present and future tangible property. Banks will then be able to take effective and meaningful security over the assets of a local trading company.

Title financing

In addition, a key feature of the PPSA regime is that it treats title finance arrangements (such as finance leases and conditional sale agreements) as security interests. The owner of the asset will therefore need to perfect such a deemed security interest by registration. When the Law is extended to chattels, this will clearly impact on the business practices of Jersey's finance lessors.

Real property

The Law does not apply to the taking of security over Jersey real property. The existing laws of Jersey will continue to apply in relation to security over land.

Factoring

The Law extends the registration system to factoring (ie the outright assignment of receivables). This is not the taking of security over receivables but relates to the purchase of receivables (as seen in factoring arrangements). In order to perfect the outright assignment of receivables, the assignment must be registered. Under English law, in order to perfect an English law assignment, notice would need to be given to the contractual obligor (the rule in *Dearle v. Hall*). The Law avoids this approach as registration is now the only method of perfection as regards the outright assignment of a receivable. That being said, the assignee may still elect to give notice to the relevant obligor (to ensure that the obligor only obtains a good discharge by paying the assignee).

Position when compared with English law

The PPSA security law model now reflected in Jersey law has many benefits when compared to English security law:

- There is a simple concept of a 'security interest'. English law has a range of security 'labels' – a mortgage, a charge by way of legal mortgage, a fixed charge, a floating charge, a pledge and an assignment by way of security. All such labels are avoided. The Law simply relates to a 'security interest'.
- The registration system applies to all persons who create security over Jersey situated property – whether the grantor is an individual or a corporate entity. The extension of the registration system to individuals is notably absent under the English law regime.
- The validity of a security interest is not affected if the grantor retains the right to deal with the collateral. This will therefore avoid the English law debates as to whether the secured party has sufficient control to create a fixed charge as opposed to a floating charge. These technical debates are avoided under Jersey law.
- There is a single place to look to for rules relating to perfection and priority (namely, the Law itself). Under English law, the perfection and priority rules are varied and complex and turn on the nature of the asset and the identity of the grantor.
- The Law (when extended to chattels) will treat finance leases and conditional sale agreements as security interests and these will need to be registered. This reflects the reality of such transactions – although a person is the true legal owner of the assets, the transaction in substance amounts to a security arrangement (as the legal owner will have recourse to the asset to satisfy any unpaid rental or the unpaid purchase price).

Conclusion

The Law is a significant reform and enhances the ability of a secured party to take security over Jersey property that meets international standards and expectations. The ability to take security over all present and future Jersey intangible movable property and the enhanced enforcement powers are significant improvements on the previous security law regime.

This article provides only a general overview of certain matters. This article does not constitute legal advice and should not be relied on by any person as giving any legal advice. You should obtain independent legal advice if you need any guidance or advice on the matters discussed in this article.

MARK DUNLOP is a partner at Bedell Cristin.

Introducing Encompass…

The new R3 key sponsorship partner offering a visual information management platform set to change the way professionals search and review insolvency information.

Insolvency, restructuring and turnaround professionals can now quickly understand company ownership and structure using a new platform that aggregates, analyses and presents information from Companies House, Land Registry and a growing range of commercial providers. Benefits include improved communications, making faster commercial decisions and reducing unbillable hours in fixed fee and pre-appointment work.

Phillip Sykes president of R3 says, 'An important aspect of R3's role is to support insolvency practitioners to adopt best practice and continue to innovate in the market. We are excited at signing up Encompass as a technology partner that understands, identifies with and fully supports these core goals. We look forward to growing the relationship with Encompass as they continue to develop their role in the UK.'

Designed with the industry, for the industry

Encompass commenced its Pre-Release Group programme in February with involvement from firms including BDO, Deloitte, Freeths, Grant Thornton and Mazars. Feedback from the early users allowed Encompass to develop the product

> A sizeable element of insolvency work is speculative.

in alignment with customer' needs and fine-tune prior to general release. A number of participants discovered that Encompass reduced search and review processing time by 66 per cent compared with their previous way of working. Kevin Pinkerton, a partner at law firm Freeths, observed, 'A sizeable element of insolvency work is speculative. This means that inevitably costs will be incurred which may ultimately be irrecoverable. Assessing possible Insolvency Act claims is not something you can dumb down or make simple. With Encompass, information is able to be assessed more quickly, which is ultimately going to be helpful to us and our clients.' With new enhancement released each month, customers can expect to see Encompass to develop in alignment with their needs. ◻

In conversation with

Ian Schofield, recently retired insolvency practitioner and BDO partner, is now an industry adviser to Encompass. He and Mark Nuttall VP, UK & EMEA at Encompass, discuss how Encompass assists restructuring and insolvency professionals.

Ian: So Mark, from a partner or insolvency practitioner's perspective - what problem does Encompass solve?
Mark: Taking control of an insolvent company's assets is a primary responsibility for all IPs. Understanding the full picture – sometimes before they take on an appointment can be critical. We provide a simple, fast and comprehensive way, a one stop to find 'who owns what'.
Ian: Yes, company, property and asset searching can take hours, or even days, of work. But surely, most information needed by practitioners can now be found electronically, making it more straightforward than when we ordered paper copies of reports to be delivered by post?
Mark: You would think so. However, while information providers have embraced electronic distribution, many insolvency professionals continue to search for assets using the same paper-based techniques
Ian: Old habits die hard! What makes this a problem?
Mark: Well, information comes down the wire at internet speed but screeches to a halt at the insolvency practitioners' office doors. So, back to your original question: Encompass is new technology that enables insolvency professionals to modernise search.
Ian: OK. We all use Google; is Encompass a search engine for insolvency?
Mark: Not quite, search engines typically take the word or phrase we enter, compare it to an index and then retrieve documents containing our search term. Encompass is a visual information management platform. It aggregates and analyses data about people, companies, property and assets, and then automatically visualises information as an interactive graphical chart.
Ian: So the output is a picture. That's an improvement on the spreadsheets that are typically shared around when reviewing ownership structures.
Mark: Yes, it's a fact established in other professions that visualising complex information aids understanding. We're confident that insolvency professionals will find it similarly beneficial.
Ian: And how about speed – does Encompass get the job of asset search done faster than traditional methods?
Mark: Yes, it does. And that could mean fewer unbillable hours in pre-appointment.
Ian: How do firms start using Encompass?
Mark: Simple. Encompass is software as a service, delivered from the cloud.
Ian: Encompass is now a key sponsorship partner of R3. Tell me more.
Mark: Encompass is building a close partnership with R3 by being a key sponsor. We are attending and presenting this new software and its capabilities at a series of R3 technical meetings across the UK, as well as being in attendance at the R3 Annual Conference in Berlin.

Ian Schofield

Mark Nuttall

For more information, to register for a webinar and request a 14 day free trial, visit www.encompasscorporation.com or call 0333 772 0002.

The bankruptcy squeeze

A blow to creditors and a boon to debtors.

Bankruptcy remains the most well known, and perhaps most feared, of the personal insolvency processes. Since the current threshold was introduced 30 years ago, it has been used by creditors owed as little as £750 as a dire threat to extract payment from reluctant debtors. However, the government has stepped in and is squeezing the bankruptcy process, seeking to ensure bankruptcy is reserved for the most appropriate cases and encouraging alternative regimes for the management of small debts.

> The legal framework underpinning the bankruptcy process is in a state of flux.

As a result, the legal framework underpinning the bankruptcy process is in a state of flux. This article will look at what is changing, what has changed and the opportunities and risks for the insolvency sector.

Credit-fuelled growth – how long can it continue?

The credit crunch proved a temporary wake-up call about the danger of credit-fuelled spending and growth. Over the past five years consumers have sought to pay back their credit, succeeding in reducing their borrowings by a quarter (*Precious Plastic study,* PwC). However, fuelled by economic growth, falling unemployment, real wages rising and historic low interest rates, consumers are fast rediscovering their appetite for credit-fuelled purchases.

This good news for consumers translates into the lowest number of formal individual insolvencies since 2005. The same conditions that are encouraging consumer borrowing are helping those with problem debts, especially because creditors are increasingly willing to agree informal repayment plans rather than incur the costs of formal insolvency proceedings. This has led to a significant reduction of bankruptcies (20,318 in 2014, the lowest annual level since 1998) and debt relief orders (DROs) (26,688 in 2014, the lowest annual total since 2010). How long this may continue is the million-pound question, although the Chancellor and Governor of the Bank of England are presumably hoping it will continue for some time. The government's recent bankruptcy and DRO reforms should help continue this downward trend in individual insolvencies.

Bankruptcy threshold raised

The headline grabbing change is the planned increase of the threshold for bankruptcy proceedings from £750 to £5,000: a 675 per cent increase, roughly speaking. The threshold is the minimum level of debt for which a creditor can force a debtor into bankruptcy and this increase is the first revision since 1986. The government's stated aim is to reserve bankruptcy, which has the most significant consequences, for those with sizeable debts. This has massive impact, removing bankruptcy as a threat for thousands of debtors who owe these smaller sums.

The changes have been welcomed by consumers and insolvency professionals alike, who have long campaigned that the £750 threshold was inappropriately low. The current £750 threshold means that creditors can easily threaten a non-paying debtor with, or simply issue, bankruptcy proceedings. When faced with the threat of being declared bankrupt and all that it entails (eg the loss of control over assets, the loss of directorships and the stigma), many debtors suddenly locate the money (either from family or loan sharks) to pay off the debt. However, this is not possible in every case and every insolvency professional who deals with individuals can tell cautionary tales of where people's home have been sold and their lives significantly damaged over comparatively small debts. The reality is that the associated professional costs of bankruptcy often quickly dwarf the original debt.

However, while debtors might be rejoicing, creditors are faced with having to consider other options to pursue low-value debts. A bankruptcy petition may have been a disproportionate instrument for recovery of low-value debts, but in seeking to redress this balance, the government has heavily favoured debtors. Suppliers/creditors chasing debtors for less than £5,000 are essentially left with two choices: an informal agreement with the debtor for repayment, or formal court proceedings in the small claims court either resulting in judgment or a negotiated resolution. Given the increase in the threshold is planned to take effect on 1 October 2015, it may be that some creditors rush to recover smaller debts while they can still threaten bankruptcy.

DRO requirements softened

In addition to the threshold increase, the government is proposing that debtors with debts of no more than £20,000 and assets of £1,000, plus a vehicle (worth not more than £1,000) will now be able to enter the DRO regime, which is a low-cost alternative to bankruptcy. DROs were previously only available to those with less than £300 in assets who owed a maximum of £15,000. The government estimates that this will enable some 3,600 more people with low-level debt to use DROs.

The DRO regime is an administrative, rather than court-based, procedure and is designed to provide debt relief to individuals who would otherwise be excluded from existing procedures. DROs are designed to support financial rehabilitation by offering debtors an incentive to address their debt issues earlier by offering protection from those debts included in the DRO, preventing enforcement of those debts and discharging them at the end of the DRO (usually after 12 months). The government clearly sees DROs as something to be encouraged, pointing to a survey of DRO users that showed that 96 per cent of users would have been unable to deal with their debts without DROs – 79 per cent also said that the process had a positive impact on their mental health.

> The current £750 threshold means that creditors can easily threaten a non-paying debtor with, or simply issue, bankruptcy proceedings.

While arguably this change is a further blow to creditors seeking to recover small debts, the government considers that the people who will benefit from the new DRO regime will be those with very low realisable assets and therefore no realistic ability to repay their debts.

The bankrupt's estate – keep your hands off my pension

It is common for pension savers to have the right to take some of their pension benefits from age 55 and George Osborne has been busy unlocking pensions in part to encourage consumer spending so that from April 2015, scheme members have significantly greater freedom to cash out their pension savings. However, there is a real risk that unlocking a pension and receiving payments from it may give creditors access to an asset that is otherwise untouchable in any subsequent bankruptcy.

Unless excessive, pension savings are

generally safe from a trustee in bankruptcy, except where the bankrupt member has already started to draw his pension. The Insolvency Service's guidance makes it clear that the official receiver may not influence the bankrupt individual in making the election to draw down. However, inventive trustees have sought to access pension savings and in *Raithatha* v. *Williamson* [2012] EWHC 909 (Ch), persuaded the court to force a bankrupt member to exercise an option to start receiving a pension that he had not yet touched and therefore bring his pension into the bankruptcy estate for division among the creditors.

Arguably, this ruling has now been contradicted by *Horton* v. *Henry* [2014] EWHC 4209 (Ch). In this case, the trustee applied for an income payments order against three pension policies and a self-invested personal pension held by Henry. None of the pensions were in payment and the amounts that Henry would eventually be entitled to receive from them would not be known until then. Deputy Judge Robert Englehart QC held that there was a difference between pensions that were in payment and those that were not. He further held that a bankrupt's unexercised rights to draw his pension did not represent income to which the bankrupt was entitled and therefore fell outside of the bankrupt's estate. Unless the member triggered those payments, they were neither certain nor contractually payable.

While this decision accords with most commentators' understanding of the law, it has led to confusion as it appears to stand in conflict with the same court's earlier decision in *Raithatha*. *Horton* is the subject of an appeal, with a hearing window of 14 May to 14 July 2015 and it is hoped that the Court of Appeal will lay down a clear rule and uphold the reasoning in *Horton*.

Given the recent pension changes enable a member to access their entire pension fund as a lump sum, insolvency professionals will be eagerly awaiting the appeal. If the Court of Appeal were to follow *Raithatha* then even a relatively small fund could become an attractive target for an income payments order. Individuals with problem debts should think carefully before unlocking pension assets to pay off debts. They may be best served leaving their pension pot untouched and sitting out a bankruptcy. Insolvency practitioners should beware having their fingers burnt by seeking to crack open a tempting pension pot.

> "These are deadlines missed at an insolvency practitioner's peril."

The bankrupt's estate – stay away from my property

While the number of bankruptcies and DROs have significant decreased, since the Enterprise Act 2002 reforms, the length of the processes has stayed broadly the same. The various personal insolvency regimes all normally last for 12 months, save where the bankrupt has been difficult or uncooperative with the trustee in bankruptcy.

By contrast and way of key reminder, the effects of bankruptcy can linger for far longer. For instance, a bankruptcy will often require the sale of the bankrupt's home to release any equity. However, a bankrupt can seek to prevent or delay a sale if the value of their beneficial interest is less than £1,000 or it is a family home, in which case a bankrupt can delay the sale for up to a year to organise somewhere for the family to live. However, since the Enterprise Act 2002 amended the Insolvency Act 1986 by adding s283A, a trustee in bankruptcy must take specific steps to realise the bankrupt's former interest in a dwelling house within three years of the date of the bankruptcy order; after which the bankrupt's former interest will automatically re-vest in the bankrupt. These are deadlines missed at an insolvency practitioner's peril.

Concluding thoughts

The proposed changes to the threshold and the DRO regime are subject to parliamentary scrutiny before coming into force in October 2015. Given the positive reception these reforms have received, it is not anticipated that these changes will be watered down.

Debtors are the greatest beneficiary of the proposed changes. The government is keen to encourage debtors to deal with their small claims at an early stage before they spiral out of control. The planned increase of the threshold removes the threat of bankruptcy from thousands of debtors, forcing creditors to work with the debtors to agree flexible plans for repayment.

Even with the recent changes, £5,000 is still a relatively small threshold given the drastic consequences of bankruptcy. We will wait to see the implementation of these plans and the reaction of the court. However, as the threshold is effectively a pre-assessment of the appropriateness of the bankruptcy process, the courts may be less likely to intervene on a debtor's behalf. In the meantime, creditors should be considering their debtors list for debts worth less than £5,000 and deciding which bankruptcy petitions should be issued prior to October 2015.

The changes to bankruptcy also offer an opportunity for insolvency practitioners to expand their bankruptcy practices. While sometimes viewed as the poor cousin to a commercial insolvency practice, it is clear that with the smallest bankruptcies weeded out, the technical skills of insolvency practitioners will be put to good use dealing with bankruptcies. This is especially the case given the changes to the law, which may catch the less wary practitioners out. ◻

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Minmar solution or minimal difference?

Chris Umfreville casts a light on the Deregulation Act 2015 and administrator appointment reform.

Somewhat unseasonably, the 'Christmas tree bill to end all Christmas tree bills'[1] passed onto the statute book this spring, when the Deregulation Act 2015 (the Act) received Royal Assent on 26 March 2015. Addressing a variety of issues ranging from health and safety at work, private hire vehicles and child trust funds to alcohol licences, the baubles of the Act of most interest to administrators and insolvency professionals are the reforms contained in Part 2 of Schedule 6. Nestled among these is a small, but potentially significant reform to the process for the appointment of an administrator out of court by the company or its directors. Introduced to prevent delays in the out-of-court appointment of administrators,[2] a problem arising from *Minmar* v. *Khalatschi* [2011] EWHC 1159 (Ch) and subsequent cases, the reform potentially stands to raise as many concerns as it addresses.

The what

When a company or its directors wish to appoint an administrator out of court, they are required to give notice of their intention to do so to certain prescribed persons. Under the current regime in Schedule B1, introduced to the Insolvency Act 1986 by the Enterprise Act 2002 reforms, a 'person who proposes to make an appointment under paragraph 22' (usually the company's directors) must give five business days' notice to a qualifying floating charge-holder (QFCH) under paragraph 26(1) and 'such notice as may be prescribed to such other persons as may be prescribed' under paragraph 26(2).

As shall be considered in more detail below, the inter-relationship, and independence, of the requirements of these paragraphs have caused a great deal of judicial debate, which has had a significant and detrimental impact on the insolvency profession. As a result, the requirement in paragraph 26(2) is to be revised, to make clear its dependency on the requirement to give notice to a QFCH under paragraph 26(1). When the reform comes into force, the requirement to give notice of the intention to appoint administrators under paragraph 26(2) shall be revised as:

'26(2) A person who *gives notice of intention to appoint under sub-paragraph (1)* shall also give such notice as may be prescribed to such other persons as may be prescribed.'

Accordingly, it will be clear that notice need not be given to these 'other persons as may be prescribed' in the absence of a QFCH entitled to notice.

The why

The Enterprise Act 2002 introduced significant reforms to the administration process within the Insolvency Act 1986, including most significantly the concept of out-of-court appointments by either a QFCH, a company or its directors. This streamlined process proved popular, with the majority of administrator appointments now being made out of court by the company or directors under paragraph 22.[3] While these reforms opened the door to a quicker appointment, the removal of the court's direct involvement in appointments introduced the risk of administrators appearing to have been appointed, only for their appointments to be challenged subsequently for procedural irregularity.

After a prolonged honeymoon period following the Enterprise Act 2002 reforms, a number of cases between 2011–2012 raised the issue of the impact of procedural irregularity in appointments by the company or its directors, particularly the failure to give notice pursuant to paragraph 26(2).

It is generally accepted, despite a clear rationale to suggest otherwise,[4] that rule 2.20(2) of the Insolvency Rules 1986 (the Rules) prescribes the persons to whom notice must be given pursuant to paragraph 26(2). Included among these persons is any landlord exercising commercial rent arrears recovery and, where an appointment is made by the directors, the company itself. The judicial debate, and ensuing uncertainty, has centred around two issues: to whom must notice of intention to appoint be given under paragraph 26(2); and the consequences of failing to give such notice.

Among the line of cases are the four key judgments handed down in *Hill* v. *Stokes* [2010] EWHC 3726 (Ch), *Minmar* v. *Khalatschi* [2011] EWHC 1159 (Ch), *Re Virtualpurple* [2011] EWHC 3487 (Ch) and *NatWest* v. *Msaada* [2011] EWHC 3423 (Ch). While these cases considered very different sets of facts, they essentially came down on two sides of the divide. On the one hand, in *Hill* v *Stokes* and *Re Virtualpurple* it was deemed only necessary to serve notice to the parties under rule 2.20(2) where there was a QFCH under paragraph 26(1), and in any event failure to do so would not invalidate

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the administrator's appointment pursuant to paragraph 22. On the other hand, the judgments in *Minmar* and *Msaada* made it clear that the parties in rule 2.20(2) were entitled to notice of intention to appoint irrespective of the presence of a QFCH, and failure to give such notice would invalidate the administrator's appointment. These contrasting decisions, especially those in *Virtualpurple* and *Msaada*, which were handed down on the same day, unleashed huge uncertainty.

A modicum of calm was restored following the decisions in *Re Ceart Risk Services* [2012] EWHC 1178 (Ch) and subsequently *Re BXL Services* [2012] EWHC 1877 (Ch), which held that failure to give notice pursuant to paragraph 26(2) would not invalidate an appointment. It was not, however, settled whether such notice needed to be given pursuant to paragraph 26(2) in the absence of a QFCH. As a result, as Mann J made clear in an earlier judgment, '[u]ntil there is a clarification in the [Insolvency R]ules or a decision of the Court of Appeal the position would remain uncertain'.[5]

It is, seemingly, this uncertainty that the Act seeks to address. The explanatory notes to the bill as it passed through both Houses of Parliament explained that the current legislation requires a company or its directors to give notice of their intention to appoint to both QFCHs and to the 'prescribed persons' set out in rule 2.20(2)

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of the rules.[6] The explanatory notes suggest that the parliamentary draftsmen recognise the lack of impact that can be made on an appointment by these 'prescribed persons,' and that the requirement to give them notice 'can lead to unnecessary delays where there is no one else to whom notice of intention to appoint must be given'.[7] As a consequence, the requirement to give notice of intention to appoint to the persons prescribed by rule 2.20(2) of the rules is to be removed from paragraph 26(2), by the amendment detailed above, where there is no QFCH.

The problem

At first sight, the amendment to paragraph 26(2) appears welcome. It is now clear that notice of intention to appoint will not need to be given in the absence of a QFCH. Rather, notice of intention to appoint must only be given to the parties in rule 2.20(2) (being the prescribed persons identified in the explanatory notes) in the presence of a QFCH. Scratch beneath the surface of this requirement, however, and the drafting produces a worrying, and surely unintended, side-effect.

When notice of intention to appoint is given to a QFCH under paragraph 26(1), paragraph 28(1) provides that no appointment may be made until either five business days have passed or the QFCH consents in writing to the appointment. Thus there is a clear mechanism for the QFCH to acquiesce to an early appointment, potentially on the same day as it receives the notice of intention (indeed, almost immediately). There is, though, no similar provision allowing the additionally prescribed persons to consent to an early appointment, nor any guidance as to the amount of notice required. In the absence of any prescribed notice period, the courts would be likely, based on the decisions in *Minmar* and *Msaada*, to view the notice period as five to ten business days.[8]

A sensible response may be that if the QFCH waives the notice period pursuant to paragraph 28(1), this would automatically bind the additional prescribed persons, allowing an early appointment. As the explanatory notes identify, these persons cannot block (or rather, cannot override) an appointment, so it would be odd that they could delay it when the QFCH, who does have such ability, has consented to the appointment. This suggestion does not work, however, with the provision as currently drafted.

In the absence of express provision in the Insolvency Act 1986 or the Rules, the notice of intention would be deemed served on the prescribed persons on the second business day after service, pursuant to Civil Procedure Rule 6.14 as applied by rule 12A.3 of the Rules. To allow the prescribed persons to be bound by the waiver of notice by the QFCH before they had been deemed to have received the notice would undermine the purpose of serving notice on those persons in the first place. The reform to paragraph 26(2), which makes it clear that notice of intention to appoint must be given to the additionally prescribed persons in addition to a QFCH, will therefore prolong the period between the service of a notice of intention to appoint and the subsequent appointment where a QFCH has consented to the appointment.

This discrepancy raises the possibility of a new wave of invalid appointments under paragraph 22. Given the clear requirement to give notice to the prescribed persons as a result of the reforms under the Act and the judiciary's previous approach to the availability of relief under paragraph 104 or rule 7.55, an appointment made within five business days of notice of intention being served and in the absence of express waiver of the notice period by the prescribed persons would risk being declared invalid.

The possible solution…?

Although the Act received a great deal of scrutiny as it passed through both Houses of Parliament, the changes to paragraph 26(2) were agreed with no recorded discussion.[9] That the amendment was approved, without consideration that it could fail to fulfil the exact purpose for which it was being enacted, is a major concern for insolvency practitioners.

That is not to say, however, that the reforms introduced by the Act cannot achieve the stated purpose. The reform is not yet in force, and as yet no date has been set for its coming into force. In light of the proposed reform to the rules, and the proposed introduction of the Draft Insolvency Rules 2015 during 2016, there is an opportunity to address the problem.

A provision within the revised Draft Insolvency Rules 2015, making it clear that any waiver of notice by a QFCH under paragraph 28(1) will be binding on the prescribed persons and allow an appointment before the expiry of the five business day notice period, would remove the doubt surrounding the revised paragraph 26(2) provisions. This in turn would provide comfort to prospective appointees and allow a swift appointment where expedient.

It could, of course, be argued that, in line with the position in *Re BXL Services* [2012] EWHC 1877 (Ch), failure to serve notice on the additionally prescribed persons would not invalidate an appointment in the manner described, but would be a remediable defect. This

> Scratch beneath the surface and the drafting produces a worrying side-effect.

would not, though, seem the most sensible approach to deal with the ambiguity created by the reform to paragraph 26(2), given that it is a position reached following a number of inconsistent first instance judgments. To avoid any further potential uncertainty, clarification in the Draft Insolvency Rules 2015 to coincide with the coming in to force of the reform would remove possible concerns for insolvency practitioners.

1 Deregulation Bill HC Deb 27 February 2014 col. 101. See the comments of Chi Onwurah MP.
2 Explanatory Notes to the Deregulation Bill 2013–14 to 2014–15, at para 472.
3 See for example C Umfreville, P Walton and P Wilson 'Pre-Pack Empirical Research: 4 Characteristic and Outcome Analysis of Pre-Pack administration' (2014), Part A1.6, available at www.gov.uk/government/publications/graham-review-into-pre-pack-administration.
4 C Umfreville 'Out of Court Administration Appointment Reform: Hardy Solution or Another Fine Mess?' (2014) 2 NIBLeJ 9 144–147.
5 *Re MF Global Overseas Ltd (in administration), Re MF Global Finance Europe Ltd (in administration)* [2012] EWHC 1091 (Ch), [2012] 2 BCLC at para 12.
6 Explanatory Notes to the Deregulation Bill 2013–14 to 2014–15, at para 471.
7 Ibid para 472. The notes do incorrectly state that the 'prescribed persons' cannot 'block the appointment of an administrator'. See (4) above at 155 for more detail.
8 *Minmar* v. *Khalatschi* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798 para 63 and *NatWest* v. *Msaada* [2011] EWHC 3423 (Ch) paras 59–60.
9 Deregulation Bill HC Deb 6 March 2014 c234 and Deregulation Bill HL Deb 28 October 2014 cGC396.

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Corporate attribution and directors' duties

A path has been cleared to holding more directors to account for their wrongdoing.

The Supreme Court has handed down its long awaited decision in the much heralded appeal in *Jetivia S.A. and another* v. *Bilta (UK) Limited (In Liquidation) and others* [2015] UKSC 23, which came before the court for hearing in October 2014.

> Where a company has been the victim of wrongdoing at the hands of its guiding minds and their co-conspirators, liquidators can confidently bring a claim against those parties.

The Supreme Court dismissed the appeal, upholding the decision of the Court of Appeal, which in turn upheld the decision of Sir Andrew Morritt at first instance. In so doing it dismissed the appellants' original application for the claims against them to be summarily dismissed based on:

(i) the maxim *'ex turpi causa'* (the principle that a claimant cannot rely on his illegal action to bring a claim); and
(ii) an argument that s213 of the Insolvency Act 1986 (IA 1986) does not have extra-territorial effect.

Summary

The decision is highly relevant to liquidators who are bringing, or wish to bring, proceedings in the name of a company to recover losses that the company has suffered where the company has been a victim of wrongdoing (1) by its directors; and (2) by third parties who assisted the company's directors in the wrongdoing.

The judges all agreed that in the circumstances of this case, the knowledge or acts of the fraudulent directors could not be attributed to the company so to provide the directors (and third parties who assist them) with a defence to the claim. Attribution would mean that the illegal act or knowledge would be, in the eyes of the law, considered to be the company's act or knowledge as much as that of the wrongdoers – therefore forcing the company to rely on its own illegality.

Attribution of knowledge or acts will be fact sensitive. For claims by the company against directors (or their accomplices) involved in wrongdoing against the company, the answer is clear, those wrongful acts or knowledge will not be attributed to the company. In contrast, in a different context the same knowledge would likely be attributed to the company, for example if a third party made a claim against a company for a loss they suffered because of the company's role in the wrongdoing.

In practice this means that where a company has been the victim of wrongdoing at the hands of its guiding minds and their co-conspirators, liquidators can confidently bring a claim against those parties without fear of them being able to rely on an 'illegality defence' of this type. The wrongdoing is not considered to be the company's.

> IPs have brought claims under s213 IA 1986 against defendants globally, with great success, for many years.

The judgment also finally ends the debate about whether the decision in *Stone & Rolls Ltd (In Liquidation)* v. *Moore Stephens*

(A Firm) [2009] UKHL 39, [2009] (*Stone & Rolls*) supports an illegality defence by directors who have acted in breach of duty. Critics have long argued that this case should not be considered an authority on the issue of attribution of knowledge and should be considered as decided on its own specific facts. In short the court found the decision in *Stone & Rolls* was distinguishable and should generally be confined to the facts of that case.

The decision also clarifies that s213 IA 1986 does have extra-territorial effect, much to the relief (although probably not surprise) of the insolvency litigation industry. Insolvency practitioners have brought claims under s213 IA 1986 against defendants globally, with great success, for many years.

> In *Paramount* the court held the words 'any person' in s238 IA 1986 should bear their literal and natural meaning and not just mean any person within the UK.

Background

In brief: Bilta and its liquidators Kevin Hellard and David Ingram (the liquidators) of Grant Thornton UK LLP (together the claimants) brought claims against nine defendants in the main proceedings. The claims brought against only four of those defendants, namely the directors of Bilta (Chopra and Nazir) (the directors) and the appellants (Jetivia and its director), are relevant to the appeal judgment.

The claims

The claim against the directors and the appellants is that they were involved in a conspiracy to defraud Bilta that involved Bilta's directors breaching their fiduciary duties as directors and Jetivia and its director dishonestly assisting them in doing so. The claim is based on the allegation that Bilta's directors caused Bilta to enter a series of transactions to buy and sell carbon credits (also known as European Emissions Allowances (EUAs)) with various parties. It is claimed the directors caused Bilta to purchase EUAs from entities outside the UK, which were free from VAT; Bilta then sold the EUAs to UK entities inclusive of VAT (but often at a price that was slightly lower than it had purchased it for). Bilta claims the directors, in conspiracy with the appellants and others, directed most of the money due to Bilta to be paid to other parties (including to Jetivia). The effect of this trading was that Bilta was insolvent and unable to pay its VAT liabilities in the approximate amount of £38m.

Collectively the claims

Bilta brought claims against the directors for conspiracy, breach of duty and fraudulent trading. The claims Bilta brought against Jetivia and its director were for conspiracy and dishonest assistance, and the former also for knowing receipt (for which the first limb of the appeal is relevant).

The claims the liquidators brought against Jetivia and its director were for fraudulent trading under s213 IA 1986 (for which the second limb of the appeal is relevant).

Points under appeal

The appellants argued the claims should fail as Bilta was fixed with the knowledge of the directors (said to be complicit in the fraud). The result being the directors could defend the claim based on the maxim *ex turpi causa*. If the claims against the directors failed then the claims for conspiracy, dishonest assistance and knowing receipt (which each rely on the court accepting the directors had breached their duty) would also necessarily fail.

The appellants also argued the fraudulent trading claims under s213 IA 1986 against them were precluded as Jetivia was a Swiss company and its director was a Swiss national living in France when the relevant transactions were carried out. They argued claims under s213 IA 1986 could only be brought against defendants resident in the United Kingdom.

The Court of Appeal held that the director's knowledge was not attributed to the company in these circumstances. This was so whether there was a sole actor (where all director/shareholders were in on the fraud) as in this case or not. The Court of Appeal held the illegality defence of *ex turpi causa* was not applicable. It was bound by the decisions in *Belmont Finance Corp Ltd* v. *Williams Furniture Ltd* [1979] Ch. 250 and *Attorney General's Reference (No.2 of 1982), Re* [1984] Q.B. 624. The Court of Appeal held that a director of a one-man company could be liable to account for breaches of fiduciary duty that he committed against the company.

As for the liquidators' claims, the Court of Appeal held that it was bound by its own decision in *Re Paramount Airways* [1993] Ch 223 (*Paramount*). In *Paramount* the court held the words 'any person' in s238 IA 1986 should bear their literal and natural meaning and not just mean any person within the UK. The Court of Appeal in Bilta followed that decision, giving the same interpretation to the words 'any person' for s213 IA 1986.

Appellants' case

The points the appellant put before the Supreme Court for consideration in respect of the claims of Bilta, raised the issues:

(i) whether and in what circumstances director's acts and knowledge were attributed to a company; and
(ii) whether the decision in *Stone & Rolls* applied to the facts of Bilta.

The relevance of the latter point was that in *Stone & Rolls* the fraudulent knowledge of the director was attributed to the company such that the company's auditors were successfully able to raise an illegality defence to a claim for negligence for failing to detect the fraud. However, *Stone & Rolls* was a claim against a third party to the fraud (ie not against the fraudulent director) and was a claim in negligence (ie not for breach of fiduciary duty that at the point of insolvency would include duties owed by directors to creditors).

As for the liquidators' claims for fraudulent trading, the appellants asked the court to consider whether:

(i) s213 IA 1986 was in fact intended to apply to 'any person' wherever in the world they may be; and
(ii) if there was a jurisdictional nexus needed for such a claim, whether that was something that the court should decide at a trial (as held in *Paramount*) rather than at the outset of the case.

The Supreme Court's judgment

A panel of seven judges sat on the hearing of the appeal. Lord Neuberger, Lord Mance and Lord Sumption delivered individual judgments and Lord Hodge and Lord Toulson delivered a joint judgment. Lords Clarke and Carnwath agreed with Lord Neuberger. The judges unanimously agreed that the appeal should be dismissed on both grounds.

> The Court of Appeal held that a director of a one-man company could be liable to account for breaches of fiduciary duty that he committed against the company.

On the issue of attribution, Lord Neuberger summarised the conclusion of the judges as follows: that where a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to the claim brought against the directors by the company's liquidator in the name of the company.

There was some difference of approach between the judges in reaching this conclusion. In particular Lords Toulson and Hodge additionally analysed the question by reference to the statutory duties » of directors in the context of insolvency (in particular ss172(3) and 180(5) Companies Act 2006). They considered that permitting directors to rely on an illegality defence would deprive the duties that directors owed at the point of insolvency of all content.

Lord Sumption considered the case as an application of the rules of attribution and the exception to those rules in cases where the claim was by a victim against a perpetrator for breach of duty. In contrast Lord Mance did not consider that it was appropriate to analyse the case as one of *prima facie* attribution, which was then negatived under a breach of duty exception. Lord Neuberger agreed with Lord Mance on this point.

Whichever way it is analysed, all of the judges agreed that an illegality defence based on the maxim *ex turpi causa* had no place in this case as it would only arise if the company was attributed the knowledge of the directors, and it was not.

The Supreme Court acknowledged there was a need for the proper approach to the illegality defence to be determined as soon as reasonably possible in an appropriate case. However, as the illegality defence did not arise in this case (given there was no attribution of knowledge) they did not consider this to be a proper case for that approach to be determined.

In respect of *Stone & Rolls*, the judgments confirm that it does not support a director in running an illegality defence against a claim by the company for breach of fiduciary duty. Lord Neuberger considered that the differences between Lord Sumption on the one hand and Lords Toulson and Hodge on the other as to the proper interpretation of *Stone & Rolls*, underlined that it was hard to derive much by way of reliable principle from the decision. While Lord Sumption's judgment does offer some

> "A panel of seven judges sat on the hearing of the appeal."

principles that can be derived from *Stone & Rolls*, there is some difference of opinion between the judges on these points. Lord Neuberger concluded that subject to these points, *Stone & Rolls 'should be put on one side and marked "not to be looked at again".'*

The court was also unanimous in dismissing the appeal on s213. It was not disputed that the court had *in personam jurisdiction* in this case. Rather the appellants contended that Parliament had not intended s213 to apply to persons resident outside the UK as there was nothing expressly in the wording of the statute that indicated it was intended to have extra-territorial effect. The court dismissed this

argument, which Lord Sumption remarked was 'misconceived'. The court noted that as a matter of English law, a winding-up order is of worldwide effect (although it may not always be universally recognised as such) and that it would seriously handicap the efficient winding-up of a British company in an increasingly globalised economy if the jurisdiction of the English court did not extend to people and companies overseas who had been involved in the carrying on of the insolvent company's business. The court approved the approach of the Court of Appeal in *Re Paramount Airways* [1993] Ch 223 where it was held that the court had jurisdiction under s238 IA 1986 against a foreign resident abroad. Lord Sumption also had regard the effect of the European Insolvency Regulation (Council Regulation (EC) No 1346/2000) (Insolvency Regulation); however, Lords Toulson and Hodge did not consider it was necessary to rely on the Insolvency Regulation in order to determine subject matter jurisdiction in this case.

Commentary

The judgment gives much greater certainty to liquidators seeking to make claims against directors of a company that has been the victim of a fraud at their instance.

As far as the circumstances in this case (and similar liquidator cases) are concerned, the decision not to attribute knowledge to the company seems to be the right result. There is much to be said for the approach of Lords Toulson and Hodge that the purpose of the duty owed by directors to creditors would be undermined by attributing the knowledge of the fraudulent director to the company so to defeat the company's ability to enforce that duty. It would be most unconscionable if the director of a company could prevent the company from recovering against him for his wrongdoing while he was in control.

> "The decision is also welcome clarification that the fraudulent trading provisions of the IA 1986 apply extra-territorially to defendants outside the jurisdiction."

The decision of the court not to apply Stone & Rolls and to distinguish it as being confined to its facts may be the part of this decision that creates the most ripples. There will be several cases, current and past, where Stone & Rolls has been relied on as authority for an illegality defence by directors to a breach of duty claim in circumstances similar to those in Bilta, when it is now clear that such a defence should not apply.

The decision is also welcome clarification that the fraudulent trading provisions of the IA 1986 apply extra-territorially to defendants outside the jurisdiction. The approval of the approach in *Re Paramount Airways* means that liquidators can have confidence that when statutory provisions such as ss213, 214, 238 and 239 use the words 'any person' they do indeed mean 'any person' wherever they reside. ▫

Macfarlanes LLP represented the appellants. Counsel for the appellants were Alan Maclean QC of Blackstone Chambers and Colin West of Brick Court Chambers.

Gateley LLP represented the Respondents. Counsel for the respondents were Christopher Parker QC of Maitland Chambers and Rebecca Page of Enterprise Chambers.

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June

Date	Event title	Venue
3	**Breakfast Briefing – Employee issues**	Eversheds LLP, Leeds
4	**Restructuring Day**	Holiday Inn Bloomsbury, London
5	**Eastern Golf Day**	Diss Golf Club, Diss
5	**Yorkshire Ladies Lunch**	Aspire, Leeds
8	**Breakfast Briefing – Employee issues**	TLT LLP, London
8	**North West Regional Meeting**	Baker Tilly LLP, Manchester
9	**SPG Technical Review**	Cheltenham Chase Hotel
11	**South West Region Black Tie Dinner**	The Grand by Thistle Hotel, Bristol
18	**Scotland Golf Day**	Renaissance Club, North Berwick
19	**North West Ladies Lunch**	The Lowry Hotel, Manchester
19	**JIEB Graduation Ceremony**	BMA House, London
23	**Property Law for Insolvency Practitioners**	The Queens, Leeds
24	**North West Golf Day**	Worsley Golf Club, Manchester

July

Date	Event title	Venue
1	**South West Regional meeting with TMA & IFT**	Bristol
3	**London Ladies Lunch at The Langham**	The Langham Hotel, London
7	**SPG Technical Review**	Holiday Inn Bloomsbury, London

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Upfront fee estimates in time-cost cases

Gareth Limb offers advice regarding changes under the Insolvency (Amendment) Rules 2015.

The Insolvency (Amendment) Rules 2015 (the 2015 Rules) see the end of the perceived 'blank cheque' approach to approval of office-holders' remuneration. Instead, in simple terms, when you are seeking approval of the basis of your fees on a time-cost basis, you, as the office-holder, will need to provide creditors with an estimate of the fees that will be incurred in administrations, bankruptcies and liquidations (other than members' voluntary liquidations). The estimate will act as a cap on your fees that cannot be exceeded without creditor approval. At the same time you will also need to provide 'details of the work the insolvency practitioner and his staff propose to undertake' and of the expenses that are likely to be incurred, which will include the amounts of such expenses as well as the nature of them. Even when only seeking fee approval on a fixed fee or percentage basis, you will still need to provide the same information about the work that you propose to undertake and expenses likely to be incurred. Remember that expenses will include both category one and category two expenses.

We will have to wait until SIP 9 has been revised to put some meat on the bones of the Rules and to provide some guidance on what is expected. Hopefully, and it is certainly implied by *Dear IP No. 65*, the SIP will also provide an outline format for the presentation of the information to creditors. This would avoid each firm having to develop its own format and would provide a consistency of disclosure, which must be of benefit to creditors. What is clear, though, is that you will certainly need to get a good feel for a case, either pre- or post-appointment (depending on case type), in order to help you provide an accurate estimate of your time-costs, the work that you propose to undertake, and expenses that are likely to be incurred.

Reporting requirements

The 2015 Rules also impose additional reporting requirements in progress reports, particularly where your remuneration has been approved on a time-cost basis. Where the time-costs you incur are likely to exceed your fee estimate, you will need to include an explanation for this, even in cases where you do not intend to seek approval to draw increased fees, or cannot draw them because there are no funds in the case against which to draw them. Irrespective of the basis on which your remuneration has been approved, in cases where your expenses incurred exceed, or are likely to exceed, the estimate given when seeking your fee approval, then you will also have to provide reasons for that excess. While the 2015 Rules are silent on this, presumably in the interests of transparency you will also need to provide a revised estimate, but we will have to wait for SIP 9 to see if this extra step is going to be required.

> "We will have to wait until SIP 9 has been revised to put some meat on the bones of the rules."

Looking at each case type in a bit more detail

In administrations, the fee and expenses estimate will need to be provided in your proposals, even if it falls to the chargeholder, or the chargeholder and preferential creditors, to fix the basis of your remuneration. In bankruptcies and compulsory liquidations then, arguably you should find out about the debtor or the company, its assets and background (rather than just relying on what you have been told by the Official Receiver) before seeking a fee resolution to help ensure the accuracy of your estimates. You may even want to wait until you have undertaken some initial investigations to find out if there are any potential antecedent recoveries before seeking a fee resolution, so that you can factor in time-costs and expenses associated with such actions rather than having to seek approval for an increase in fees at a later date – thereby risking creditors refusing to do so.

There are different issues to consider in Creditors' Voluntary Liquidations. First of all, you will need to provide an accurate estimate even in nil asset cases or minimal asset cases where the directors are paying some or all of your costs. Secondly, although the 2015 Rules indicate that it is the liquidator who must provide the fee estimate to the creditors when seeking fee approval, it appears that it may in fact be possible for you to do so before you have been formally appointed liquidator. In a recent blog post on Insolvency Oracle, based on her recent discussions with the Service Michelle Butler comments that, 'The Insolvency Service does not believe this is limited to the liquidator once he/she is in office. In other words, the prospective liquidator may provide the fees estimate before the members' meeting. This means that, provided the IP can produce an early estimate, these new rules should not impact on the current practice of holding members' meetings and section 98 meetings on the same day. In other words, the prospective liquidator may provide the fees estimate before the members' meeting.' This is certainly a very practical and pragmatic interpretation of the meaning of *liquidator* in this context and it is to be *welcomed*. Hopefully SIP 9 and *Dear IP* will provide some guidance on the meaning of *liquidator* which can safely be relied upon. Ultimately, of course, it will be for the courts to interpret the meaning of *liquidator* in this context.

If no guidance is in fact forthcoming then the safest approach will be to follow the apparent meaning of liquidator and wait until you are actually in office before sending the estimate to creditors. Consequently, you will either have to hold a general meeting of creditors or seek a fee resolution by correspondence sometime after the s98 meeting, or alternatively hold the s98 meeting within the 14 day statutory window after the meeting of members at which the winding-up resolution was passed and you were appointed the members' liquidator. The 2015 Rules just say that 'the liquidator must, prior to the determination' provide the fee estimate etc to creditors, but do not set out how much notice has to be given to them. No doubt this will be covered in the revised SIP 9, although s98 does of course say that 'notices of the creditors' meeting [must] be sent by post to the creditors not less than seven days before the day on which that meeting is to be held'.

Just to complicate matters further, in the future when seeking fee approval, the Small Business, Enterprise and Employment Act 2015 has introduced new provisions regarding 'decision procedures', whereby physical meetings of creditors will be prohibited unless requested by sufficient creditors. Those provisions will come into force when the minister makes the necessary regulations, which is likely to be when the modernised Rules are introduced in April 2016. The effect of this revised approach will be that you will have to place reliance almost exclusively on written resolutions or meetings with remote attendance. There are also provisions whereby resolutions can be passed by deemed consent; but while the modernised rules will permit these to be used to confirm your appointment as liquidator by the creditors, deemed consent will not be available to approve your remuneration, or indeed to increase it.

> "I am sure that the regulators will be making sure that the estimate has not been deliberately set too high."

Starting preparation now

Clearly there will be a need for you to provide an accurate estimate when seeking fee approval, both to avoid having to report extra information to creditors and also because I am sure that the regulators will be looking at the estimates given compared to time-costs actually incurred, to make sure that the estimate has not been deliberately set too high. Further information will be forthcoming when SIP 9 is revised, but in the interim it would be worth taking some time to analyse the time-costs incurred by the SIP 9 category of work for the different case types you take on, and also looking at a range of cases of different 'size' and complexity within each case type. The time-costs you identify in your analysis will clearly vary depending on the type, size and complexity of the case, but it will give you an idea as to the range of your time-costs when providing an estimate, while also providing you with a defence should you be criticised for over-estimating your fees. ◻

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Licences and Insolvency

Born out of a realisation among international insolvency practitioners and lawyers that despite the harmonisation of intellectual property law in much of the world, the treatment of intellectual property rights in the event of insolvency remains an issue to be determined for the most part purely in accordance with domestic insolvency law, with often surprising or troubling results, this book aims to provide the reader with answers to some of the more pressing questions faced when dealing with an IP licence affected by insolvency in a cross-border scenario.

Broken down by country, each chapter sets out a summary of the applicable general principles of insolvency law in that jurisdiction, types of insolvency procedures involved and the availability and effect of preliminary proceedings, describing the institutional bodies and professionals involved in the field of insolvency, along with their respective powers and roles, before delving into the treatment of IP licences in insolvency situations.

Inevitably, for a work which compares jurisdictions with roots as diverse as civil law, common law, Talmudic law and socialist law, *Licences and Insolvency* runs into a few difficulties with inconsistent terminology and difficulties in discerning where the lines between the various insolvency procedures and professionals are drawn. The reader will be assisted by considering neutrally the information provided and taking off his or her 'common law hat'.

The usefulness of this book is limited by the reality that in practice, when dealing with an IP licence/insolvency issue with a cross-border element, practitioners will inevitably end up relying on the advice of practitioners from the relevant jurisdiction(s). However, as a novel comparative study and an introduction to some of the issues to watch out for (and areas to probe when instructing practitioners overseas), it serves its purpose well. ◻

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R3 membership categories

We continually strive to improve benefits for all members. Membership benefits across categories include:

- A copy of RECOVERY every quarter
- Attendance at regional meetings
- Priority bookings for R3 courses and most of its conferences
- Technical bulletins and releases
- Access to the members' section of the R3 website
- An invitation to the R3 annual conference
- Continuing professional education at discounted rates

Please see below for details of the different categories of membership:

- **Full members** are invited to contribute to the development of insolvency, business recovery and turnaround professions at both local and national levels.
- **Benefits include**: use of the designatory letters MABRP and a certificate of membership, inclusion in the R3 Directory and a copy of it, membership of INSOL International.
- **Associate members** are individuals who do not meet the requirements for full membership but work significantly within the business recovery sector.
- **New Professional (Student) members** are individuals preparing to take the Joint Insolvency Examination Board (JIEB), Certificate of Proficiency in Insolvency (CPI) or Certificate in Insolvency (ICAEW) qualifications. Pass students of the JIEB are eligible to apply for full R3 membership.
- **New Professional (Networking) members** are individuals who have recently joined their firm, and/or are new to the business recovery sector and wish to network with R3 members. This category receives electronic copies only via access to the R3 website.

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Tell them where you saw it…

Summer 2015

Interview with…
Phillip Sykes

Sandra Kessell talks to **Phillip Sykes**, the incoming R3 president.

Phillip Sykes biography

- The new R3 president Phillip Sykes studied modern languages at the University of Oxford before training as a chartered accountant with BDO Binder Hamlyn and finding his niche in the 'special' department dealing with insolvency. He went on to be a partner at Arthur Andersen and head of corporate advisory services at Moore Stephens before joining Baker Tilly as head of London restructuring and recovery in January of this year.

- An early member of the Society of Practitioners of Insolvency, Phillip has served on the Investigation Committee and the Insolvency Licensing Committee at the Institute of Chartered Accountants and R3's General Technical Committee. In his spare time he is a keen horseman.

Q You've spoken about how you want to focus on the value of the profession, engagement with stakeholders, and the integrity of the profession. Can you tell us more about that?

A The whole issue of integrity and engagement with the wider stakeholder group is something that is absolutely fundamental to the development of the insolvency profession. If you draw a parallel with company directors and go back a few years, the touchstone by which a company director operated was an absolute focus on delivering maximum value to shareholders. We've seen a fundamental sea-change in that and the new Companies Act has brought in a whole raft of responsibilities. The nature of insolvency work means that IPs are going to be under the spotlight because distress is always more interesting, certainly from a media perspective, than good going concern situations. IPs have to be aware of the extent to which there's a fiduciary element to their work. You're engaging not just purely to maximise the benefit to creditors – although that's a very important touchstone – but you do have to consider what impact your work may be having on other stakeholders – whether it be environmental or the thorny issue of employee collective redundancy.

Q What about highlighting the integrity of the profession? That doesn't come across in the media, either.

A No, it doesn't as well as it might, and part of that is a failure in communication. For instance, if you approach creditors' meetings properly, then by the end you should have established a rapport with your audience and you should have them onside. We're not always good at communicating, perhaps because of a reluctance to deliver bad news, so saying, 'I hope to make a distribution in six to nine months' when actually you should probably be saying 'six months to three years', because things don't always work according to plan. If there are claims, law suits and complex guarantee warranty claims, all these things can delay even the smallest distribution because of the time frame needed to deal with them; litigation, as we all know, can be a drawn out process.

Q What are the main challenges for the insolvency profession in the next 12 months?

A There's a lot of regulation coming towards us: setting up and getting the pre-pack pool under way and the related SIP 16 changes; there's the new fee structure, which I'm going to talk about later on – those are key. There is less insolvency work around and that's a challenge too but we have to continue to respond to the concerns of government, media and other stakeholders and make sure that, when we are doing our work, it is clear why we're acting as we are. What the profession as a whole needs to do, through R3 and through the recognised professional bodies (RPBs), is to make sure the pre-pack pool is respected and is dealt with properly and that we engage with the new structure for up-front fee estimates, so that we're not just following the letter but also the spirit of the law to ensure that we're putting creditors into an informed position.

Q Who would do the job of sorting out ailing companies if not a professional organisation or a professional set of people? There's an obvious need for IPs.

A In the 'old' days, before licensing, anyone could get involved and that allowed the sort of abuses that led to the 1986 Insolvency Act and the whole licensing regime, which was, without question, needed. My plea to government today would be to allow a period of calm to allow the new regulations and rules introduced over the last 12 months to bed in. The UK does have a very well respected insolvency regime. The World Bank review substantiates that. We may have slipped to 13th because the most recent figures put more of an emphasis on a Chapter 11-type process, but we are still world leaders in the efficiency of our insolvency processes and the level of return to creditors. Our regime has a lot of flexibility within it and we should see what comes out of the Americans' own review of Chapter 11 before considering whether there are some aspects that would be useful for UK legislation. For instance: the area of continuity of supply in the UK has been improved, in large part due to R3's lobbying. Once upon a time it was just the utility companies that were required to continue to supply, now that includes the whole IT infrastructure as well. If you look at Chapter 11, the US goes quite a bit further in terms of the legal powers the trustee has to enforce continuity of supply, not just utilities and IT infrastructure but suppliers to the business in every area. That's an on-going area of interest.

Q A lot of regulatory and legislative changes affecting the profession were introduced in the last 18 months. Which one do you think will have the most positive impact on the profession and insolvency regime?

A I think the pre-pack pool and upfront estimate of fees both have potential for making a really positive impact but we have to embrace them and work with them to make sure that the information that is provided is in accordance with the spirit of what people are trying to achieve.

Q You have been in front of parliamentary committees representing R3 quite a few times: the BIS Select Committee in March 2015 and the Committee examining the Small Business Bill in October. What do you make of the process and do you think that your representations have made a difference?

A Where I think R3 has done an amazing job is in terms of radically improving the perception of the insolvency profession within Parliament. So when I go along to give evidence to one of these committees I'm actually greeted as a member of a profession that is trying to do a proper job within the British economy and that's a massive sea-change in terms of the sort of reaction IPs once got. I think that the things that we have been particularly working on – like trying to keep the Jackson exemption; and making clear the issues between the collective redundancy legislation and the reality of insolvency – all these get taken on board pretty sensibly by the committees. I've felt that our representations have been taken into account. For instance, at one hearing, I made the point that IPs are keen to keep section 98 and paragraph 51 creditors meetings as physical meetings that people can come to because of the value of creditors meeting together and exchanging information. I made the point that, if virtual meetings were the only way to go, why was I physically sitting in front of the select committee? Toby Perkins MP, at the time the shadow minister for small business, quoted me during the subsequent proceedings of the committee. And following that we had a meeting with BIS Minister Baroness Neville-Rolfe and she picked up on that. I think she tipped the balance in terms of the Jackson exemption being extended and changed the threshold for the number of creditors

needed to ask for a physical meeting. It is not only the select committees that can make a difference, but meetings with ministers and other groups, individual face-to-face meetings and meetings at the House of Lords. One of the issues going into a new parliament is how that will affect R3. Having educated quite a lot of MPs over the past five years, some will move on and many of the new faces will know nothing about insolvency. That is what R3 is for – to ensure the continuity of the message about the profession and its value.

Q Changes to the way insolvency fees are set will be introduced from October; how well do you think the profession will adapt?

A I think the profession will adapt well. It will be difficult in complex cases because it is going to be next to impossible to give a complete estimate of what the costs are going to be. The key thing is that the legislation, as I understand it is, will enable you to get back to the creditors and explain why your initial estimate needs to be amended. But that really is good practice in terms of what happens already. If you're doing an administration with a bank involved, very often the bank will ask for an estimate up-front. Or if you're doing some work for government under the Proceeds of Crime Act, for example, you will have had to tender for that piece of work.

Q The government announced that a decision on insolvency litigation's exemption from the Jackson reforms will be postponed to later in the year. Is this just delaying the inevitable or is there a will in government to rethink the end of the exemption? There is also the composition of the new government to consider…

A The previous government stated that there should be a review in relation to the reconsideration of the exemption from Jackson for insolvency and it is then going to be up to us to put forward lots of examples as to why insolvency litigation is a valuable tool in the IP's armoury and should continue. I think there is a genuine acceptance now that it was something that did need to be thought about again. What the outcome of that will be depends on our continuing to make the case forcibly and convincingly.

Q The European Commission has published recommendations on the harmonisation of European insolvency laws. Do you think the Commission's interest in insolvency will lead to any changes to the UK regime? Are there things we can borrow from European countries that do things better?

A There are some splendid things that Europe does better but I don't think we're going to get them. If the Commission actually enacts specific legislation then we have no alternative but to incorporate it. But I think the most recent proposed changes are ones which, on the whole, we're not unhappy with. There's been a lot of jockeying between the Commission and Parliament and drafts have gone to and fro. Then there's been a recent publication stating that the reason European capital markets aren't harmonised is because European insolvency legislation isn't harmonised. Personally I think that is nonsense. The last thing European capital markets think about is insolvency.

Q Do you think Europe could borrow anything from the UK regime?

A They could, but the trouble is the UK cultural, legal basis is so different from the rest of Europe. »

There's a permanent tension between their prescriptive type of legislation and the common law we have here and the extent to which IPs operate as professionals without rushing back to the court. We have a very good insolvency regime here, which is known to some extent in other Commonwealth countries – and Ireland – and then you have the US Chapter 11 process, which has some fairly major critics of its own and then you have the European Commission. So there's a tension with academics, legislators and the professionals trying to agree amendments to cope with changes in the marketplace against the reality that people come from a particular cultural, legal background and, if they are familiar with that, they feel that is the best way to do it.

Q Did you have a master plan to be an IP?

A No – very few people do. I left university with a degree in modern languages, joined Binder Hamlyn, part of BDO, became a chartered accountant and thought about leaving to go into commerce or asset management when somebody said, 'If you're looking for secondment, the special department is looking for recruits.' When I asked what the department did, they said, 'Something to do with liquidations' – that was in 1980 – and I've been involved in insolvency ever since. It's a very rewarding profession but it's not for everybody.

Q Why did you take on the role of R3 president? The responsibilities are not just this year – you have to do the vice-president's role first…

A Quite a few years ago I answered a call from the Institute of Chartered Accountants England and Wales who were looking for people to serve on the Insolvency Licensing Committee. I got called on to the Investigation Committee instead and spent six years examining complaints against chartered accountants of all types, not just IPs; then as soon as I finished I was 'encouraged' to join the Insolvency Licensing Committee – so I did six years on that as well. I felt after 12 years I had done my bit for the profession, but when two or three years ago I said to my then partners that, with a lot of vacancies coming up on council, it was a good year to put someone forward, I found them looking at me. As I've always been an admirer of R3 and what it does I stood aiming, if elected, to be a bit of a backbencher, but having joined, I was encouraged by Giles Frampton to join the General Technical Committee – which is a very interesting committee. Then I was persuaded to stand for president.

Q Were you aware of the setting up of R3?

A Yes, I was an early member of the Society of Practitioners of Insolvency. There are a number of RPBs and R3 is a single voice for the profession. It is extremely good at what it does in terms of scrutinising legislation, lobbying, PR for the profession and on the educational side of things. One of the areas I'm also interested in focusing on this year, is to continue strengthening the regional committees and R3 in Scotland.

Q What contribution can ordinary members make?

A At a very basic level it's important that people should support our campaigns and surveys. For instance, we got a tremendous response to the survey about the government's proposal to abolish the power of the office-holder to call a creditors meeting and for continuing the exemption of the Jackson reforms. It's natural to respond to things one feels feel strongly about, but I would urge members to respond all surveys. Members are terribly important in terms of providing evidence for the messages we want to give government. I think we have demonstrated that when we get to talk to government we are listened to and we can make a difference. R3 is a trade body so at its very core, R3 aims to protect and promote R3's members' interests. We can only do this if we know what R3 members want and need – and this is where R3's regional network comes in. We have a strong and active network across the UK and we encourage all R3 members to become active members by attending meetings and events and ensuring that R3 at the centre understands, and so therefore can properly represent, all members' interests.

Q What is the most memorable insolvency case you've been involved in?

A I have had a very interesting career. One of my first appointments was to a company called Barber Greene, which manufactured Tarmac pavers up near Bury St Edmunds, and we traded that business full blast for about six months and had a fantastic result for the creditors and for the workforce, who retained their jobs. I was the administrator for Sock Shop, for Oasis and for Reader's Digest, all of which were fascinating in their way.

But in terms of history, being involved in the Asian banking crisis in Indonesia, seconded to the Indonesian Bank Restructuring Agency as an international expert to advise on how to take control of, and then deal with, something like 70 insolvent banks, was just a massive piece of work. It was in the context of very different culture and massive corruption. I was there during the Jakarta riots and the fall of Suharto's government, dealing at a very senior level with ministers. It was memorable and fascinating but in some ways I wonder how much has really changed there.

Closer to home, essentially our own banking crisis was not so very different to what happened in Indonesia – just with many more noughts on the end. Banks were lending recklessly against overvalued assets and were caught short when the tide went out. We in the West could have learned a lot from the Asian banking crisis but we failed to do so.

Recently I've been involved in the members' voluntary liquidation of LOCOG – the London Organising Committee of the Olympic Games and Paralympic Games, which was of course completely solvent. It started off as a relatively small piece of work but we ended up being appointed earlier than originally planned, so before the final staff had left, and when there were still quite a lot of creditors to pay and disbursements to the British Olympic and British Paralympic Associations to be made. We worked very closely with the previous management – who were absolutely excellent – I was extremely impressed by the quality of the team that Seb Coe had appointed around him. I did have the memorable moment of being able to introduce myself to Princess Anne as her liquidator, rather naively thinking we could then have a chat about horses, but she was in business mode, she wanted to know what I was going to do, what the time frame was, what it was going to cost… absolutely razor-sharp.

Q If you weren't an IP, what would you be?

A It would have to be something to do with horses, really. I was a language graduate – that was partly from being from a diplomatic background. My father was an ambassador and as a result I grew up speaking several foreign languages as a child. In an ideal world I would have been a farmer, have a stable full of horses and go eventing. I didn't take up riding until I was 45, so I have the passion of the late convert. □

SANDRA KESSELL is the publishing manager of *RECOVERY*.


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