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**Autumn 2009**

# RECOVERY

## Energy and transport

### Will the wheels of industry continue to be oiled?

**Plus**
Legal update, Technical update, Economic snapshot: Midlands Region

Autumn 2009

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# Editorial

You may feel comforted to know that your editor's words are his own. They should certainly not be taken to portray R3 policy (for which read the president's column on page 4), although they will doubtless coincide with it on occasion. They are, however, the sometimes heartfelt view of a longstanding member of the insolvency profession.

You may not remember the summer 2009 editorial. A call for clearer communication by and on behalf of the profession was coloured by concern about our regulatory regime – the expression of which appeared not to sit well with some regulators. That is a shame because there was no suggestion that our regulators are not trying hard.

Communication is the bigger issue and the truth remains that as a profession, despite R3's great strides, we have a long way to go in getting the right message across clearly at the right time. It is perhaps inevitable that The Insolvency Service's first report on the monitoring of pre-packs, which noted that 65 per cent of pre-packs were fully compliant with SIP16, was reported in the national press as 'in an extraordinary 35 per cent of cases insolvency teams are not bothering to comply'. Far less well reported was the part of The Insolvency Service's conclusion stating 'it should be noted that failure to comply with the SIP does not imply misconduct in the pre-pack sale itself, a lack of good faith or failure to act in the best interest of creditors. In many cases, apparent non-compliance may be attributed to early differences in interpreting the requirements of the guidance.'

Neither was there timely recollection of the point made by Baroness Vadera in the House of Lords on 23 June, that: 'One has to remember that the plight of small creditors, which I feel acutely as Small Business Minister, is actually the result of the insolvency, not of the pre-pack'. We would do well, as a profession, to get that message across.

C. Laughton

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# Help for redundant employees

**Martin Buxcey explains how a new partnership agreement between the government and the private sector aims to support employees facing redundancy.**

Since March 2009, I have been involved in developing a partnership agreement between R3 (representing IPs), The Insolvency Service (IS) and Jobcentre Plus (JCP). The purpose of the agreement is to support employees facing redundancy. This is an exciting and challenging opportunity to help shape a government and private sector initiative.

### About the partnership

The need for the partnership has been highlighted because of the current economic situation and the government's desire to provide a quicker and more effective response to those unfortunate enough to have lost their jobs. It is a very high profile initiative sponsored by Phil Wilson (MP for Sedgfield) because of local issues raised by constituents affected by real redundancy situations. Phil has made this agenda very visible during discussions with his Westminster colleagues.

The aim of the partnership is to bring together colleagues from the three organisations to share intelligence and gain access to government services more quickly, enabling the IS and JCP to deploy resource to affected areas. This will ensure that the full range of support is offered through the Rapid Response Service (RRS) of JCP and our network of local partners. It will also provide IPs with easier access to expert support to signpost people to the right service at the right time, thus minimising impact and confusion.

### Why the partnership is important to JCP

The latest seasonally adjusted figures for May 2009 (released in June) show 1,545,000 people are claiming Jobseekers' Allowance (JSA). That is 90 per cent higher than in May 2008 (800,000). Although we have seen a slowing in the rate of increase over the last two months, unemployment is still rising.

Having earlier access to the employees being made redundant enables JCP to deploy support and equip the workforce with the necessary skills to move quickly back into work. When a company goes into administration, time is of the essence. Correct signposting can ensure the successful engagement with partner organisations to deliver RRS support and guidance.

### JCP's Rapid Response Service

The Rapid Response Service is the support JCP gives to employers and their employees facing redundancy to help them find new jobs. In response to the economic downturn, in November 2008 the National Economic Council announced a doubling of RRS funding for the remainder of 2008–2009, and a further doubling to £12 million for 2009–2010. This has enabled JCP to extend the scope of RRS, giving much greater flexibility in its range and application.

### RRS support and eligibility

Since November 2008, JCP has supported over 2,000 companies reporting redundancies through its RRS.
The RRS offers support to:
- employers proposing 20 or more redundancies
- other employers where there is a significant impact on the local labour market
- any employer who contacts us about RRS.

The RRS support is available for employees:
- who have been made redundant
- under threat or notice of redundancy
- up to 13 weeks after being made redundant.

Employee support includes help and advice on: the labour market, searching for jobs, and on benefits and tax credits. Additionally, the service can provide people with skills assessments (an analysis of skills needs in the context of the labour market) and job-focused training. An Action Fund can help remove the barriers to returning to work: for example travel costs, equipment or childcare costs.

Our responses to proposed redundancy situations are delivered in partnership between JCP and other organisations. These can include HM Revenue & Customs, skills bodies (for example the Learning and Skills Council, in England, the Welsh Assembly government and Skills Development Scotland), regional development agencies and local authorities. JCP will act as a single point of contact for IPs to reduce the number of interested parties seeking information, thus simplifying the process.

### What's in it for IPs?

Throughout this engagement the partnership has been conscious that all stakeholders need to benefit from the arrangement. It is envisaged that by working closely together JCP will be able actively to support IPs at the coal face of administration by:
- having experts on hand to answer questions about benefits or, via partners, on housing/council tax benefit, family tax credits or self employment;
- releasing the pressures on IPs as others will be on hand to manage information and employee queries;
- helping to reduce the anxiety and uncertainty felt by employees impacted by redundancy as they will be clear about the next steps to take;
- co-ordinating national and regional responses by acting as a single point of contact – as JCP will engage with its local partners and organisations; and
- enhancing the JCP and administrator image to ministers and the media.

### Successes to date

Although it is very early days, there are already some excellent examples of working in partnership with other organisations. For instance, JCP was notified on a Tuesday afternoon of 110 redundancies due to happen the following day. The same afternoon JCP did the following:
- prepared literature for issue to the workforce;
- arranged for a member of JCP staff to be on hand the following day to work on site with the IPs delivering benefit advice and signposting to services;
- signposted employees to a partnership meeting for the following week to provide jobsearch advice, skills analysis and CV preparation support (over 81 per cent of the workforce subsequently attended the meeting).

JCP would like this to be the level of support offered in all cases. However, this will not always be achievable at short notice. Early insight into the potential timescales and numbers of redundancies would allow JCP to target and plan its response to best effect. □

**Martin Buxcey is at Jobcentre Plus.**

# President's column

**R3 is working hard in high-profile areas to ensure its members' voice is heard and understood, says Peter Sargent.**

Sparks inevitably fly when the words regulation and pre-packs collide; the more so when journalists comment. IPs have always been in the firing line; which is not to say we should tolerate inaccurate reporting or self-serving sniping, from whichever direction.

### Recent reports

Before telling you what we are doing, let me remind you of the reports on our industry that have inflamed passions this year. These are from the Department for Business Innovation & Skills (BIS – formerly BERR) Select Committee on The Insolvency Service; The Insolvency Service on insolvency practitioner regulation; and separately on their SIP 16 policing. And just out is the Hampton Review. Ammunition has been found within these and duly fired in our direction. 'Where is our shield to fend off these attacks?' and 'Where is our sword to strike back?' I hear you ask. The answer is R3. Not with rhetoric, still less bluster; but with facts and independent analysis, plus frequent, focused briefings and discussions with key opinion formers and legislators. (See article on page 29 from The Insolvency Service.)

That our efforts are working is demonstrated by the government's official response to the Select Committee's report[1], which accurately recognises and supports the beneficial role of pre-packs: '*It is the government's view that while vigilance is certainly needed in this area, any action taken must not unduly impair a means by which a material contribution is made to the rescuing of jobs and economic value that might otherwise be lost*.'

### Launch of the APPG

Significantly, July saw the formal launch of an All-Party Parliamentary Group on Insolvency, supported by R3. This offers us the opportunity to explain to parliamentarians what we do in the insolvency, restructuring and turnaround fields, individually and in combination, and how it has and continues to play a vital part in taking the UK through this recession successfully. (See interview with Natascha Engel, chair of the APPG, on page 56.)

### Addressing areas in need of improvement

Lest anyone think I am complacent about what individual practitioners or regulators have to do, well, I am not. There are inevitably areas in need of improvement within the industry. We are working closely with the Service, the individual RPBs and our members to identify these; and we will devise solutions and then implement them through training and courses, via the provision of technical support and through more effective communication to stakeholders, whether within the profession or outside of it.

The goal should not be for any one organisation, whether R3, the Service or the individual RPBs, to claim sole credit for improving our insolvency world. We all benefit from being seen as a well regulated, highly professional community of practitioners and regulators. This is not just about perception, but the reality too. Inevitably there are minorities in any industry (parliament and banking also come to mind) who let the majority down through failures to act efficiently or promptly, or, regrettably, by acting improperly or illegally. R3 wants such bad apples identified and removed. We all have a part to play in this: through reporting possible examples of questionable conduct to the regulators; by the regulators accelerating their investigations; and by ensuring the transparent and widely publicised enforcement of suitable disciplinary measures, when justified.

"That our efforts are working is demonstrated by the government's official response to the Select Committee's report, which accurately recognises and supports the beneficial role of pre-packs."

### Jobcentre Plus

As part of our commitment to engage with wider stakeholder groups I met representatives of Jobcentre Plus and Phil Wilson, MP for Sedgefield, to discuss progress in developing a workable protocol for IPs to use to assist those affected by insolvency, and to help them find as quick a return to employment as possible. (See the opinion piece on page 3.) This complements earlier R3 contacts with the TUC. I also participated recently in an R3/Smith Institute event that considered corporate insolvency, in advance of hosting events at the main political party conferences this autumn.

### The continuation of self-regulation

The price for not continually striving to improve our standards and reputation, and being seen to succeed in doing so, is much greater than merely losing the sympathy of the public, politicians and press. What is at stake is the continuation of self-regulation; other professions have already lost that privilege. If we are to retain this it will have to be on merit, and that is a battle that has to be fought and won – constantly.

### Networking opportunities

Rest assured, it is not just UK insolvency professionals who feel unfairly treated and badly regarded at times. My recent attendance at the INSOL International conference in Vancouver brought home how similar are the challenges practitioners face throughout the world. As with R3's conferences, the new friendships and professional contacts made, and the old ones renewed, are an important part of the experience, the more so when combined with strong educational content.

Within the UK, networking opportunities abound, whether R3 courses or local events put on by our hardworking regional committees. Immediately before writing this I attended events in the North West and Eastern Regions and was impressed by the lively debate and interest in our industry so clearly in evidence at both.

I am reminded of the saying, 'So much to do, so little time'. Well, we all have to do the 'right things right', continually and visibly. Does anyone disagree? I hope not! □

[1] www.publications.parliament.uk/pa/cm200809/cmselect/cmberr/919/91904.htm

**Peter Sargent is a partner at Begbies Traynor.**



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# Burning platform

**Have your shout. If you have comments about articles in *RECOVERY* or concerns about the industry we'd like to hear from you.**

Dear Sir

## Regulation – who wants what?

The regulatory regime for insolvency is not without its critics. Some of the points made including those in the editorial in the summer issue of *RECOVERY* are fair, but many are wide of the mark.

The system is designed to serve the public interest – so does it do that? Our present system has been in place for a little over 20 years. Is it fit for purpose in the 21st century?

## Multiple licensing bodies

Let us deal first of all with one of the frequent cheap shots at the current regime – that there are too many regulators for a relatively small population of practitioners. There are two main criticisms in this respect, one is that it gives rise to inefficiency and the other is that the process of regulation is disjointed. The inefficiency argument might hold more water if:

1) all the regulatory bodies specialised in insolvency regulation, with the effort and resource duplicated several times over, and
2) if the costs of this alleged waste were being passed on to creditors.

This is not the case. It is no accident that some IPs are licensed by the bodies with which they hold other qualifications, and indeed it is precisely because those bodies are engaged in other activities that they can pass on economies of scale. An IP's choice of regulator is a matter for them, as long as creditors don't suffer as a consequence, and provided the system is not disjointed as a result.

Recent studies of the disciplinary processes of the bodies have demonstrated that there are no significant differences between the outcomes in comparable regulatory cases. There will always be examples that suggest some inconsistency in decisions in apparently similar situations, but this ignores the unique circumstances in each case. It also ignores the cohesion provided by the government's oversight through The Insolvency Service.

The licensing bodies have made great strides towards joined-up regulation. The Joint Insolvency Committee (JIC) brings together all the regulators in a concerted effort to make sure that standards across the profession are uniform. The work of the JIC can be seen in the shape of the new universal code of ethics and Statement of Insolvency Practice 16 on pre-pack administrations. Indeed, the JIC is currently undertaking a revision of all the SIPs, engaging with key stakeholders and consulting widely in the process. Here is clear evidence that the joint efforts of the regulators are being pooled successfully, in the public interest, to move regulation forward pro-actively.

## Conflict

Some have argued that the effectiveness of the professional bodies is tainted by a natural tension between their member body roles (looking after their subscribers' interests) and their roles as regulators. This has always been perception rather than an issue where anyone has been able to offer evidence of actual conflicts of interests. It amounts to no more than a theoretical worry about how the system might be viewed by complainants who, naturally, want to be sure that their allegations will be fairly heard.

A tremendous amount of work is undertaken by the licensing bodies and The Insolvency Service to make sure that licensing and complaints processes are transparent and involve lay input. Indeed, some complaints processes have been upheld at judicial review. Lay input is real and anyone who has taken part in regulatory or disciplinary deliberations will know how vocal lay members can be. It is inconceivable that the bodies would seek to do anything other than carry out their duties to their fullest extent as it is only by weeding out poor practice among a minority that the regulators can preserve the respect they enjoy.

## Transparency and publicity

The Insolvency Service has recognised that more could be done:

1) to demonstrate that there is an appropriate degree of regulatory activity by both the Service itself and the professional bodies; and
2) to provide reassurance of that through greater transparency.

Discipline, and where necessary public reprimand, is one of the weapons in the regulator's armoury, but so too are the discussions that take place as part of the regular monitoring process, which is focused on helping practitioners to achieve the best service possible, give best value and ensure that IPs remain fit and proper to act in what is a technically demanding environment.

The Recognised Professional Bodies have always published findings in individual cases, where this has been merited, and reported their regulatory activity to the Service. What has been lacking perhaps is a centralised record of this activity, and this has now been achieved by the publication of the Service's detailed annual report containing this information.

## Stakeholders

Creditors can now see the broader picture through the Service's report. They are also better informed on pre-pack cases than ever before because of the new SIP requirements on provision of information. Creditors and their representative bodies, such as the Institute of Credit Management and British Bankers Association, are engaged in the regulatory process, through acting as lay volunteers on regulatory panels and participating in fora on standards. The Insolvency Practices Council, predominantly a lay group, represents the public interest and publishes its own annual report on regulation.

> "The insolvency regime in the UK is one in which practitioners and the creditor community can take pride, and in which the public can have confidence."

The JIC provides a vehicle through which the regulators can speak to the IPC and others with one voice. It has been doing this to good effect while trying always to achieve a balance between unwarranted regulatory burdens that increase costs and the need for change in the public interest where necessary.

The Insolvency Service has a key role to play at the hub of the regulatory regime. It has engaged constructively with the professional bodies and the wider stakeholder community, and it provides the glue that holds the system together.

Far from being broken or in a state of disrepute as some have suggested, the insolvency regime in the UK is one in which practitioners and the creditor community can take pride, and in which the public can have confidence. ☐

**Andrew Tate is the current chair of the Joint Insolvency Committee and a director at Abbott Fielding Limited.**

# News update

## Red alert figures

This issue of *RECOVERY* carries theme articles about energy and transport. Recent figures from Begbies Traynor illustrate the problems within these key sectors over the last year.

**Significant problems by sector**

| | Year on year | | | Quarter on quarter | | |
|---|---|---|---|---|---|---|
| **Sector** | **Q2 2008** | **Q2 2009** | **% change** | **Q1 2009** | **Q2 2009** | **% change** |
| Automotive | 2,995 | 4,410 | 47% | 4,775 | 4,410 | -8% |
| Manufacturing | 5,064 | 8,296 | 64% | 7,755 | 8,296 | 7% |
| Transport & communications | 4,139 | 6,978 | 69% | 6,757 | 6,978 | 3% |

**Critical problems by sector**

| | Year on year | | | Quarter on quarter | | |
|---|---|---|---|---|---|---|
| **Sector** | **Q2 2008** | **Q2 2009** | **% change** | **Q1 2009** | **Q2 2009** | **% change** |
| Automotive | 68 | 134 | 97% | 131 | 134 | 2% |
| Manufacturing | 165 | 396 | 140% | 297 | 396 | 33% |
| Transport & communications | 167 | 255 | 53% | 256 | 255 | 0% |

Figures showing the regional picture are also noteworthy as the *Economic snapshot* article in this issue (see page 38) is from the R3 Midlands Region, home of many automotive companies and their supply chain manufacturers.

**Significant problems by region**

| | Year on year | | | Quarter on quarter | | |
|---|---|---|---|---|---|---|
| **Region** | **Q2 2008** | **Q2 2009** | **% change** | **Q1 2009** | **Q2 2009** | **% change** |
| East Midlands | 7,142 | 10,848 | 52% | 12,440 | 10,848 | -13% |
| West Midlands | 10,675 | 15,590 | 46% | 18,315 | 15,590 | -15% |

**Critical problems by region**

| | Year on year | | | Quarter on quarter | | |
|---|---|---|---|---|---|---|
| **Region** | **Q2 2008** | **Q2 2009** | **% change** | **Q1 2009** | **Q2 2009** | **% change** |
| East Midlands | 237 | 379 | 60% | 366 | 379 | 4% |
| West Midlands | 344 | 514 | 49% | 558 | 514 | -8% |

## APPG launched

The All-Party Parliamentary Group (APPG) on insolvency, supported by R3 was launch on 16 July at the House of Commons. The group is intended to bring together IPs, Business Link, local Chambers of Commerce, Citizens Advice and the Federation of Small Businesses into a local network. Natascha Engel MP, chair of the group, is interviewed on page 56.

Natascha Engel, MP

## Cross-border M&As

The Companies (Cross-Border Mergers) Regulations are now in effect in the UK. They will enable UK companies with European businesses looking to restructure to take advantage of a new procedure as an alternative to a business transfer and merge with a company in a different European Economic Area state. The Regulations apply to both public and private companies with limited liability

There are three types of merger and the procedure involves a court process. In each case, the assets and liabilities of the company being absorbed are transferred to the transferee, and the transferor is dissolved without going into liquidation. Generally, third party consents are not required unless the court orders shareholder or creditor meetings to be held.

Mergermarket, an M&A intelligence service, has reported that a total of 223 insolvency transactions took place globally during the first half of 2009, up from just 90 in the same period in 2008 and an increase of 148 per cent.

## Walker *Review* published

Sir David Walker, a senior adviser to Morgan Stanley, published his *Review of corporate governance in UK banks and other financial industry entities* on 16 July. There were five key themes of the review.

- The Combined Code of the FRC (Financial Reporting Council) remains fit for purpose but tougher capital and liquidity requirements and a tougher regulatory stance on the part of the FSA are necessary. There are no proposals for new primary legislation.
- Principal deficiencies in BOFI* boards related much more to patterns of behaviour than to organisation. The most critical need is for an environment in which the executive can be challenged effectively before decisions are taken on major risk and strategic issues. Particular attention to board composition is important to ensure the right mix of both financial industry capability and critical perspective from high-level experience in other major business. Non-executive directors will need to increase their time commitment.
- Board-level engagement in the high-level risk process should be increased with particular attention to monitoring risk and discussion leading to decisions on the entity's risk appetite and tolerance. The CRO should have clear enterprise-wide authority and independence, with tenure and remuneration determined by the board.
- There should be greater fund manager and other major shareholder engagement with their investee companies to support long-term improvement in performance. The Institutional Shareholders Committee (ISC), the FRC and the FSA should promote this and fund managers should be expected to conform on a 'comply or explain' basis.
- Board level oversight of remuneration policies should be increased, in particular in respect of variable pay, and in associated disclosures. Not less than half of expected variable remuneration should be on a long-term incentive basis with vesting, subject to performance conditions, deferred for up to five years.

Most of these recommendations will be incorporated as guidance and provisions in the Combined Code. Precisely how this should be done alongside the Combined Code provisions in relation to non-financial listed entities will be for review and determination by the FRC.

The themes were followed by 39 steps outlining potential changes, covering: board size, composition and qualification; funding of the board and evaluation of performance; the role of institutional shareholders; communication and engagement; governance of risk; and remuneration.

The consultation period will run until 1 October and conclusion will be forthcoming in November 2009. The *Review* is available on **www.hm-treasury.gov.uk**. To make your views known, contact the secretariat office on 020 7066 0032 or e-mail feedback@walkerreview.com.

*Banks and other financial institutions. This refers only to listed banks: HSBC, Barclays, Lloyds TSB, Royal Bank of Scotland, Standard Chartered and other financial institutions listed on p113 of the Review.

# Legal update: a case of the leopard changing its spots?

**A look at the changing face of schemes of arrangement.**

As the economic downturn continues, we are witnessing some notable changes in the way debt restructurings are being carried out. Simply refinancing debt is often no longer a viable option. Instead, as lenders have to deal with increasingly complex situations involving large syndicates, multiple layers of debt and cross-border corporate structures, we are seeing innovative uses of tried and tested restructuring tools such as the debt-for-equity swap and, more recently, Companies Act schemes of arrangements (schemes).

### Debt-for-equity swap

Under a debt-for-equity swap, creditors take equity in distressed borrowers that they consider to have a long-term future. This offers creditors the prospect of achieving an enhanced return through their equity share. The purpose of this return is to compensate those creditors for the greater risk taken in supporting the business.

A scheme allows the debtor company to compromise its liabilities to those creditors to whom the scheme applies. In some cases a scheme may include a debt-for-equity swap; in others, debt will be rescheduled or compromised. There will be some instances where the two are combined. The use of schemes to effect a restructuring is not itself a new concept. For example, schemes were used in the restructurings of British Energy and MyTravel.

### Interesting issues with regard to schemes

Recent instances of schemes being used to effect debt-for-equity swaps have highlighted some interesting issues. These arise from the way in which a scheme can be imposed upon dissenting creditors.

A scheme is a compromise or arrangement under Part 26 of the Companies Act 2006 that is entered into by a company and its creditors or members or any class or classes of them. Historically, schemes have been used in a wide range of situations including corporate reorganisations, takeovers and demergers, and by both solvent as well as insolvent companies. Schemes offer all parties wide flexibility as to the nature of the compromise or arrangement and contents of the scheme, provided certain key issues are properly addressed.

A company seeking to enter into a scheme must first prepare a scheme document containing the terms of the arrangement it is seeking to effect. Then an application is made to the court to convene meetings of creditors and members. If consent is granted, meetings are then held to obtain the approval of the scheme by the requisite majorities. A scheme must be approved by a majority in number that represents at least three quarters in value of each class of creditor or member to whom the scheme applies. Assuming approval is obtained, the scheme must then be sanctioned by the court.

While this may sound fairly straightforward, the determination of voting classes has often been (and continues to be) a contentious issue. Case law provides a definition of 'class' as those creditors or members whose rights are not so dissimilar as to make it impossible to consult together with a view to their

"A scheme is a compromise or arrangement under Part 26 of the Companies Act 2006 that is entered into by a company and its creditors or members or any class or classes of them."

common interest. At the final sanctioning hearing, following approval of the scheme by the various classes, the court will assess the fairness of the scheme and, critically, whether the determination of classes and allocation of voting rights have been carried out correctly.

### Cram down

A scheme, if sanctioned, will bind *all* of a company's creditors or members, whether secured or unsecured. Provided the minority constitutes less than 25 per cent of each class, a scheme can therefore be used to impose a settlement on a dissenting minority including a minority of secured creditors. The effect is similar to the 'cram down' possible under Chapter 11 proceedings in the US. In contrast, the company voluntary arrangement (CVA) under Part 1 of the Insolvency Act 1986, which was originally designed to provide a quicker and simpler procedure for a company to effect a composition of its debts with its creditors, lacks any power to bind secured creditors. The CVA procedure therefore suffers from a significant drawback in that it gives any secured creditor the ability to derail a restructuring by simply refusing to sign up to the CVA (and instead, going ahead with enforcing security or commencing proceedings).

This ability of schemes to cram down dissenting creditors is well known. Some recent schemes, however, have gone even further in terms of sidelining junior creditors from the restructuring process. These schemes have seen junior creditors (sometimes as far up the debt hierarchy as the mezzanine) denied any right to vote on the basis that they have no economic interest in the scheme.

www.mccarthyandstone.co.uk

Using a combination of the schemes and a pre-packaged sale from administration, the company's assets and £500 million of senior debt were transferred to a new entity incorporated especially for the restructuring. Senior creditors entered into a debt-for-equity swap with the new company. They took 100 per cent of the new company's equity, having compromised, under the

> "If junior creditors (or shareholders)… can mount an argument that the valuation of a company, or the valuation method used, unfairly undervalues the company, then they may be able to challenge a scheme successfully."

**McCarthy & Stone plc**

A good example of this is the pair of connected schemes recently entered into by British homes builder McCarthy & Stone plc and its senior lenders. These gave effect to a debt-for-equity swap giving senior lenders full control of the company. Following a valuation exercise of the company's assets, the valuation of the company was deemed to be less than the total senior debt. Accordingly, second lien and mezzanine creditors were deemed to have no realistic prospect of a return and therefore lacked any economic interest in the schemes. The withholding of voting rights from these creditors that this valuation process entailed was approved by the courts, which gave sanction to the scheme in April this year.

scheme, £200 million of the original £700 million total senior debt. Shareholders saw their entire equity wiped out. Mezzanine and other junior creditors were left with unsecured and worthless debt claims against the insolvent shell company left remaining.

**Crest Nicholson plc**

A further example of a debt-for-equity swap leaving junior creditors out of the money is the scheme that was entered into by another troubled British housebuilder, Crest Nicholson plc. Here the company entered into a scheme with its creditors under which the original senior debt of £1.1 billion was reduced to £620 million in exchange for 90 per cent equity in the company (86 per cent passing to senior lenders and four per cent to second lien debt-holders). The remaining ten per cent went to management. The mezzanine lenders were, again, deemed to have no economic interest in the scheme. This led to the exclusion of these creditors from the scheme approval process. They received no equity as part of the restructuring. Existing shareholders were wiped out, including a 50 per cent stake held jointly by HBOS and the West Coast Capital private equity vehicle owned by Sir Tom Hunter.

### Where does the value break?

Crucial to the success of senior creditors in being able to disregard their junior counterparts in the scheme process in this way is the point at which the value breaks. This depends on the worth of the company, which will in turn determine whether there are sufficient assets to repay the entire senior debt and some of the junior debt, or merely part of the senior debt. The McCarthy & Stone restructuring illustrates well the importance of valuation. In McCarthy & Stone, a number of valuations and counter-valuations took place over an eight-month period, significantly prolonging the scheme process. The point of valuation was addressed by the judge at the initial convening hearing. He stated that he was satisfied that the value broke in the senior debt and it was therefore correct that voting rights had not been allocated to junior creditors.

### The position of junior creditors

The junior creditors in the two examples above did not seek to challenge the >>

valuations given to the respective borrowers. However, if junior creditors (or shareholders) in a future scheme process can mount an argument that the valuation of a company, or the valuation method used, unfairly undervalues the company, then they may be able to challenge a scheme successfully. This could, potentially, result in them being constituted as a class, and having a right to vote in the scheme. Given the different methods that can be used for valuations (and the resulting variety in possible viewpoints as to where the value breaks) it would not be surprising to see such challenges being raised in future. In addition, and as the judge in McCarthy & Stone pointed out, disgruntled creditors excluded from a scheme will still have the right to bring claims to any administrator subsequently appointed to the relevant company.

> "Under the Companies Act 2006 any company (including overseas incorporated companies) that is liable to be wound up in the UK, as provided for by the Insolvency Act 1986, can enter into a scheme."

### Schemes used by overseas companies

Notwithstanding these issues surrounding valuation, schemes continue to enjoy great popularity. This is demonstrated by their use by overseas companies (particularly those incorporated in jurisdictions that lack equivalent procedures). Under the Companies Act 2006 any company that is liable to be wound up in the UK, as provided for by the Insolvency Act 1986, can enter into a scheme[1]. This includes overseas incorporated companies so long as they have a sufficient connection to the UK. How 'sufficient connection' is defined is therefore of crucial importance to any overseas company seeking to take advantage of a UK scheme.

In *Re Drax Holdings Ltd*; *Re Impower Limited*[2] the court considered whether two overseas companies (incorporated in the Cayman Islands and Jersey respectively) had a sufficient connection to the UK in order to be able to use a scheme. The companies had been incorporated for the purpose of raising finance to acquire assets in England, and the key finance documents were governed by English law and contained clauses submitting to the jurisdiction of the English court. The assets charged under the finance documents included property in England and shares in English companies. The court was therefore satisfied that there was 'sufficient connection' to the UK for a scheme to be presented by the company in the UK.

If there is no 'sufficient connection', or if it is considered there is a risk that one cannot be established, then an overseas company may consider the drastic option of shifting its centre of main interests (COMI) to the UK. Under the EC Regulation on Insolvency Proceedings (1346/2000) (the Insolvency Regulation) the place of a company's registered office is presumed to be its COMI in the absence of proof to the contrary. This is therefore a rebuttable presumption and the cases of *Re Eurofood*[3] and, more recently, *Re Lennox Holdings plc*[4] provide clarity as to the wide variety of factors that the courts may consider in determining whether a state different to that in which the company in question is incorporated should be deemed to be its COMI. These factors include where the day-to-day administration of the company is carried out, where decisions by directors are made and the location of the company's business and operations. Shifting a company's COMI has precedent in the context of restructurings. In 2005, for example, car parts manufacturer Collins & Aikman undertook a COMI shift in order to implement its restructuring under an English administration.

At the time of writing, sources suggest that German roofing supplies producer, Monier, is seeking to implement a restructuring using a scheme of arrangement. If the company is unable to establish that it has the required sufficient connection it will therefore need to move its COMI (and the COMI of a number of its subsidiaries) to the UK in order to gain jurisdiction to use a scheme. Whether or not Monier will need to go to these lengths is unclear. However, the fact that, as has been reported, the company has given serious consideration to the expensive and burdensome task of moving its COMI demonstrates the strength of the appeal of the scheme process to distressed companies.

### The risks involved

Despite the obvious attractions the scheme of arrangement offers, as demonstrated in these recent instances of their use, there are risks involved in using a scheme to effect restructurings. Unlike formal insolvency processes (notably administration) schemes do not benefit from the automatic cross-border recognition provisions provided for by the UNCITRAL Model Law or, within the EU, the Insolvency Regulation. Furthermore, within Europe, it is far from certain that schemes will be recognised as judgments under the Brussels Regulation (44/2001).

Accordingly, an English court-sanctioned scheme does not itself have any effect on a creditor's ability to obtain and enforce judgment against a borrower in an overseas jurisdiction unless that jurisdiction is prepared to recognise a scheme. Any company proposing to use a scheme to compromise its debts should therefore check whether a scheme would be recognised in all those jurisdictions in which it holds assets. As a general rule, common law jurisdictions, for example Hong Kong or the Cayman Islands, will recognise an English scheme. In the US it should generally be possible to obtain recognition under Chapter 15 of the US Bankruptcy Code. In jurisdictions in which there are equivalent procedures available, such as Hong Kong, it would be possible to propose an identical scheme using the local procedure. The approach of other jurisdictions, such as France and Spain, is less easy to predict.

In practice, companies and their creditors are only likely to use a scheme where there is no alternative available. This is because the requirement to hold two court hearings and creditors meetings makes the scheme process relatively lengthy: likely taking several months from the start of negotiations with creditors to the final scheme sanctioning hearing. This in turn, makes using a scheme to effect a restructuring an expensive option, and also gives rise to the risk that a creditor could instigate proceedings before a scheme is approved.

Notwithstanding the issues surrounding recognition and the formalities involved in the scheme process, it is clear that the scheme of arrangement is enjoying new popularity as a tool to effect debt-for-equity swaps in a distressed context; this provides senior creditors with a means to recover value from failing counterparties. Although recent instances of schemes being used in restructurings have caused significant losses to shareholders and junior creditors, it should be remembered that, from the perspective of a company's management and employees, and of the wider economy, a scheme often offers a viable (and sometimes the only) means to effect a company's rescue. ☐

1 Section 895(2)(b) CA 2006
2 [2004] 1 BCLC 10
3 [2006] Case C-341/04
4 [2009] BCC 155

**Joe Bannister is a partner and Edward Mathison is an associate in the Business Restructuring and Insolvency Group at Lovells.**

# Recent case summaries

## Corporate and personal insolvency update from Stefan Ramel.

### Corporate insolvency

***(1) Gresham International Limited (In Liquidation) (2) Louise Mary Brittain* v. *(1) William Moonie (2) Myra Moonie (3) Meadow Trading Company Limited (4) Gresham (Gibraltar) Limited (5) Alan Geoffrey Dickinson [2009] EWHC 1093 (Ch) (Peter Smith J)***

*Facts*: G Ltd was wound up on 22 May 2003. G Ltd and its liquidator B issued proceedings on 16 May 2007 against various respondents seeking relief in respect of several transactions entered into by G Ltd in the two years prior to its liquidation. B had not obtained sanction from the liquidation committee, the court or the Secretary of State prior to the issue of those proceedings. B first sought sanction from the liquidation committee on 17 May 2007. The liquidation committee became inquorate on 27 July 2007 due to the resignation of two creditors; thereafter B sought sanction from the Secretary of State on 7 August 2007. Sanction for the commencement of legal proceedings was given on 13 August 2007, some three months after the proceedings had been issued. B had not sought and did not obtain retrospective sanction. The proceedings were served on the respondents on 12 September 2007; on 3 June 2008 the respondents queried whether sanction had been obtained. B applied to the court on 8 December 2008 for directions and declarations in respect of the sanction.

*Held*: Pursuant to rule 4.184(2) of IR 1986, the court has power to ratify any exercise by a liquidator of an IA 1986 power that the liquidator exercised without sanction; before the court can ratify the exercise of such a power, it must be satisfied that the liquidator acted in a case of urgency and sought ratification without undue delay. The judge held that the court also had a residual discretionary power, notwithstanding the failure by B to comply with the requirements of rule 4.184(2) of IR 1986, to retrospectively grant sanction. In *Gresham*, the judge granted prospective sanction to cover all claims as from 8 December 2008. However, having held that B failed to comply with rule 4.184(2), the judge declined to exercise his residual discretion to grant sanction for the period from 16 May 2007 to 8 December 2008 because he was not satisfied that the failure to apply for sanction was down to mere inadvertence, and there was no other reason to depart from the requirements laid down in the rules.

**Comment**: *Gresham* is a timely reminder to officeholders of the importance of obtaining sanction before the commencement of legal proceedings.

Of course, the failure to obtain sanction prior to the commencement of legal proceedings does not affect the validity of those proceedings insofar as the respondents to the proceedings are concerned; it does mean, however, that the officeholder is not entitled to an indemnity out of the estate in respect of legal costs. The officeholder would have to meet those costs personally. In *Gresham*, the judge considered that, in the case of an inadvertent failure to obtain sanction, there is no reason in principle for the court to decline to grant retrospective sanction. The scope of the word 'inadvertence' in this context was not made clear by the judge. However, a significant factor in the judge's decision in *Gresham* was the fact that B was unable to explain why sanction had not been obtained prior to the commencement of proceedings; for an officeholder to rely on the residual discretion identified by the judge it will be very important to be in a position to set out, with clarity, the reason(s) for which sanction wasn't or couldn't be obtained.

> "*Gresham* is a timely reminder to officeholders of the importance of obtaining sanction before the commencement of legal proceedings."

### Personal insolvency

***(1) Paul Warren Lewis (2) Gonda Taryn Lewis* v. *Metropolitan Property Realisations Limited [2009] EWCA Civ 448 (Laws and Thomas LJJ, Mann J)***

*Facts*: The first instance decision of Proudman J in this case was reviewed in this column in *RECOVERY* (spring 2009 issue). B and his wife were the joint registered owners of a property. On the very last day of the three-year 'use it or lose it' period, the joint trustees in bankruptcy entered into a deed of assignment with MPRL (which was the largest creditor in the bankruptcy). Under the terms of the deed, MPRL would immediately pay the trustees £1 in return for which B's beneficial interest in the property was assigned to MPRL. If the property was later sold by MPRL, it was required to pay 25 per cent of the net proceeds of sale to the trustees. B and his wife applied for a declaration that B's beneficial interest in the property had revested in him pursuant to s283A(2) of the Insolvency Act 1986. The key issue for decision was the meaning of the word 'realises' in s283A(3)(a). At first instance the application failed. B and his wife appealed.

*Held*: The appeal was allowed. The Court of Appeal concluded that 'realises' in section 283A(3)(a) does not include 'a sale for future cash consideration, at the stage before that cash is got in'. A sale and a realisation are two different matters. The assignment by the trustees was thus a sale but not a realisation; if there was to be one, the realisation would, on the facts of *Lewis*, necessarily occur some time after the expiry of the three-year 'use it or lose it' period since the assignment took place on the very last day before the expiry of that period. B's interest had therefore revested in him pursuant to section 283A(2); MPRL had no interest in the property.

**Comment**: The Court of Appeal in *Lewis* has restored certainty to the area of matrimonial home realisations by trustees in bankruptcy; the scheme devised by the joint trustees and MPRL in *Lewis* which, in effect, drove a coach and horses through the concept of section 283A has not been allowed to prevail. It would seem that the three-year 'use it or lose it' period means exactly what it says: in cases falling within section 283A, trustees do only have three years to take one of the permitted steps to realise their interest in the matrimonial home. ☐

**Stefan Ramel is a barrister at Guildhall Chambers.**

To get your voice heard in Legal Q&A contact **Sarah Houghton** at GTI (**sarah.houghton@groupgti.com**).





# Legal Q&A

## Claire Martin-Royle **answers your insolvency queries.**

**I have been approached by a secured creditor to be appointed as an administrative receiver of a society pursuant to a debenture that post-dates 15 September 2003. Can I lawfully be appointed as an administrative receiver of the society?**

I assume for the purposes of this advice that (i) the secured creditor is a holder of a qualifying floating charge in accordance with paragraph 14 of Schedule B1 of IA 1986 (ii) the debenture was validly entered into, is enforceable and, as created, granted the secured creditor a floating charge over the whole or substantially the whole of the society's property (iii) none of the exceptions (when an administrative receiver can be appointed notwithstanding the general prohibition) set out in S72B to S72G apply and (iv) there is no reason why you personally should not or cannot accept the appointment on commercial or legal grounds.

Pursuant to S72A of the IA 1986 the holder of a qualifying floating charge created on or after 15 September 2003 may not appoint an administrative receiver of a 'company' unless one of the exceptions set out in the Act applies. The first question you need to consider is whether the society over which you are to be appointed is a company such that the prohibition applies.

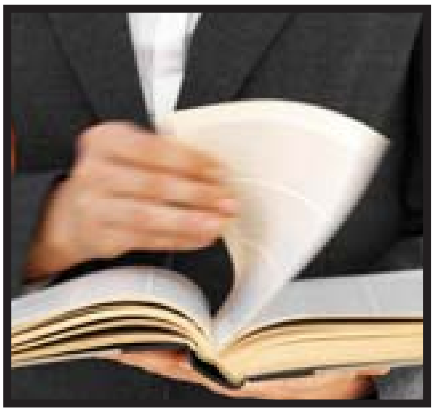
You will need to consider the form of society over which you will be appointed, what other statutory regimes apply in relation to the society and if the IA 1986 or any secondary legislation specifically deals with that type of society.

The term 'company' in IA 1986 is defined by virtue of the Companies Acts. In the Companies Acts the term company means a company formed and registered under the relevant Companies Act 'unless the contrary intention applies'.

In the recent decision of *In the Matter of Dairy Farmers of Britain Limited* [2009] EWHC 1389, Mr Justice Henderson considered whether an industrial and provident society (IPS) was a company for the purposes of Part II of IA 1986 and, in particular, S72A. This case provides some recent guidance on how the courts will approach such a question.

It was clear that an IPS is not a company formed and registered under the Companies Acts so it would only be considered a company for the purposes of the IA 1986 if there was a 'contrary intention'.

In *Dairy Farmers of Britain* it was held that there was no contrary intention to



"An IPS is not a company formed and registered under the Companies Acts so it would only be considered a company for the purposes of the IA 1986 if there was a 'contrary intention'."

extend the term company to include an IPS. An IPS was considered distinguished from a foreign unregistered company, which may fall within the scope of 'company', because there is a separate statutory regime relating to the winding up of a registered IPS. It was also borne in mind that if the IPS was a company the secured creditor would be unable to appoint an administrative receiver due to the prohibition in S72A and it would be unable to appoint an administrator because it was agreed that an IPS is not a company for the purposes of Part II and Schedule B1 of IA 1986.

If the society over which you are to be appointed is not a company then, in line with *Dairy Farmers of Britain*, the prohibition in S72A will not apply. This conclusion also means that you will not be an administrative receiver as defined by S29(2) IA 1986, which will impact on your duties and powers.

**I have been advising a company in financial difficulty and assisted in the negotiations to sell the business and assets by way of pre-pack contract. Can I now accept the appointment as administrator of the company?**

The topic of pre-pack administration sales has been much discussed and you will be aware of the need to comply with SIP16.

A close involvement with the company prior to your appointment in relation to its financial position and the negotiation of a pre-pack contract puts you in a particularly vulnerable position with regard to criticism. It has recently been emphasised in *Clydesdale Financial Services Ltd & Ors* v. *Smailes* [2009] EWHC 1745 that insolvency practitioners should give careful consideration as to whether they are able, and it is appropriate, to accept an appointment when they have had prior involvement with the company.

The courts have previously held that all advice provided to the company prior to the administration should be formally disclosed even if that advice relates to the appointment itself in an administrator's formal consent to act.

In *Smailes*, a creditor of an LLP challenged the terms of a pre-pack sale because they considered the valuation of the work in progress to be incorrect. The creditor made an application to remove the administrator on the basis there needed to be an independent review of the contractual terms and the appointed administrator could not undertake this review due to his involvement prior to his appointment. The court held the circumstances leading to the sale did give rise to a legitimate concern that warranted an investigation and due to the administrator being so closely involved he would find it difficult to conduct such an independent review. It went against the administrator in *Smailes* that by the time of the application the majority of the LLP's creditors were supporting the administrator's removal.

You should give careful consideration to all of the facts, including whether the creditors support the appointment and whether you can form independent decisions on issues such as a sale of any assets. It is recommended you record in writing why you consider it appropriate to accept the appointment notwithstanding your prior involvement ☐

**Claire Martin-Royle is a solicitor at Jones Day.**



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# Technical update

Richard Heis **reviews potential changes that will affect IPs.**

### Statements of insolvency practice up for review

When the Society of Practitioners of Insolvency (SPI) was formed in November 1990, one of the first tasks of its new technical committee was to review all the guidance notes then in issue by its sponsoring bodies as part of their regulatory regimes. This was to ensure that they were up to date and of continuing relevance to members, and to establish a uniform body of guidance for all practitioners.

The issue of regulatory guidance is, of course, a matter for the RPBs, but in order to ensure that everyone could be made aware of the contents of the guidance notes SPI also issued them to all its members in October 1991. The documents as issued by SPI were known as 'statements of insolvency practice' (SIPs), a term subsequently also adopted by the RPBs. A technical bulletin issued at the time explained that while SPI was not a regulatory body, it was issuing the SIPs for the benefit of its members, who should regard their contents as best practice.

Since that time, new SIPs have been issued and existing ones revised to take account of legislative changes and other developments. The work of drafting and reviewing SIPs has been undertaken by SPI (now R3) but there has always been a need for co-ordination between the various RPBs and between the RPBs and SPI/R3. Initially this was achieved through a joint committee called the Best Practice Liaison Committee, but in December 1999 this function was taken over by the newly formed Joint Insolvency Committee as part of its role of co-ordinating various regulatory activities. The JIC consists of representatives of all the RPBs, with R3 as observers.

> "There has been a debate about whether SIPs should be re-drafted purely as statements of principles, with all detailed technical and procedural guidance removed, or whether they should be more detailed and prescriptive."

The JIC recently announced its intention to undertake a comprehensive review of all the SIPs, to see which need updating, and which could be dispensed with altogether. As part of this process there has been a debate about whether SIPs should be re-drafted purely as statements of principles, with all detailed technical and procedural guidance removed, or whether they should be more detailed and prescriptive. The argument in favour of adopting a principles-based approach is that it is flexible enough to apply to a variety of circumstances, requires the IP to think carefully about compliance, and should not require frequent amendments to deal with legislative and procedural changes. Against that it is argued that such an approach could make it too easy to criticise the exercise of an IP's judgment with the benefit of hindsight, and that it could be difficult for the IP to demonstrate compliance in the absence of clearly laid out guidelines, and would be difficult to monitor.

Those who favour a more prescriptive approach argue that it provides a greater degree of clarity, and makes it easier for IPs to know what is expected of them and whether or not they have complied. It also affords less scope for criticism of an IP's conduct on subjective grounds.

In order to sound out views, a conference to discuss the review of SIPs was held on 5 March under the auspices of the JIC. The question of whether SIPs should be principles-based or prescriptive was put to a vote, with a clear majority favouring a mixture of both depending on the subject matter of the SIP. The RPBs subsequently sought their members' views by correspondence.

The JIC is setting up small working groups to revise the SIPs, and has sketched out a provisional timetable with a target date for completion of the process of 31 January 2011.

> "The provisions envisage a core limitation regime that can be applied to the majority of claims for a remedy of a wrong or for the enforcement of a right, and to claims for restitution."

### Reduction in limitation periods

In 2001 the Law Commission published its report LC270 on the law relating to limitation of actions. It concluded that the current law was unfair, complex, uncertain and outdated, and made recommendations for change. The Ministry of Justice has now decided to implement the recommended changes, and is proposing to include them in the Civil Law Reform Bill to be published in draft form later this year.

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### Technical Bulletin

*Technical Bulletin 87* was issued in June. Its contents included:
Financial Markets and Insolvency – Part VII of the Companies Act 1989

- Sale of bankrupt's home for deferred consideration – recent Court of Appeal decision
- IVA – nominee falling short of expected professional standards
- Court considers pre-pack administration sale and authorises pre-appointment costs
- Liquidator denied retrospective sanction to bring proceedings
- Fraudulent trading – cause of action accrues on making of winding-up order
- Data protection – court orders transfer of information to trustee for liquidation of US company
- Assignment of fruits of action – limits of liquidator's powers
- No trust fund established where client's moneys paid into overdrawn bank account
- Early dissolution of liquidation – change in Court of Session practice – Scotland
- EC Insolvency Regulation – letters of request to other European courts
- EC Insolvency Regulation – jurisdiction to decide action to set aside prior transaction
- VAT Bad Debt Relief – change of policy by HMRC
- Pensions Regulator finalises its 'Material Detriment' code of practice
- Fire risk – update on advice from the London Fire Brigade

The provisions envisage a core limitation regime that can be applied to the majority of claims for a remedy of a wrong or for the enforcement of a right, and to claims for restitution. In broad terms, a claim would have to be brought within a primary limitation period of three years. This would run from the date on which a claimant knows (or ought reasonably to know) the facts giving rise to the cause of action; the identity of the defendant; and whether any injury, loss or damage (or benefit received by the defendant) was significant. However, no claim could be brought after the expiry of a ten-year long-stop limitation period, which normally would run from the date on which the cause of action arose.

> "Between September and December 2009 Lord Justice Jackson will write his final report, which will contain recommendations for law reform."

A number of practitioners have expressed concern about the reduced limitation period, arguing that it does not provide enough time to prepare a case in complex insolvency situations, particularly as an insolvency officeholder comes as a stranger to the company to which they are appointed without the benefit of prior knowledge. It is also suggested that it could have the effect of forcing parties to litigation before either side is ready.

The Ministry of Justice is conducting a limited consultation, and R3 will be responding.

### Review of the costs of civil litigation

In January 2009 the Master of the Rolls appointed Lord Justice Jackson to lead a review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. Lord Justice Jackson published his first report on 8 May. This is primarily an overview of the current situation, and does not itself make recommendations for reform. There was a period of consultation and public seminars from May and July; between September and December 2009 Lord Justice Jackson will write his final report, which will contain recommendations for law reform. It is clear that his recommendations will have some effect on insolvency practitioners, and we await developments with interest. ☐

**Richard Heis is a partner in KPMG Restructuring.**

# Rescue in the North Sea

**Oilexco North Sea Limited charts new territory as it is the first rescue of an extensive oil exploration, production and development company.**

Oilexco Incorporated (Inc) is a Canadian and UK listed oil exploration, development and production group, with headquarters in Calgary, which conducted its business on the UK continental shelf, via its principal trading subsidiary, Oilexco North Sea Limited (ONSL). Over the previous four years, ONSL had become the largest driller of wells in the North Sea, building its business model and reputation around the exploitation of proven oil reserves.

ONSL holds licence interests in a number of key oil fields such as Huntington, Balmoral, Brenda and Nicol together with dozens of others, in many instances holding majority stakes or outright ownership and controlling operator functions. ONSL produces around 15,000 barrels of oil per day and, prior to the rescue, this was set to double in the short term with the bringing into production of the Nicol2 and Shelley wells.

Until a balanced portfolio of licence interests is achieved, oil exploration and development companies, which in the recent past in the North Sea has meant more niche operators than oil super-majors, have required substantial financing. For 2008 alone, ONSL's additional cash needs were budgeted at around $1 billion. Given its business model and with oil prices around $150 per barrel, ONSL was confident that it could continue to move forward towards achieving its strategic objective of a balanced portfolio.

As a consequence and to secure ongoing supply, ONSL entered into three long-term contracts for the provision of two drilling rigs and a floating production, storage and offloading (FPSO) vessel in respect of the Shelley field. The duration of these contracts were for up to five years.

The global economic crisis coupled with the sustained fall in oil prices to around $45 per barrel in a matter of months fundamentally changed the business prospects of niche exploration and development companies during the second half of 2008 as they relied, partially, on revenues from producing assets to fund ongoing and expensive exploration and development. While ONSL had raised $750 million of its target funding for 2008 during the first half of the year, it was unsuccessful in its attempts at raising debt or equity to bridge the gap.

A failed sales process in the latter few months of 2008 facilitated by an emergency funding line from its banks of $47.5 million could not stave off the prospect of insolvency. On 31 December 2008, the directors announced their intention to place ONSL into administration. On 7 January 2009, with weather conditions at their worst in the North Sea, a team of four from Ernst & Young LLP were appointed as joint administrators, and embarked upon an attempt to rescue the oil company. This had never been attempted before in an insolvency process in the UK due to the regulatory, health and safety, trading counterparty, financial and operational complexities, and the risks inherent with this sector.

> “While ONSL had raised $750 million of its target funding for 2008 during the first half of the year, it was unsuccessful in its attempts at raising debt or equity to bridge the gap.”

### Immediate tasks in the lead up to administration

Five immediate tasks needed to be dealt with in the days leading up to administration.

1) A funding line for the period of administration needed to be negotiated with ONSL's syndicate of 11 banks. This involved the drafting, negotiating and agreement of a number of documents with all 11 banks. The administration moratorium was unlikely to be a practical solution to dealing with single source, health and safety-critical suppliers, who were owed over $100 million of arrears at the date of appointment. It was therefore necessary for the administrators to commit to significant funding facilities as part of their attempts to rescue the company as a going concern.
2) Negotiations and agreements had to be undertaken and reached with the Department of Energy and Climate Change (DECC) to the effect that licences granted by DECC would not be revoked upon an insolvency event or during the period of the administration. Discussions were also held regarding the treatment of existing and potentially new decommissioning liabilities and the administrators' overall trading and realisation strategies. DECC's overall strategy involved keeping the production assets pumping hydrocarbons and selling ONSL's portfolio of interests to a single approved entity.
3) It was also necessary to undertake negotiations with the Health and Safety Executive (HSE) and to reach agreements about the safe operation of production facilities during the administration.
4) The administrators had to be added to ONSL's extensive insurance policies as oil-related industries are specifically excluded from normal insolvency practitioners' open-cover arrangements.
5) Retention and incentivisation negotiations needed to be carried out with key operational management and employees and successfully resolved to support the Day 1 court order. This permitted the devolving of day-to-day management responsibility back to the ONSL management team – a requirement of DECC, the HSE and insurance policies' annotations.

Having successfully achieved the above, ONSL was placed into administration by order of the High Court on the petition of the directors. The overriding operational strategy agreed by the administration was to maintain oil production and suspend, where possible, exploration and development activity subject to finalising a decision on whether two fields, almost ready for hook up, could be brought into production in the very short term.

### Immediate tasks

Coupled with the usual immediate tasks of business stabilisation, supply chain and customer management, wider employee retention and joint operating agreement (JOA) partner negotiation, weekly reporting procedures were adopted in relation to DECC, the banks and the HSE.

It was also necessary to renegotiate the intra-group services agreement as the virtual data room site for the failed sales process and technical (geological, etc) and accounting support (JOA, statutory and management) were all provided by the parent company or one of its affiliates based in Canada.

While DECC supported the ongoing business operations, having not revoked the various field licences, it was important



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to negotiate with JOA partners to avoid loss of operator rights (which, in addition to management and accounting control, gives impetus to the field development strategy) that arise upon an insolvency event in standard JOA documents. In addition, interests in licences were capable of being forfeited upon the failure to meet cash-call payments, a number of which were in arrears and within the default cure periods, due to liquidity constraints in the run up to administration. These needed to be reviewed, negotiated, agreed and regularised.

The three long-term contracts, mentioned above, had the potential to crystallise over $0.8 billion of claims upon termination. ONSL (and also potential bidders through its failed sales process) had already identified these contracts as onerous. Negotiations were required to finalise drilling operations and safely tow the rigs back to harbour, while the FPSO vessel needed to be anchored and made safe pending a decision over whether the relevant field would be brought into production during the administration.

Having renegotiated the intra-group services agreement, the sale process for ONSL's entire portfolio was restarted within a week of the commencement of the administration. Forty eight confidentiality agreements were signed with indicative bids requested by the end of January 2009.

### Sales process

Negotiations with bidders throughout January identified increasingly the possibility that ONSL could be saved as a legal entity (the first applicable layer of the single overarching administration purpose). This would preserve the accumulated tax losses of $1 billion and minimise the risk of loss of field licence interests as a result of pre-emption rights being exercised on transfer of the interest to a new corporate entity. Comparatively few contracts were exposed to change of control clauses. This was confirmed by the indicative bids presented at the end of January.

The administrators resolved to take six bidders through to the second negotiation round, with final bids due by early March. Bidders negotiated and presented bids on two bases: a share sale of ONSL and a fallback of a sale of its business and assets.

The strategy to support a share sale necessitated the restoration of ONSL to solvency through a company voluntary arrangement (CVA) coupled with the appointment of receivers over the share held in ONSL by Oilexco Inc, which had been placed into an insolvency procedure under the Companies' Creditors Arrangement Act in Canada.

The administrators formed a creditors' committee comprising the two rig suppliers, the FPSO supplier and two other trade creditors. The two rig suppliers and the FPSO, both individually and on a combined basis, held the economic voting power in the CVA. In parallel to the second bidding round, the administrators negotiated with ONSL's syndicate of 11 banks and the administration creditors' committee to achieve a commercial settlement to support an acceptable dividend distribution structure for the CVA.

By early March 2009, bids were presented and final contractual negotiations were entered into over a further two-week period. Exclusivity was ultimately granted to Premier Oil plc (Premier) and contracts were exchanged by mid-March on both an enhanced share sale basis and a fall back business and asset sale basis. Negotiations were successfully concluded, in a very truncated timeframe, with the syndicate of 11 banks and the administration creditors' committee over the terms of the CVA, including the final drafting and issuing of the CVA proposals within one day of exchange of contracts.

> "Six bidders negotiated and presented bids on two options: a share sale of ONSL and a fallback of a sale of its business and assets."

### Completion process

Premier, as a listed company, was required to elicit the support of its shareholders for the transaction (by way of a Class 1 circular) and was also required to raise debt and equity finance to fund its bid. While committed funding was in place to support exchange of contracts, the EGM in connection with the Class 1 circular was pursued in parallel to the CVA process.

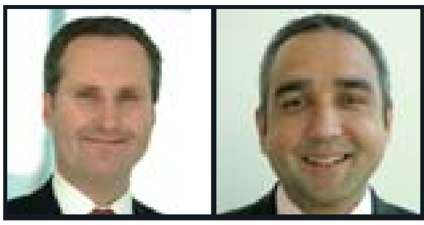
On 15 April, the CVA was approved, on an unmodified basis, by creditors holding 99.82 per cent of those claims voting, together with its shareholder. Premier obtained the support of over 99.9 per cent of its shareholders to the transaction on 20 April. The share sale was completed on 21 May 2009.

### The outcome

The outcome of ONSL, which is the first such major oil and gas sector insolvency, is a notable achievement for a number of reasons. Having committed to a substantial funding line to support the efforts to restructure ONSL through administration, the administrators have accomplished the following.

1) Preserved the ONSL entity (achieving the first applicable layer of the single overarching administration purpose) and its business and assets as a going concern, including accumulated tax losses, in a transaction valued in the region of $0.6 billion.
2) All employees have retained their jobs with accumulated employment rights.
3) The syndicate of 11 banks has recovered a substantial proportion of its lending.
4) The unsecured trade and expense supply chain has recovered over $125 million through the administration and the terms of the CVA, which resulted in a 30-fold increase in recoveries to the unsecured creditors when compared to a business and asset sale.
5) The UK government (via DECC) has avoided the termination of a substantial number of North Sea oil licence interests, preserved tax revenues, avoided the prospect of significant decommissioning liabilities being left with the public purse and secured a new, financially sound entrant into the UK continental shelf.
6) The rig suppliers (and supply chain generally) have an ongoing customer to support new contracts and the FPSO supplier has entered into a new contract for the provision of the facility for a substantial portion of its original contract term.
7) Oil production levels have been maintained during the administration and the buyer hopes to revert to the strategy, aiming to almost double them, by bringing the two fields into production – with delays minimised at circa four months. Minimal disruption to exploration and development activities has been experienced with the other JOA partners welcoming a strong new JOA partner.
8) This elegant solution was achieved in just four months.

The administrators have been advised by the Restructuring, Litigation and Oil and Gas teams at Herbert Smith, among others. □



**Roy Bailey (far left) is a restructuring partner and Kevin Haywood (left) is a restructuring director at Ernst & Young.**

# Shipping insolvency: the storm before the storm

**James Stonebridge warns that Rule B is a trap for the unwary.**

There can be few industries within this recession that have been more severely affected than the shipping industry as it has suffered plummeting vessel values and charter rates together with over-capacity. Therefore, one would anticipate busy times for restructuring professionals within the shipping market.

### Remedies available to creditors in different jurisdictions

Shipping is, in many respects, unlike other industries. Professionals who think that the issues affecting the shipping industry are essentially the same as those applicable to the wider economy, and that they can therefore apply the same solutions, do so at their peril. In fact, the remedies available to creditors may be more numerous and wide-ranging than in any other industry. Take, for example, the provisions dealing with the arrest of ships. The categories of claimants who have such a right of arrest and the basis on which ships may be arrested vary from jurisdiction to jurisdiction. Indeed, it is possible that, in keeping with previous shipping downturns, we will see a rise in ship arrests and the large-scale ownership of vessels by banks, as banks may prefer this remedy to other alternatives, including any formal insolvency process.

### Rule B is intended to maintain the status quo

Another issue for consideration particular to the shipping industry relates to a maritime attachment lien, which is governed in the United States by Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions to the Federal Rules of Civil Procedure (Rule B). Historically Rule B (garnishee) attachments served two purposes:

- ensuring the satisfaction of a claim against a shipping company; and
- ensuring a defendant's appearance in an action – because shipping companies' assets can be scattered around the world.

Rule B is intended to maintain a status quo until the dispute can be litigated and a Rule B plaintiff may obtain an order of attachment against the defendant's property that is in the hands of a garnishee. Once the property has been restrained, Rule B provides the defendant with the opportunity to appear before the court to contest the attachment.

Standards have been set by the New York courts for issuing and then vacating Rule B but it is fair to say that the procedure has been widely used and provides a draconian means by which a claimant can secure and seize cash, in advance of a dispute having been litigated. In more recent times, Rule B attachments have been used to attach bank credits used in the electronic transfer of funds to and from parties absent from the United States jurisdiction and, in particular, the wire transfer of US dollars that are routed through New York. This use of Rule B attachments to restrain electronic funds has increased dramatically recently. Indeed Rule B attachments accounted for 10 to 30 per cent of all monthly filings in the southern districts of New York in the second half of 2008. Further, Rule B attachments comprised 16.4 per cent of all civil case filings in the southern district of New York.

### *Atlas Shipping*

The use of Rule B and its relationship with insolvency law has been the subject of cases both in New York and in the English Court of Appeal. Starting first with New York, the decision in *Atlas Shipping AS*, 27 April 2009, related to the interplay between Chapter 15 of the Bankruptcy Code and Rule B. The US Bankruptcy Court was asked to vacate Rule B attachments obtained by the foreign creditors of Atlas Shipping and Atlas Bulk Shipping AS, two Danish corporations that were in bankruptcy proceedings in Denmark and which had, through their foreign representative, obtained petitions in Chapter 15 proceedings before the US Bankruptcy Court. The US Court was also asked to entrust the seized funds to the foreign representative for administration in a Danish bankruptcy proceeding. The maritime attachments were issued in support of arbitrations commenced by unsecured creditors in London pursuant to provisions of applicable charters.

The former section 304 of the Bankruptcy Code more clearly supported the granting of this relief to a foreign representative than did Chapter 15. The objecting foreign creditors therefore argued that under Chapter 15 the relief

> "The use of Rule B and its relationship with insolvency law has been the subject of cases both in New York and in the English Court of Appeal."

could not be granted if the foreign representative had not commenced proceedings under Chapter 7 or Chapter 11. The objecting creditors argued that the court's discretion was limited by language in Chapter 15 that prohibited a foreign representative from initiating avoidance actions in a Chapter 15 case. The US Bankruptcy Court rejected the creditors' arguments and concluded, consistent with principles of comity, that the Rule B attachment should be vacated pursuant to the US Bankruptcy Code and the funds turned over to the foreign representative – subject to administration in a Danish bankruptcy proceeding.

The objecting creditors in *Atlas* also contended that the Danish Bankruptcy Court did not have personal jurisdiction over the objecting creditors and that any stay issued by the Danish Court could not prevent them from proceeding with their arbitrations in London, which they planned to do. They argued that the automatic stay applicable in the Chapter 15 case extends only to a debtor's property in the United States and not to the London arbitrations. Further, if they were successful in obtaining arbitration awards in London the creditors would obtain English judgments on the arbitration awards and would then return to the district court in New York to seek recognition of the English judgments against the assets that had been garnisheed under the Rule B attachments. The US Bankruptcy Court stated that in this fashion the objecting creditors hoped to circumvent the jurisdiction of both the Danish and the US Bankruptcy Courts, under Chapter 15, and to recover the entire amount of their claim.

The US Bankruptcy Court took a dim view of this and had doubts about the efficacy of each of the above-mentioned points comprising part of the objecting creditors' strategy. It regarded the argument that the Danish Court had no personal jurisdiction as questionable. Also in doubt was the ability of the creditors to obtain English judgments on potential London arbitration awards in light of what the US Bankruptcy Court regarded as UK principles of cross-border insolvency distribution (to which they referred to *Re HIH Casualty & Gen. Ins Limited* [2008] 1 WLR 852).

### *Bloom* v. *Harms Offshore*

Given the decision in *Atlas* on 27 April 2009, it is interesting that the matter came before a different court in the case of *Bloom* v. *Harms Offshore AHT 'Taurus' GmbH & Co KG* [2009] EWCA Civ 723, Court of Appeal, 26 June 2009.

This case arose out of the application for an administration order in respect of Oilexco North Sea Limited (see page 16) and on 15 May 2009 the application of the administrators for a mandatory injunction requiring the appellants to use their best endeavours to procure the release of two *ex-parte* Rule B orders. The *Harms* decision is interesting since it looks at matters from the perspective of the English courts, albeit that the court was not referred to in the *Atlas Shipping* case. The appellant argued that by issuing Rule B they had not breached any statutory restriction on legal proceedings against the company in administration since these did not have extra-territorial effect. Furthermore, assets of the company in administration, unlike those of a company that had been wound up, are not subject to the trust that justified anti-suit injunctions against creditors in liquidation. Therefore the submission was that the district court in New York was properly seized of an attachment against property within its jurisdiction and comity required the courts in England to abstain from interfering with proceedings before the US Bankruptcy Court.

> "The effect of the appellants' conduct was to 'set a trap' for the administrators to find."

In this case, the timing was such that the company went into administration in early January and in late January the appellants obtained Rule B attachments that were not served on the administrators until March 2009. On 19 March 2009 the administrators sought to make a payment of more than $3 million to a post-administration supplier of services to the company and, as with all electronic funds transfers in dollars, that sum went to the supplier's accounts with one of the banks in New York that had been served with the attachment orders. The sum of approximately $2.2 million was attached. The New York proceedings and attachment orders were then served on the administrators on 24 March 2009, and on 7 May 2009 the administrators brought proceedings seeking Chapter 15 relief.

### The Court of Appeal

The Court of Appeal held that it has long been established that the statutory prohibition against creditors bringing proceedings against a company being wound up by the court is not extra-territorial (ie it does not extend to proceedings brought in foreign courts). The administrators contended that the definition of 'property' in section 436 of the Insolvency Act included every description of property wherever situated and, as such, the prohibition in paragraph 43 of Schedule B1 would apply to property outside of the jurisdiction.

The Court of Appeal held that it would be difficult to interpret the provision as applying to proceedings brought by a creditor, which is not subject to the jurisdiction. The judge said that, in normal circumstances, it would be inappropriate for the English Court to grant injunctive relief affecting procedures in a court of foreign jurisdiction. However, the conduct of the creditor against whom the injunction was sought, and the circumstances by which the property of the company was attached, justified, in this case, the granting of an injunction; despite the strong presumption that the court would not interfere with the proceedings of a foreign court. In particular the conduct of the creditor was castigated as oppressive or vexatious and, on this basis, the court could and should grant relief in order to protect the performance by administrators of their functions and duties, and thus the creditors of the company, pursuant to orders of the court.

In this regard, the court was critical of the fact that, when the appellants sought Rule B, they had neither informed the district court of the fact that the company was in administration nor of the arbitration agreements by which they were bound. The appellants did not inform the administrators of the attachment orders they had obtained until after they had succeeded in attaching funds sufficient to secure their claims. The effect of the appellants' conduct was to 'set a trap' for the administrators, which, when sprung, obstructed the proper discharge of the administrators' functions. The Court of Appeal was also troubled by the draconian nature of Rule B.

### Beware Rule B

To the writer, it is slightly surprising that, given the *Atlas* decision, the administrators felt it necessary to seek the assistance of the Court of Appeal on this point (albeit that there were urgent reasons to do so) and it clearly emphasises the importance of seeking prompt recognition under Chapter 15 (assuming funds are available to do so). The *Harms* decision is, however, welcome for administrators of shipping companies, given the propensity and ease with which Rule B attachments can be sought, even though, arguably, the English Court seems to have reached its view on the basis of conduct and a remedy that, as this article notes, is very common in the United States. In conclusion, Rule B is a trap for the unwary and goes to emphasise that the shipping industry has its own particular rules that make this such a challenging (but interesting) area in which to practise. ☐

**James Stonebridge is a partner at Norton Rose.**

# Motor retail insolvencies

**The motor trade is suffering. Daniel Taylor suggests that, despite government and dealership initiatives, further outlet rationalisation and dealer insolvencies are likely.**

The auto sector continues to experience unprecedented turbulence on a global scale, culminating in the Chapter 11 filings in recent months of two stalwarts of the automotive world, Chrysler and General Motors. This followed several years of declining vehicle sales, and a crippling (for the Big 3 US manufacturers at least) shift in consumer demand away from light trucks towards more fuel efficient vehicles, reflecting the impact of the credit crunch in the real economy, as well as the hike in oil prices in the middle of 2008.

The wider ramifications of these problems are being felt throughout the automotive supply and distribution chains, with component suppliers struggling to cope with the volume implications of aggressive manufacturer production cuts, and dealers treading water until consumer demand recovers.

### UK dealer impact

As is widely reported in the press, the UK has suffered heavily, the real decline being felt from June 2008 onwards and continuing through to June 2009. UK new car registrations for the six months to June 2009, were 25.9 per cent below the same period in the previous year.

Some reports suggest the rate of decline is slowing, partly supported by the UK scrappage scheme, which is claimed to have boosted car sales by 40 per cent (30,000 units) since its introduction on 18 May 2009. But given that the scheme is capped at 300,000 units this might just be a short-term boost rather than a long-term solution.

### Recent dealer failures

There have been a number of recent dealership failures, perhaps the largest of which were Camden Group Services and 1Car1. Camden's undoing was due largely to its unsustainable debt levels, and 1Car1, a 17,000 fleet leasing and rental business, fell victim to a fall in demand, combined with the decline in used vehicle residuals in autumn 2008. There have also been failures of a number of regional groups: JDV Limited and Brooklyn Motors plc, to name but two. These were smaller, but still significant, particularly in terms of regional manufacturer representation.

### Dealer resilience

Dealers have displayed a high degree of resilience in the face of these market challenges, but there are a number of other factors at work that have underpinned performance and protected some dealers from the worst effects of the downturn in new vehicle demand.

Used car values recovered in the early part of 2009 and have continued to deliver strong profits, probably helped as production shutdowns mean that new vehicles are in increasingly short supply. Secondly, many dealers took considerable cost out of the business in late 2008; measures range from a detailed overheads' review to company-wide payroll restraint (and in some cases pay cuts). Thirdly, manufacturer production cuts have helped to match supply and demand levels more closely, allowing the local manufacturer national sales companies (NSCs) to reduce volume targets allowing volume bonus to be more easily achieved.

> "With UK registrations of 2.1 million in 2008, and projections for 2009 of around 1.6–1.7 million, dealer numbers still look too high so the sector could be faced with a 20 per cent correction."

### Issues in insolvency

With UK registrations of 2.1 million in 2008 and projections for 2009 of around 1.6–1.7 million, dealer numbers still look too high so the sector could be faced with a 20 per cent correction. As part of this process it is inevitable that there will be further insolvencies. Motor retail insolvencies present a number of issues for the appointed insolvency practitioner, not least of which is due to the number of business stakeholders whose needs must be balanced to achieve a positive outcome. Key stakeholders will include:

- vehicle manufacturer (of which there may be more than one in multi-franchise situations);
- manufacturer captive finance house (that generally provides the funding for new, and often used, vehicles, and also the consumer finance to customers to effect a purchase);
- clearing bank (providing general banking, overdraft and loan facilities); and
- non-captive finance houses (who may provide vehicle funding lines and consumer finance).

The various stakeholders have differing priorities and objectives. The manufacturers' concern is to protect sales and representation; the finance house's priority is the location of the funded vehicle stock (and the extent to which vehicles have been sold 'out-of-trust', ie sold and delivered to the customer, but the payment not having been made by the dealer to the finance houses – or are double funded); the bank's primary concern is clearly the ability to recover its indebtedness in full, an area that has come under increasing pressure as the property market has declined (and that inevitably leads to increased tensions between the various stakeholders as the security pool evaporates). Added to this, priority and cross-guarantee agreements can often be complex, particularly where dealer groups have grown by acquisition over an extended period.

### Maximising realisations

Arguably the best way to maximise realisations is to trade the business for a period of time in order to test the market and establish interest, as well as providing the opportunity to sell vehicle stock through normal retailing. The ability to do this, however, relies on securing funding to cover trading losses, which has historically come from the manufacturer, but where there is now a much reduced appetite, particularly where the dealers are smaller and where representation risk is lower. It also relies on support from stock funders to leave stock in place rather than repossessing (again, an area of increasing resistance from many funders given the monthly vehicle book drops and perceived increased risk while vehicles are left on site). Added to this, the nature of the manufacturer franchise arrangements leads to a low appetite for bidders for the business unless they have manufacturer support, with a particular reluctance to bid for a business where they know a preferred candidate has already been identified. This makes the creation of competitive tension in the process difficult to achieve, which provides its own challenges in terms of value.

In the current climate, a period of trading is only really feasible if funding is in place. Assuming that the business can operate in insolvency at a break-even level or better is a high-stakes strategy. As a result, increasing numbers of dealer insolvencies are either close downs or pre-pack deals.

> “In the current climate, a period of trading is only really feasible if funding is in place. Assuming that the business can operate in insolvency at a break-even level or better is a high-stakes strategy.”

The key in all cases is to try to keep all stakeholders on board and fully engaged in the process. It is also important to have a comprehensive knowledge of the sector, the key individuals (including likely purchasers with the means to move rapidly), the operation of the various manufacturer consignment plans and the vehicle funding lines in order that decisions can be taken knowledgably and quickly. Examples of areas to watch that can enhance or detract from asset realisations include:

- the potential equity in funded used vehicle stock (which is often funded at 80 per cent book value, thus delivering a potential value opportunity, especially in the current market where used values are strong);
- set-off of warranty and bonus debt against manufacturer liabilities; and
- pre-paid service plans and customer deposits, which can be a significant value detractor.

**Outlook**

The remainder of 2009 will be interesting as the short-term boost from used vehicles begins to wane; performance will largely rely on a sustained level of new vehicle sales predicted on increasing consumer confidence and the availability of credit. Volumes are coming under pressure in Q2 as the production slow-downs take effect, leading to the short supply of some models and long lead times.

In order to survive, dealers will need to continue to get the basics right, and insist on tight cash and working capital controls throughout the business. NSCs will continue to appraise their networks and revise their strategy in light of market developments, and dealers should do the same in their own businesses. If profitability really comes under pressure then dealers should not shy away from difficult decisions that might include more fundamental changes to the business in terms of number of outlets needed to serve the market area. It is likely that this form of restructuring will be a key feature of outlet rationalisation. ☐

**Daniel Taylor is an automotive partner at Grant Thornton UK LLP.**

# Why road haulage is slowing down

**With customers down and fuel costs up Kate Gibbs explains that the industry is in for the long haul.**

The Road Haulage Association (RHA) recently undertook an e-mail survey of members to gather evidence on the impact the economic and banking crisis is having on business, cash flow and prospects in the road haulage sector.

We have been meeting with government bodies including the Department for Transport (DfT), the Department for Business, Enterprise and Regulatory Reform (BERR) and the Treasury, and the evidence gathered has strengthened, more than ever, our ability to represent the industry.

In terms of general activity, the road haulage sector has seen a downturn in business compared with what would have been expected for the first half of the year. While 10 per cent of members have seen little change and 2 per cent have seen business increase, 17 per cent say they are down between 5 per cent and 10 per cent.

### Customers slower to pay

Customers are taking longer to pay, and it is worth noting that research for the RHA in spring 2008 indicated that road haulage was already suffering 15 per cent longer payment periods than the UK average. And although two members out of the 325 survey respondents are being paid sooner than before, 52 per cent tell us that their customers are taking significantly longer to pay. The smallest firms, with less than five trucks, are the least affected by increased payment periods but even in this sector the figure is 46 per cent. Larger customers are said by members to be generally the worst offenders.

Reported changes are typically 30 days from invoice stretching to 45 or even 60 days, and there is significant resentment about large companies abusing their negotiating position and effectively using road haulage and logistics companies as banks. BERR's initiative on prompt payment appears to have fallen completely flat in respect of larger companies, although the commitment to prompt payment by central government is welcome.

### Credit famine

Banks have been seriously problematic in agreeing credit or overdraft facilities of 22 per cent of members and a slightly higher proportion, 25 per cent, have had difficulty in gaining credit for consumables. It is possible, though conjecture, that the figure in respect of banks could have been higher but for the sharp downturn in business, which has reduced cash flow requirements in the short term.

> "Banks have been seriously problematic in agreeing credit or overdraft facilities of 22 per cent of members and 25 per cent have had difficulty in gaining credit for consumables."

### Fuel costs up

A key cost for road hauliers is, of course, diesel. Payment terms have been reducing for several years but this process has accelerated since August 2008, when credit risk insurers started rethinking their involvement with the sector. Many firms are now given no credit at all; others have 7 days'; and very few have more than 14 days' credit. This means that much of the road haulage diesel used in the UK is fully paid for before it is used to earn revenue yet the revenue is slower than ever in coming.

Given that diesel already typically accounts for 30 per cent to 40 per cent of the operating cost of an articulated truck, it is a cost that looks set to rise again if government goes ahead and increases fuel duty by yet another two pence per litre. Because of this duty demand, the government has a direct impact on the cash flow of road haulage businesses that is perhaps unique in the economy.

### Employment issues

Pressure to find drivers and on drivers' pay has largely disappeared, although longer term fears of a shortage remain in the background. RHA offices have had an increasing flow of inquiries from firms seeking advice on redundancy – and this has prompted a marginal increase in demand for advice on contracts of employment, an area which can be overlooked by employers.

Driver pay rates are expected to rise this year in just 6 per cent of firms and to fall in 14 per cent. The rest expect pay rates to remain at the same level. However, a number of members have commented that their drivers' gross pay would fall sharply as they went onto shorter hours and reduced overtime.

According to anecdotal evidence, haulage rates in some sectors have been falling recently. Looking forward over the coming months, almost half (48 per cent) of survey respondents expect haulage rates to fall and 41 per cent expect little change. A slight increase is expected by 7 per cent and a further 1.5 per cent expect a sharp increase in haulage rates.

### Insolvencies and restructuring

These predictions of haulage rate increases reflect the view that many businesses have gone out of the industry and that many more will do so in the coming months, reducing supply and therefore allowing the firms remaining to regain much needed profitability. However, it is likely that the number of firms that expect rates to rise would have been significantly higher had the survey been carried out six or even four months earlier and there is now a wider appreciation of the reduction in demand.

In addition, many transport firms are seeking to diversify as their established markets and customers decline. That many haulage operations will become casualties of the current economic climate is an inescapable fact. However, those that manage to weather this financial storm will emerge stronger, more efficient and with an even greater will and incentive to succeed. □

**Kate Gibbs is the head of communications at the Road Haulage Association.**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# XL – an airline lands with a big bump

**The difficulties of starting administrations at 1.00 am, keeping all parties informed and the logistics of having thousands of creditors all make the XL administrations some of the most demanding ever.**

At 1.00 am in the morning on Friday 12 September 2008, XL Leisure Group plc and ten of its subsidiaries, the UK's third largest package holiday group, went into administration. It was the biggest British tour operator collapse for over 30 years and left some 90,000 people stranded. Bringing them home was described as the largest repatriation since Dunkirk. A further 200,000 people had booked holidays with XL. Last, but for some, not least, many Hammers fans had to buy new shirts as XL had been West Ham's lead shirt sponsor.

### The history of the XL group

The origins of the XL group date back to the 1990s with Sabre Airways, which became Excel Airways. That was bought by the Icelandic Avion group and acquisitions followed. Subsequently, there was a management buy-out in late 2006, though the group kept its close Icelandic connections. By the summer of 2008, the group had become the XL Leisure Group. It had 1,700 employees, over 40 companies, operations in many European countries and ran package holiday operations and airline services from 12 airports to over 50 destinations.

### Oil fuelled the demise

So what caused the demise of XL? In large part, it was fuel costs. In early 1999, oil hit a low of just $16 a barrel. It then climbed and, broadly, stayed around the $30–$50 a barrel mark for a few years until 2005. The price rose through 2006 and 2007 and broke $100 a barrel for the first time in early 2008. Commentators talked about the problems that such a high price of oil might cause, but, to most people's surprise, it kept climbing. Some started talking about the $200 barrel and people took them seriously as oil hit $147 a barrel in July 2008. In the event, the price fell back quite quickly, but it stayed well above $100 a barrel for several months.

This extremely high oil price was hurting many airlines – 2008 saw the demise of Zoom Airlines, Futura, Silverjet, Maxjet, Oasis and Eos. XL was facing an 80 million increase to its annual fuel bills and in the competitive travel and package holiday market, it could not pass on these additional costs to the customers. Various options were considered and certain lenders retained Kroll to review the situation. Regrettably, in the end, there was no alternative but to prepare for administration and (what is now) Zolfo Cooper was lined up.

### Court flexibility

The appointment of the administrators merits some comment as it shows how helpful and pragmatic the English court and judges can be. When planning the administrations, it became clear that it would not be possible to trade the airline's business on an on-going basis. One concern was to try to start the administrations when the fewest aeroplanes were in the air. XL had bought low-cost flight slots and therefore tended to fly at 'unusual' times, the effect of which was that there was no time when XL did not have planes airborne.

> "Zolfo Cooper and Freshfields… analysed the flight schedule and ascertained that the optimum time was for the administrations to start at around 1.00 am."

Zolfo Cooper and Freshfields (who act for the administrators) analysed the flight schedule and ascertained that the optimum time for the administrations to start was at around 1.00 am. Plainly, judges do not normally sit at this time in the morning, so consideration was given to how the appointments could coincide with the optimal timing. An added complication was the extensive media interest in XL and the rumours that were circulating that 'something might be happening'.

The amendments introduced by the Enterprise Act 2002 allow for out-of-court appointments to take effect by faxing a notice of appointment to the designated court fax number. Insolvency Rules 1986 Rule 2.19(5) states that 'The appointment shall take effect from the date and time of that fax transmission'. However, this out-of-hours fax notification regime only applies to appointments by the holder of a qualified floating charge (QFC). Directors and company appointments can also happen out of court; but, there is no out-of-hours regime as there is for the QFC appointment. In light of this, the legal teams turned to an in-court appointment and worked to ensure that it took effect from 1.00 am.

Various options were considered to effect a 1.00 am appointment – eg everyone waiting up and then commencing a hearing at around midnight, or doing the same but by a telephone hearing. In the end, the agreed process was to have a court hearing late on Thursday 11 September and to seek an order that only took effect from 1.00 am, coupled with an agreement to report back if circumstances changed materially.

This resulted in the unusual situation of a High Court judge coming to the offices of Jones Day (who were acting for the XL group and were making the directors' administration applications) for a court hearing late in the evening of 11 September 2008. Accordingly, at approaching 10.00 pm, the XL directors, Zolfo Cooper and the various advisers sat down around a conference room table to hear the directors' administration applications. Plainly, those applications were successful and the judge granted the administration orders at 10.52 pm to take effect from 1.00 am on 12 September. Before turning to other aspects of the XL administrations, it is worth commenting positively about the judge's flexibility. Naturally, this unusual order was made in the context of specific circumstances that rendered these administration applications as exceptional. That said, this pragmatic and helpful approach is part of what makes the English legal system and courts attractive for parties when choosing an appropriate regime and is to be welcomed.

> "Ensuring that an accurate message was given to the public was not easy, particularly as the group sold package holidays in different ways."

### Interest in the administrations

Returning to the substantive aspects of the administrations, everyone was conscious that the appointments were just the beginning and rapid, carefully co-ordinated action was required. It was clear from an early stage that there would be enormous interest in the XL administrations – from the general public, naturally, but also from journalists and politicians. In anticipation of this, Zolfo Cooper retained a media consulting firm and put together a highly effective, detailed communications pack with appropriate messages for the different stakeholder groups.

Lawyers from Freshfields accompanied Zolfo Cooper to various airports around the country and to all of the XL call centres on the day of the appointments, to address the inevitable legal issues that arose when addressing the employees and dealing with the questions and concerns of customers and other creditors. Twenty-four hour emergency contact lines for the airports had been obtained in advance, and these were used to ensure that the airports were made aware immediately that no XL planes could take off following the appointments. The fax machines at Freshfields went into overdrive as notices were faxed to a multitude of aircraft lessors and sub-lessees.

Telephone hot lines were set up to deal with the flood of enquiries from the public and information was posted on the XL.com website (now known as www.xladministration.com). This happened very shortly after the appointments became effective – in order to try to communicate as much information as quickly and accurately as possible. To that end, a press conference was held on the morning of the appointments, when both Alastair Beveridge, Zolfo Cooper, and Phil Wyatt, then chief executive of the XL group, spoke about the group's collapse.

### Information for the public

Ensuring that an accurate message was given to the public was not easy, particularly as the group sold package holidays and flights in various different ways (eg, directly over the internet and indirectly through travel agents) and under various different brands (Kosmar, Medlife, Aspire, Travel City Direct and Freedom Flights, as well as the better known XL). This meant that not all customers had the same rights to repatriation and compensation. Some were protected by ATOL and some had the benefit of being able to claim through their credit card providers (thanks to section 75 of the Consumer Credit Card Act 1974). However, regrettably, others had no right to any compensation whatsoever, particularly because the failure of an airline is often carved out of travel insurance policies.

### Creditors' meetings at Wembley Arena

As the administrations move forward, one of the difficulties encountered has been how best to deal with the huge number of creditors, many of whom have relatively small claims. The Insolvency Act states that administrators must provide regular, detailed updates to all creditors on the conduct of the administration, but it was not drafted with administrations of this scale in mind.

Providing the initial notification to creditors of the appointment of the administrators (a statutory requirement) was expensive and showed that the address details for many of the customers were incorrect or out of date (evidenced by the high number of notices that were returned to the sender). Since then, the administrators have successfully obtained dispensation from the court so that they can provide much of the information that must be supplied to creditors over the internet rather than by post, which has resulted in sizable cost savings for the estates. This is another example of the English court system adopting a pragmatic approach and adapting the insolvency legislation for current needs.

When the time came to hold the first creditor meetings, these were only necessary in respect of five out of the eleven companies placed into administration. The remaining six had insufficient assets to declare a dividend to unsecured creditors and so the administrators opted to save costs by not holding a physical meeting (see paragraph 52 of Schedule B1 to the Insolvency Act 1986). Nevertheless, the administrators were tasked with finding a venue that could accommodate the thousands and thousands of creditors entitled to attend the meetings. Wembley Arena was booked for two days, and the meetings went smoothly, with all sets of proposals being approved.

### Oil or water?

So as the recession bites, what now for airlines? Initially, they were helped as the price of oil plummeted. From the heights of \$147 a barrel in July 2008, the price had fallen as far as \$34 a barrel in February 2009 – a remarkable 77 per cent peak-to-trough drop. This provided respite for the airlines. However, oil is now largely in the \$60–\$70 a barrel band which, while a long way from the July 2008 peak, is still a hefty price. Further there is a wide range of views regarding where the price will go. An adviser to the US government has stated that it will drop back below \$20 a barrel as the recession shrinks demand. Conversely, others see it breaking through the \$100 a barrel mark before long. Some airlines hedge the price for a certain period forward; however, that carries a cost and some do not, or are unable to, hedge fully.

A further major challenge for airlines is the reduced volume of flights as a result of the global recession. By way of example, BA has suggested that it might remove business class from some transatlantic flights due to reducing demand and, of course, BA has the additional major concern of its pension fund. However, even for airlines without pension woes, the reduced demand and fulsome oil prices will give airlines a bumpy ride as they fly into the head winds of the recession – one suspects that not all will make it through. □

**Richard Tett is a partner, Anne Sharp is of counsel and Natalie Dawkins is an associate in the Restructuring & Insolvency Group at Freshfields Bruckhaus Deringer LLP.**

# Green agendas: new considerations for business recovery professionals

**Are environmental issues of real relevance to business recovery professionals or just hot air? Anna Bacon suggests they can have a material impact on asset values.**

The onset of the recession in the UK and internationally has resulted in many new impacts for distressed companies and their advisers across a range of business issues. Given the rise of environmental concerns since the late 1990s, this is another new concept that can have direct consequences for the decision-making process.

Environmental issues can have a significant impact on asset value and business liquidity, although the severity varies depending on the nature of the company and its assets. It therefore follows that capturing environmental issues during the decision making associated with restructuring or insolvency can reap real benefits in terms of liability control and protection of residual value.

## The rise of environmental regulation

Since the late 1990s, the volume of environmental legislation emanating from the European Union has increased substantially, almost on a monthly basis. While this predominantly impacts heavy industry, the growing amount of environmental legislation can (and does) impact any property and/or any business sector. Commonly, this is divided into two types of environmental liability.

1) Direct liability: that associated with a non-compliance with environmental law affecting current operations, including requirements for permits and consents, or other direct controls on business activities;
2) Latent liability: 'hidden' non-compliances that a buyer cannot discover by reasonable inspection or assessment. In relation to environmental issues, this is most commonly associated with contaminated land and asbestos management, resulting from current and/or historical practices for which the existing occupier may or may not be liable.

Non-compliance with environmental law can result in a notice for action being served on an operator, requiring them to take defined steps to investigate and subsequently rectify an actual or potential environmental impact. Where this is not completed in a timely manner, legal penalties or fines can be imposed of up to £50,000 per item, excluding legal fees and clean-up costs.

## Relevance to the business recovery sector

So why is all of this relevant to business recovery professionals? In our opinion, environmental considerations can have a material impact on decisions relating to the future viability of a business, and to the ability to sell on assets for maximum value.

> "Understanding the actual and potential environmental liabilities associated with a portfolio can be of direct relevance to a reorganisation strategy, depending on business priorities."

### Liabilities management

Those seeking to acquire an asset (whether a business or a property) will always have some sort of environmental evaluation completed prior to acquisition in which actual and potential liabilities are assessed. This is normally a screening report provided by the conveyancing solicitor (a mandatory requirement of Law Society Guidance) but can often be a more detailed independent review of environmental compliance on behalf of lenders. Correspondingly there is no hiding from environmental liabilities during a proposed sale, and lenders are now increasingly wary of these potential risks.

Understanding the actual and potential environmental liabilities associated with a portfolio can therefore be of direct relevance to a reorganisation strategy, depending on business priorities. This could include:

- maximising asset value by providing up-front information on potential liabilities to avoid price-chipping by prospective buyers or untimely delays in securing funding (whether as a result of refinancing or divestment);
- informing strategic decision making on the divestment or ring-fencing of potential liabilities; and
- value creation via the early identification of actual and potential environmental liabilities, and then supporting the business in investigating, managing and mitigating these risks to secure a return to compliance.

### Business plan review

For many businesses, particularly those with activities directly regulated via the Environmental Permitting regime, substantial amounts of both capital and operational expenditure must be committed on an annual basis to managing and improving a business's environmental impacts. While simple cost cutting is not a recommended course of action, an informed review of financial

**Relevance of environmental considerations to recovery services**

| | Environmental consultancy services | | | | |
|---|---|---|---|---|---|
| | Liabilities management | Business plan review/ environmental financial obligations | Internal resourcing/ outsourcing options | Restrictions on business activities | Merger/closure planning |
| Cash flow & working capital management | ■ | ■ | ■ | | |
| Debt advisory service | ■ | ■ | ■ | | |
| Business review and liquidity review | ■ | ■ | ■ | | |
| Performance improvement | ■ | ■ | ■ | ■ | ■ |
| Turnaround planning & management | ■ | ■ | ■ | ■ | ■ |
| Exit management services | ■ | ■ | ■ | | ■ |
| Administrations | ■ | ■ | ■ | ■ | ■ |
| Liquidations | ■ | ■ | ■ | ■ | ■ |

commitments may be able to identify savings for the business in a number of ways, including regulatory negotiation to agree variations on legally required improvements and deferment of capital programmes.

**Internal resource assessment**

In many circumstances, reduced spending on environmental compliance can result in increased business risk. Advisers must be sure that their decisions allow for the necessary resources and personnel to ensure ongoing environmental compliance (either during restructuring or closure) and/or opportunities to outsource activities, without increasing business exposure.

This is particularly important in businesses that have one or more Environmental Permit or licence.

**Restrictions on business activities**

Environmental laws can impose restrictions or controls on certain activities, and therefore advisers must be sure that any particular options for the restructuring of a business take into account the need for additional permits or licences. In some circumstances, avoiding the need for such regulatory control, with its associated costs of permit application, subsistence and potential upgrade of certain equipment, may be the most pragmatic solution for a business model.

**Mothballing of operations**

In certain circumstances, mothballing an activity, particularly a development, may be the most logical option for a distressed business. However, this may create certain environmental liabilities further down the line.

**Consolidation, output and closure planning**

Where businesses have direct environmental liabilities, these can impact exit or consolidation strategies. It is therefore essential that advisers ensure adequate provisions, in terms of both capital allowances and timescales, for environmental regulatory considerations.

This could be particularly important where the merger of two or more business operations is proposed, where the cumulative impact of combined activities could necessitate a new permit or licence or the upgrade of existing equipment to meet certain legal standards. Associated timescales for obtaining such permits can be in excess of six months in some cases.

Where closure is planned and Environmental Permits or licences are in place, these must be surrendered appropriately. The surrender process must be managed in a prescribed manner, set out by the relevant regulator, which in turn has potentially significant costs and/or timescales. As the permit is registered to a particular operator, any change in ownership or insolvency of that operator must be notified to the relevant regulator as soon as possible. This can, in some circumstances, take considerable time and require expenditure to resolve successfully. It may be difficult to divest a site where an Environmental Permit or licence remains in effect as the implications of un-surrendered permits may be considered as an environmental liability by some prospective purchasers.

Finally, a reduced output or a reduced potential output can result in a facility falling outside of an Environmental Permitting regime. While costs may arise as a result of the permit surrender process, the longer term cost savings of an unregulated business activity may result in a positive impact on the balance sheets. However, permit surrender should be approached with care where fluctuations in business output may be of a temporary nature.

**Timely management is important**

It is therefore clear that steering a distressed business through the minefield of environmental regulation can need careful consideration at the outset. Where it is done successfully, and not as an eleventh-hour reaction to risk, this can improve robustness of the business strategy, protect or even enhance asset value and minimise delays to recovery activities.

**Case study: improved information and protected asset value**

As part of the sale of an international airport, potential buyers were granted access to the asset in order to appraise likely investment risks, including those associated with environmental issues. At this time, an environmental audit estimated that contaminated land liabilities, predominantly resulting from current and former fuel storage, were in the likely range of £5 to £10 million, a cost that the bid consortium took into direct account within the business model. On reaching preferred bidder status, the consortium was allowed to complete an intrusive investigation of the property to better quantify the impacts on underlying soil and groundwater. Following this work, and given the findings of the assessment, the estimate of clean-up costs was revalued at up to £1 million, which immediately impacted on the business model and the proposed purchase price.

**Case study: managed environmental liabilities and faster value realisation**

Some of the most common victims of economic slowdown are property developers. In response to changing financial circumstances, many have chosen to mothball certain developments, even those that were part way to completion. Where development of brownfield sites was being undertaken, this can include long-term soil and groundwater remediation projects which, when complete, will add directly to land value. Stalling remediation schemes can result in the delayed clean-up of soil and groundwater and the failure to meet associated planning conditions that allow residents to take up occupancy of the buildings. Mothballing sites, even in urban locations, can provide ideal opportunities for fly tipping of waste and can allow the regrowth of vegetation, which presents an attractive habitat for certain protected species like newts, badgers, bats and reptiles. The presence of these species on site can prevent the start-up of construction works until adequate survey and relocation has been completed. Correspondingly, active management of mothballed sites may be necessary to allow the development to resume rapidly once market conditions permit.

**Case study: consideration of assets creating environmental needs**

A car hire firm was seeking to rationalise its operations and to consolidate activities in key UK hubs. Its activities in some locations involved spray booths for the repair of minor damage to the vehicle fleet. On an individual basis, the spray booth operations did not use sufficient solvent to necessitate an Environmental Permit. However, under the proposed consolidation plans creating larger regional hubs, spray painting activities at certain sites would consume sufficient solvent to breach the legal threshold for which such a permit was necessary. Such authorisation had to be obtained from the local authority for each relevant property prior to the commencement of enlarged spray painting operations. The cost to obtain a permit and to install dedicated equipment that met legal requirements at each site was approximately £50,000 per site, which business advisers did not consider to be sufficiently significant as to prevent rationalisation. However, the timescales to obtain all relevant permits was circa six months, which had to be factored into the business's proposals and costs for consolidation. □

“Mothballing sites can provide opportunities for fly tipping of waste and can allow the regrowth of vegetation, which presents an attractive habitat for protected species. The presence of them on site can prevent the start-up of construction works.”

**Anna Bacon is an associate director in the Environmental Management and Due Diligence group at Waterman Energy, Environment and Design.**

# Improving insolvency regulation

**Mike Chapman reports on reviews of The Insolvency Service and of IP regulation.**

Just as the current recession is proving to be a hectic time for insolvency practitioners there is also a lot happening on the regulatory front. Insolvency is very much in the headlines, from high-profile administrations to the fees charged by insolvency practitioners (IPs). The Insolvency Service (IS) itself is also in the spotlight as never before. As well as having to respond to the changing economic environment, whether through handling very substantial case loads or new policy developments, our regulatory work has been the focus of attention by two important bodies.

### Reviews of The Insolvency Service

The Business and Enterprise Select Committee commenced an enquiry into the IS in late 2008 and published its findings in May 2009. It made recommendations relating to the regulatory regime and touched on the issue of whether an insolvency ombudsman should be established. The government has responded to the Select Committee and commitments made in the response will require further work, both within the IS and the profession.

The Better Regulation Executive, a directorate within the Department of Business, Innovation and Skills, the IS's parent department, led a review of the activities of the IS in relation to IP regulation in late 2008. The review team, drawn from a diverse body of regulators, measured the IS's compliance with the principles set out by Sir Philip Hampton in his review of regulation and enforcement across a broad range of services in the UK. The Hampton vision is one of effective regulation; achieving regulatory outcomes in a way that minimises the burdens imposed on business. Key to this is that regulators should be risk based and proportionate in their decision-making; transparent and accountable for their actions; and should recognise their role in encouraging economic progress. The Better Regulation Executive published their report in July[1]. Both the Select Committee and the Better Regulation Executive sought views from the Recognised Professional Bodies (RPBs), R3 and creditor representatives.

### Review of IP regulation

One of the themes arising from both the Select Committee and the Better Regulation Executive's review was that there was a perceived lack of transparency regarding the work undertaken by the IS in relation to insolvency practitioner regulation. In order to address this concern the IS published a review[2] of IP regulation in June 2009. This brings together the essential features of the regulatory regime; what the public and businesses can expect from it; and what the IS and the other regulators are doing to improve it.

As this is the first such review that has been published, an overview of the system of regulation has been included to help people from outside the profession to understand the roles the various parties play. Developments in regulatory policy and highlights of the activities undertaken in 2008 are set out, including the introduction of a new ethical code and SIP16 in January 2009.

The review includes information about the monitoring by the IS of the RPBs' compliance with the Memorandum of Understanding, the agreement the Secretary of State has with the Bodies that underpins and provides consistency within the regulatory regime. Currently, the IS works within the same framework in respect of practitioners who are directly authorised by the Secretary of State. To ensure that a similar level of oversight is provided for the regulation of *all* practitioners, arrangements will be made later this year to put the direct authorisation function at arms length from the IS's over-arching regulatory function.

> "To ensure that a similar level of oversight is provided for the regulation of *all* practitioners, arrangements will be made later this year to put the direct authorisation function at arms length from the IS's over-arching regulatory function."

The review also provides information on disciplinary and regulatory sanctions taken against insolvency practitioners in 2008. Where details of individual sanctions, including the name of the practitioner concerned, are already in the public domain, that information has been published. Copies of the review have been sent to creditor groups, and our intention is to publish a similar review each spring.

There is a section on the complaints made to the RPBs and the Secretary of State about the practitioners that each Body authorises. Of course not all complaints made are justified and in future reviews we intend to provide information to indicate the proportion of complaints in the preceding year that were found to be justified.

Complaints made about IPs often question their integrity. As private individuals authorised by law to carry out formal insolvency procedures IPs must act with the highest levels of integrity. The professional standards as developed and approved by the Joint Insolvency Committee (JIC) and adopted by the RPBs and the Secretary of State are designed to help practitioners do just that.

### Review of SIPs

Earlier this year the JIC started a review of statements of insolvency practice (SIPs) to consider both the basis on which they should be prepared (eg principles-based or prescriptive) and how the drafting and approval process could be streamlined. The JIC made a commitment to extend the consultation process for SIPs outside the profession. Professional standards are put in place to ensure that creditors, debtors, directors and other people affected by insolvency procedures, such as employees, receive the high standard of service that they are entitled to expect. Consultation both inside and outside the profession should ensure that regulatory guidance is properly directed and sufficiently detailed to enable consistent high standards to be reached.

### Working to improve regulation

Looking forward, the remainder of the year is shaping up to be just as interesting as the past few months. In addition to taking forward regulatory issues highlighted by the Select Committee and Better Regulation Executive there is also The Insolvency Service's report on the first six months' monitoring of SIP16, which was published in July[3] and makes interesting reading. I look forward to working with the RPBs and members of the profession to continue to improve regulation of the profession. ☐

[1] www.berr.gov.uk/files/file52318.pdf
[2] www.insolvency.gov.uk
[3] www.insolvency.gov.uk

**Mike Chapman is head of Insolvency Practitioner Regulation at The Insolvency Service.**

# Insolvency: the landlord's view

**Whether they are retail, industrial or office based, businesses are suffering – but landlords are under pressure too. Liz Peace puts the BPF's case.**

Landlords and insolvency practitioners have always had a lively relationship. Though nobody doubts the worthiness of the IP's role, or indeed the difficult circumstances under which they often operate, landlords feel that they too often lose out.

Many British Property Federation (BPF) members go so far as to express the view that landlords are sometimes seen as a vehicle to re-inflate a failing business, through requests for rent-free periods and rental reductions, which run counter to lease agreements. Given that the majority of large landlords are trustees of pension fund money, any attempt to reverse an agreed lease is viewed as an attack not only on the foundations of the landlord's business but also as an attack on the money of the man on the street.

However, we find ourselves in extraordinary times and landlords are acutely aware of the difficulties being faced by all sectors of the economy, whether retail, industrial or office based. It is often overlooked that a landlord granting a lease to a tenant is taking a stake in that business and has a vested interest in seeing that business survive and succeed.

Though the current economic conditions are creating a challenging environment for occupiers, sound relationships and transparency between the landlord, tenant and, where required, insolvency practitioner (IP), make it easier to weather difficult markets.

## Trying times

The recent JJB Sports CVA is an excellent example of the landlord, tenant and IP working together, with the IP steering an acceptable outcome for all of the parties concerned (see page 34). This resulted in a positive outcome that was assisted by the open and honest way in which the negotiations took place. We were very impressed with the lengths the IP had gone to in order to keep various audiences informed, and tailored the communications specifically to those audiences. We would hope that this agreement sets a precedent in the industry, with similar standards upheld in any future negotiations.

However, landlords will only accept the need to restructure a business, together with the associated hardships, for those businesses that are in genuine distress *and* have a viable future business model. Like many other creditors, landlords firmly believe that insolvency legislation should only be used as a vehicle for businesses that are facing genuine difficulties and not as a convenient means to shed burdensome assets such as unprofitable retail stores. Landlord organisations are under considerable pressure in the current circumstances too!

> "Landlords firmly believe that insolvency legislation should only be used as a vehicle for businesses that are facing genuine difficulties and not as a convenient means to shed burdensome assets such as unprofitable retail stores."

## Looking to the future

Going forward, we know that the best way to deal with the challenges that are going to present themselves is for the two industries, landlords and IPs, to work closer together. To this end, the BPF has met with R3 on a number of occasions to begin the important process of dialogue and addressing some of the 'barriers' that may get in the way.

### Pre-packs

Pre-packaged administrations continue to be an issue for landlords. We fully support The Insolvency Service's Statement of Insolvency Practice (SIP)16 and are pleased to note from the latest survey of R3 members that IPs are adhering to this latest guidance in the vast majority of cases.

We have been directing, and will continue to direct, any of the complaints from our members about the handling of pre-packaged administrations by IPs to the regulatory bodies (including The Insolvency Service), should their actions not appear to be satisfactory.

### Contacts

From conversations with R3, we have been informed that in large administrations it is often difficult to identify the relevant representatives within landlord bodies with whom to communicate on insolvency matters. As an attempt to mitigate this problem, the BPF have compiled a contacts sheet of the 30 largest landlords in the UK; a document we are hoping will assist communication between the two ranks and encourage IPs to engage early with landlords. This document will be available on the British Property Federation's website – **www.bpf.org.uk** – shortly.

### Best practice guide

Over the summer, we are drawing together a best practice guide on insolvency for landlords. If any members of R3 wish to be involved in this and provide technical input your assistance would be warmly received.

## The regime

Finally, looking forward to the future shape of insolvency legislation and The Insolvency Service's current consultation on whether to encourage company rescue further, we share the view that it is not appropriate to undertake any significant amendments to British insolvency legislation in the middle of a recession.

However, when red turns to black, we believe a re-evaluation of the Enterprise Act will be necessary, especially as many landlords feel the balance in insolvencies has tipped too far in the favour of the rights of the debtor versus the rights of the creditor. We look forward to engaging with the insolvency profession on these issues when the appropriate time comes. ☐

**The British Property Federation**

The British Property Federation is a membership organisation devoted to representing the interests of all those involved in property ownership and investment. We aim to create the conditions in which the commercial property industry can grow and thrive, for the benefit of our members and of the economy as a whole.

**Liz Peace is the chief executive of the British Property Federation.**

# Dubai: weathering the storm

**Dubai is not immune from the economic recession but is taking steps to mitigate the effects.**

In recent years, Dubai has held an almost Disneyland-like allure for fascinated onlookers. As soon as glossy pictures of the launch of a sparkling new hotel, skyscraper or man-made island hit the press, plans were announced to construct another taller, larger, more extravagant or even more underwater version. Anything that happened around the world could be done bigger, better and much more fabulously in Dubai.

But Dubai is of course not an isolated mirage in the desert, and the effects of the global economic crisis have been felt even in the glittering emirate. Importantly, however, from the very outset of the crisis the governing bodies of the emirate were well advanced in their discussions on how best to deal with its impact.

### Economic impact on key sectors

Dubai does not have the level of hydrocarbon reserves enjoyed by many of its neighbours, but instead has successfully diversified into the real estate, tourism, financial services and trade sectors. Unfortunately, all of these industries are now being impacted by the global economic crisis.

The real estate sector, accounting for perhaps 30 per cent to 50 per cent of the Dubai economy, is facing a price correction; reports on the degree to which property prices in Dubai have fallen to date from their peak in 2008 vary between 30 per cent and 55 per cent.

MEED Projects is a construction industry monitoring and business opportunity subscription service. It recently reported that projects in the United Arab Emirates that have been delayed or placed on hold have reached a collective value of USD 355 billion.

Tourism was always bound to take a hit as its target market tightened its belt. Recent reports tell us that Dubai hotels saw their revenues fall by more than 40 per cent in May from a year ago. This trend was exacerbated by significant currency movements (particularly the collapse of the pound).

### Dubai's first budget deficit

Global events are clearly having an effect on the emirate's economy and many awaited the government of Dubai's 2009 budget with interest. This was formally announced in January and included a 43 per cent increase in government spending aimed at stoking economic growth and helping to resist the impact of the global slowdown on Dubai's economy. Forty five per cent of the 2009 budget was earmarked

for spending on infrastructure and public transport. With a projected spend of AED 37.7 billion against AED 33.5 billion in projected revenues, it was also the first time ever that the government of Dubai had proposed to run a budget deficit. The government's willingness to run a deficit (still one of the lowest in the Gulf region) was widely welcomed by the business community as a reflection of the government's commitment to keep up its spending on key sectors such as public services and infrastructure.

> "From the very outset of the crisis the governing bodies of the emirate were well advanced in their discussions on how best to deal with its impact."

No sooner had the budget been digested than attention turned to speculating how Dubai would cope with the high levels of debt (reported to amount to around USD 80 billion) taken on by the emirate's government-related commercial sector entities in order to finance Dubai's aggressive development strategy over the past decade.

### Refinancing the Borse Dubai

For many, the Borse Dubai refinancing in February 2009 was the first real test of Dubai's claim that it could ride out the economic storm on its own. Borse Dubai is the owner of Dubai's two equity markets (the Dubai Financial Market and NASDAQ Dubai). It originally took out a loan in March 2008 to finance the acquisition of the Nordic Stock Exchange (NASDAQ OMX).

Borse Dubai's parent, Investment Corporation of Dubai, paid part of the loan leaving USD 2.5 billion to be financed. Days before repayment of the original loan was due, Borse Dubai was able to announce that in spite of the adverse market conditions, it had succeeded in obtaining a one-year, USD 2.5 billion syndicated loan made available by banks from Dubai and Abu Dhabi, as well as banks from China, India and Europe, which replaced some of the Western banks in the original deal. Dubai had passed its first refinancing litmus test.

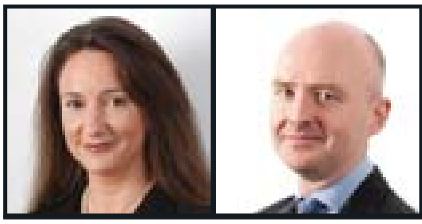
### Long-term bond launched

Also in February 2009, the government of Dubai launched a USD 20 billion long-term bond. The bond was an unsecured fixed rate paper, yielding four per cent per annum and has a five-year maturity period.

The issue allowed the government of Dubai to raise money at a cheap rate and provide its companies with the necessary funds to substitute the liquidity that has dried up globally. It is hoped that the issue will serve as a springboard for the acceleration of economic activity, and restore global confidence in the overall economic stability and growth outlook of the emirate.

The United Arab Emirates Central Bank was a subscriber to the first tranche of USD 10 billion, and both credit and equity markets reacted positively to the news; the Dubai financial market, which suffered a 72 per cent plunge last year, rose 8 per cent on the back of the bond issue. The cost of insuring Dubai's debt in the credit default swaps market also fell nearly 200 basis points following the issue.

There is a general feeling that Dubai is not out of the woods yet – but in this it is not alone. However, the government of Dubai's bond issue is certainly viewed as a crucial step to help to engineer a soft landing. It has also highlighted the symbiotic nature of the relationship of the emirates with the support from Abu Dhabi being a key factor for many. □



**Sarah Wright (far left) and Stephen McGlennan (left) are both partners at Denton Wilde Sapte LLP. Sarah is in the Restructuring and Insolvency Group and Stephen is in the Corporate Department.**


# JJB Sports CVA – fair enough?

**The JJB CVA dictated voting rights and provided for differential treatment between creditors. Jeremy Goldring asks if there was unfair prejudice and queries whether it would have withstood a challenge.**

All major jurisdictions have arrangements or compositions (in the US, the reorganisation plan; in the UK, Schemes of Arrangement and CVAs). All are subject to concepts of fairness.

For these purposes, creditors are sometimes, but not always, categorised into classes. The weight accorded to their opposition to an arrangement is usually a function of the value of their interests, either with reference to what would happen in a liquidation of assets (the UK approach) or in the event of a successful restructuring (the US approach).

Just recently in the UK a CVA was approved in which a class of unsecured creditors was singled out: landlords. Nobody else was impaired, although there was some unspecified deal between the equity and the financial creditors. Some landlords were required to change rent payment terms – their contractual and proprietary rights were varied. Others (whose stores were to be vacated) were required to calculate their claims in accordance with a fixed formula and obliged to share in a dividend to be paid from a fixed amount cash pot.

Thus the debtor company JJB Sports plc (JJB) dumped some current and future creditors – effectively choosing which vendors it wanted to trade with and which it did not – and bound any dissenters by means of the CVA. The differential treatment was nothing to do with the values of the creditors' interests in the event of liquidation or in the event of restructuring; it was about which stores were profitable and which were not.

On the face of it, JJB's CVA is a formidable rescue tool. But would it have withstood challenge?

### Challenges to CVAs

Back when the Insolvency Act was in its infancy, and way before the Scots devolved, reflecting upon democracy the Proclaimers lamented, 'What do you do when minority means you?' Where an out-voted creditor in a CVA is unfairly prejudiced, or if there's been a material irregularity, and an application to the court is made within 28 days of the report of the meeting being filed, the CVA may be set aside.

The court is not concerned with the relative commercial attraction of the CVA proposal to the complaining creditor compared to those who approved it. In other words, the fact that the proposal makes commercial sense to most (or even all the other) creditors doesn't mean that there has been no unfair prejudice or material irregularity.

> "The CVA proposal distinguished between stores from which JJB intended to continue trading (open premises) and those which it intended to close down (closed premises). Landlords of open premises would enter into rent concession agreements, by which rent would be paid monthly in advance rather than quarterly, for 12 months."

### The JJB CVA

JJB and its subsidiary Blane were tenants in about 260 stores. JJB had also guaranteed the obligations to landlords of another subsidiary, OSC.

The financial creditor and security structure of JJB and Blane was complex. There were several banks and third parties with security over various assets. The CVA proposal did not explain if there were any priority agreements nor which of the secured creditors would achieve a recovery in the event of insolvency proceedings. There was mention of some of the existing lenders continuing facilities and of new facilities to be provided if the CVA was approved and implemented, but no details were provided.

The CVA proposal distinguished between stores from which JJB intended to continue trading (open premises) and those which it intended to close down (closed premises). It was proposed that landlords of open premises would enter into rent concession agreements, by which rent would be paid monthly in advance rather than quarterly, for a period of 12 months. To landlords of closed premises, no more payments would be made; each would be entitled to make a claim, which if made by 29 April 2009 and accepted by the CVA supervisor would share rateably in a pot of £10 million, along with claims in respect of the OSC guarantees.

A one-size-fits-all approach was taken for calculating these claims, and for determining the value of all landlords' claims for CVA voting purposes. Rent and service charges to the earliest expiry of the lease were to be added to an amount for dilapidations, a fixed sum of between £10 and £20 per square foot depending on the size of the property. This was then reduced on the assumptions that (i) it would take two years to relet the property (ii) the landlord would have to offer a two-year rent free period and (iii) the rent thereafter would be at 75 per cent of current. To the result was applied a five per cent discount.

The rights of all other unsecured, secured and preferential creditors were not affected at all by the proposal.

### Material irregularity

The JJB CVA was unusual in that it included a provision dictating how voting rights were to be established. There have been no cases where this approach has been considered as a possible source of challenge. It does seem clear that a miscalculation of voting rights is a material irregularity if the outcome would have been different but for the miscalculation. There is a strong argument that any attempt to prescribe voting rights that alters the rights creditors would ordinarily have is a material irregulatory.

The prescribed use of a formula to calculate all landlord claims by reference to specific rent-free periods and fixed dilapidations ignored the fact that each property had different characteristics. The authorities indicate that the chairman of the meeting should seek to agree a value for each creditor based on the evidence in relation to his claim available to him at the time. This one-size approach seems to amount to an obvious material irregularity.

However, it is easy to criticise the approach taken by the courts in this respect. Landlords are, effectively, obliged to produce evidence to substantiate their claims. Invariably, this will be costly, involving engaging a property expert to express a view on the prospects of finding a new tenant. Ill-advised or cost-conscious landlords can easily become disenfranchised. This problem is not restricted to landlords: it has application in respect of all future claims against a debtor. And so the question becomes whether imposing a method to approximate certain future claims amounts to a material irregularity.

Another intriguing question is whether the open premises' landlords should have been accorded the same voting rights as the closed premises' landlords. In the event of approval of the CVA, only the latter would suffer significant loss. So, should regard be had to the proposed treatment of creditors who have a future claim against the debtor in determining voting entitlements?

No help is found from consideration of the workings of Schemes of Arrangement under the Companies Act, where voting rights depend upon the constitution of classes. Creditors who are out of the money have no rights at all; all others are divided into classes of which the approval of 75 per cent in value is required. No special class is necessarily required for those with future claims, or those who will fare better under the scheme than others.

Naturally, those who find how they will fare to be commercially attractive will vote in favour of the CVA; and those who do not, will vote against it. Differential treatment between creditors is probably not an issue that goes to material irregularity, but is instead a question of unfair prejudice.

### Unfair prejudice

The JJB CVA poses several questions concerning unfair prejudice. Before we look at those, we should pause to reflect upon whether a CVA can operate so as to alter contractual arrangements between the debtor and third parties. Only if the answer is yes do we need to consider whether a CVA which has that effect is unfairly prejudicial to the party or parties whose contractual rights are varied.

The definition of a CVA under the Insolvency Act 1986 is *'a composition in satisfaction of [the company's] debts or a scheme of arrangement of its affairs'* (section 1(1)). Is a contractual variation an 'arrangement of affairs'? Consider, for example, a law firm that has contracted to provide legal services at certain hourly charge out rates, and which has the right to terminate the engagement if a CVA is proposed by the client. Is it possible for a majority of creditors by means of a CVA to enforce a variation of those engagement terms, reducing the hourly rates and disapplying the termination provision? The firm would then be obliged to provide services at lower rates. If this does amount to an 'arrangement of the affairs' of the client, then the only way to avoid it is if the effect is unfairly prejudicial.

Recently in the case of *Powerhouse* it was held that, for the purposes of deciding if there is unfair prejudice or not, it is permissible only to consider (i) how the complainant is treated under the CVA compared to creditors in the same right and (ii) to conduct a 'vertical' comparison with liquidation outcome. On these tests, the hypothetical law firm's challenge would fail. It is easy to see that these criteria are adequate in relation to enforcement of existing debts, but alone are not enough where a CVA is seeking to force a contractual counter-party to perform an executive function post-CVA.

In JJB, open premises' landlords were obliged to continue to provide use of the premises and were not allowed to exercise their proprietary rights for non-payment of quarterly rent, instead accepting rent paid on a monthly basis. Potentially, (i) the contractual variation and (ii) the restriction of enforcement of proprietary rights amounted to unfair prejudice.

No case has considered whether an attempt to vary contractual terms is an arrangement of affairs of a debtor or if such would amount to unfair prejudice. On the proprietary rights issue, in the Court of Appeal case of *Thomas*, Neuberger LJ said that *'at least normally, it would seem wrong in principle that a tenant should be able to trade under a CVA for the benefit of its past creditor, at the present and future expense of the landlord'*. While this suggests that proprietary rights cannot be varied, he did not go as far as saying that. It seems odd that a CVA cannot affect a secured creditor's rights without consent but that the proprietary rights of a landlord can be affected.

For the closed premises' landlords, potential unfair prejudice arose by virtue of being treated differently (and less favourably) than (i) open premises' landlords and (ii) all other unsecured creditors. This was happening because JJB was cherry-picking suppliers (in this case of premises) with whom it wished to trade in the future. They were to be kept whole (or nearly so). Those it no longer wanted to trade with were to receive only a dividend. This certainly fails the test of comparison between creditors in the same right, be those other creditors, landlords or the general body of unsecureds; and it seems must inevitably amount to unfair prejudice.

If that is wrong, the JJB CVA represents a remarkable rescue tool. A debtor may devise a business plan that produces a decent return for its investors, re-write its contractual obligations to its financial creditors, suppliers and customers including those with proprietary (though not security) rights and force these changes through with the requisite majorities of shareholders' and creditors' approvals. It can even dictate how claims that are difficult to assess should be calculated for voting purposes.

JJB's CVA was almost unanimously approved. Voters clearly considered it to be commercially compelling. What is not so clear is whether it would have survived challenge. The Proclaimers didn't and creditors shouldn't give up hope. □

“JJB's CVA was almost unanimously approved. Voters clearly considered it to be commercially compelling. What is not so clear is whether it would have survived challenge.”

**Jeremy Goldring is a partner and manager at SJ Berwin LLP's Reconstruction & Insolvency Practice.**

# Radical changes to Trust Deeds avoided?

**The threat of proposals by the Accountant in Bankruptcy that could result in the effective 'nationalisation' of the majority of personal insolvency work in Scotland seems to have abated – for now. John Hall explains.**

The Accountant in Bankruptcy (AiB), an agency of the Scottish government, has been very active in recent years in introducing changes to the personal insolvency regime in Scotland. In June 2009 in both the report of the Debt Action Forum (DAF) and in their own Protected Trust Deed Review, the AiB called for the introduction of a simplified, fixed-fee, contribution-only Protected Trust Deed (the FTPTD), to be administered by the AiB. It was anticipated that the FTPTD would be introduced in addition to the existing Protected Trust Deed (PTD) and could have significantly reduced the number of PTDs administered by the private sector.

R3 was very concerned by this proposal and sought to answer a number of questions.

### Was the proposal for an FTPTD based on evidence or an identified need?

The AiB believes that there is a cohort of individuals who do not fit the criteria for any of the current personal debt solutions available in Scotland and who are therefore denied debt relief. They suggested that the FTPTD would enable this cohort to access debt relief. R3 believes that, if this is the case, all that is required is a simple change to the eligibility criteria for the Low Income, Low Asset sequestration (LILA), not a wholesale and unnecessary change to the Trust Deed regime.

We were worried about the evidence that would be provided by the AiB to justify a need for change. For example, the AiB predicted that there would be in the region of 5,000 Debt Arrangement Schemes (DAS) in their first year of operation, based, we understand, on guidance from the money advice community. In fact, there were less than 500 schemes in this period. At the other end of the spectrum, the AiB significantly underestimated the numbers of LILA sequestrations – they originally estimated that there would be less than 3,000 in their first year when, in fact, there were over 9,000.

> “The Calman Commission recommended on 15 June 2009 that all powers relating to corporate insolvency should be re-reserved to Westminster.”

### Could the AiB administer the proposed FTPTD scheme?

The Calman Commission recommended on 15 June 2009 that all powers relating to corporate insolvency should be re-reserved to Westminster. The Commission cited that 'there have been unnecessary and damaging delays in introducing new rules in Scotland' and that changes should be made 'with a minimum of delay'. Therefore, why take FTPTDs in-house when there have been difficulties with the corporate insolvency regime?

Taking FTPTDs in-house against this background would have raised a number of other concerns. There are no officials or staff in AiB who are currently insolvency qualified; they are unregulated, they do not have to carry professional indemnity insurance and they have Crown immunity, which means that if a debtor or creditor feels that the process has not been undertaken properly and their interests have been prejudiced, they have no means to appeal or seek redress.

### Would there be a conflict of interest?

R3 had concerns as to whether a government agency would be able to provide truly independent and objective advice. For example, how would they reconcile the challenge of acting in the debtor's best interests, especially in cases when a major creditor is the Crown and they might have to take legal action against a state controlled bank? Taking a wider perspective, is it right that the AiB should set policy, have a supervisory responsibility for personal insolvency appointments as well as act as the appointee on such appointments? The AiB is not answerable to an RPB and is not subject to monitoring visits. This raises obvious conflict of interest questions as well as the spectre of double standards in terms of regulation and supervision, in a climate where regulation is under the spotlight.

### What affect would the FTPTDs have on jobs and the public purse?

There are 115 insolvency practitioners in Scotland, the majority of whom work in small firms and deal only with personal insolvency. The introduction of FTPTDs could have had a significant effect on these firms and it was estimated that the introduction of FTPTDs could have resulted in as many as 250 job losses across the insolvency profession in Scotland.

> "The AiB is not answerable to an RBP and is not subject to monitoring visits. This raises obvious conflict of interest questions as well as the spectre of double standards in terms of regulation and supervision, in a climate where regulation is under the spotlight."

Enforced job losses would not only have added pressure to already burdened state benefits, but the loss of corporation tax and national insurance from insolvency firms and their employees would have removed a significant amount of income from the public purse. In a time of unprecedented demands on these funds, it seems to make little sense to introduce a measure that would reduce the tax take and possibly add to the welfare budget while increasing the head count and cost base of a government agency.

### The threat abates

R3 did much work behind the scenes, speaking to various parliamentarians and government advisers about our concerns. It appears that this work, as well as the timing of the Calman Commission report and the Scottish Justice Committee's decision to force the withdrawal of proposed changes by the AiB to the DAS scheme, due largely to lack of consultation by the AIB, all worked in our favour.

We were pleased that the AiB's plans for the FTPTD were not presented as a 'fait accomplis' as feared, and that a commitment to consult has been made.

R3 believes that there is no case to support the introduction of FTPTDs in Scotland. We welcome the opportunity to discuss this through the consultation. It is disappointing that the AiB chose not to involve R3 in the DAF or in any discussions regarding proposed changes to the personal insolvency regime in Scotland.

It is no secret that relations between the AiB and IPs in Scotland have deteriorated in recent years. However, if the AiB seeks an active and constructive dialogue with R3 in Scotland, they will not find me or my colleagues wanting. Our members have unparalleled knowledge, experience and expertise, which we have brought and will continue to bring to bear on the process of ensuring Scotland has a personal insolvency regime that is modern, effective and benefits all stakeholders fairly. ☐

**John Hall is the group development director at Invocas Group plc and the R3 council member for Scotland.**

# Economic snapshot: Midlands Region

**James Martin senses a gritty determination in one of our largest manufacturing regions to use its ingenuity to find new economic opportunities at this testing time.**

I should start with engineering, the traditional core of the region. Four years ago the Rover collapse seemed like a major blow to the Midlands, and especially to Birmingham, because it happened during a time of apparent prosperity and was the loss of an institution. In June this year it happened again, to LDV. Neither of these events were the death knell for commerce in the heart of the country, although truly painful for those directly affected, but they were signals to the UK economy of the need to be fit for purpose. Neither company was able to compete on the global stage with only regional resources to call upon.

### Crucible of innovation

The ingenuity of the Midlands, after all, the crucible of innovation, has led many businesses in the automotive supply chain to diversify and use their skills to service different customers, or look after existing customers differently. As a result, the Advantage Transition Bridge Fund (itself a new local idea, set up to assist Rover-affected businesses) was not called upon for help as much as expected.

> …it signals a gradual recognition that very slow and cautious growth is the reality of our economic future and that businesses must build themselves a sustainable platform within these parameters.

A similar fund set up in mid 2008 to help with the credit crunch has, however, been almost drawn down, with many further jobs saved by targeted financial intervention. This demonstrates the scale of challenge we face and is borne out by Begbies Traynor's Red Flag Alert survey showing an increase in critical problems between Q1 and Q2 2009 for engineering and manufacturing, as well as, unsurprisingly, for recruitment businesses (see page six).

### Construction and property transactions

Construction is often seen as a bell-weather for the economy. Oh dear? Commercial freeholders are struggling for strong tenants; the buy to let market in each of our conurbations has suffered from over-supply as developers hoped not to be the ones last out; and then landlords found that reduced disposable income was limiting the number of, and rents payable by, tenants. However, the much hoped for, and timidly heralded, recovery may be appearing, as we hear of small increases in both property transaction volumes and average values. Not all bad news, but it signals a gradual recognition that very slow and cautious growth is the reality of our economic future and that businesses must build themselves a sustainable platform within these parameters.

This is the key. The recent years of easy credit allowed many businesses to borrow affordably to paper over the cracks rather than fix underlying flaws. In 2000 we didn't have the routine seven-yearly downturn, when economic Darwinism would have weeded out underperformers, because the potential millenniuim bug and cheap funding distracted everyone. Sadly, therefore, there is a higher proportion of weak companies than normal facing the present challenges.

### R3 has a pivotal role

All this gives R3 a pivotal role in the region, and I have been on the airwaves and in the press on key insolvency topics. In November last year I was asked to provide advice for people struggling financially on BBC Coventry and Warwickshire. This year the Midlands' local newspapers have featured R3 comment on a number of topics ranging from pre-pack administrations to the introduction of Debt Relief Orders. Insolvency practitioners' analysis of the recession has gained attention – last month articles featuring R3 research were published in both the *Birmingham Post* and the *Derby Telegraph* discussing the numbers of people currently insolvent in the UK.

To protect the economy, businesses that should be viable need to be preserved and we must therefore persevere with business sales, pre-packed if that is the best outcome for creditors, and communicate to those unconvinced the reasons why this was the best option. Across the Midlands we sense a gritty rather than grim determination to find opportunities. This is tempered with recognition that GDP growth will be constrained by lack of spending power as unemployment increases and disposable income remains restricted.

> To protect the economy, businesses that should be viable need to be preserved and we must therefore persevere with business sales, pre-packed if that is the best outcome for creditors.

It seems likely that our profession will have a significant role for a few years, and we must keep banging the drum about early intervention and taking advice when there is still time to effect change. R3's support for the newly established All-Party Parliamentary Group on Insolvency in July is one of many ways in which we as a group can get this voice heard. This is in response to a sharp rise in small business owners coming to their constituency surgeries to seek advice from their MPs. R3 has provided MPs with a guide to answer some basic questions and signpost people in the right direction. As a regional chair or as IPs we have a vital supporting role in this process. □

**James Martin is a partner at Begbies Traynor.**

*R3 workshop*

# Buying a Business

## Are you:

- an entrepreneur or corporate finance specialist interested in distressed purchases;
- **or** a lawyer, accountant or insolvency administrator in the early stages of your career?

**This course is for you!**

**It is an introduction to the opportunities, processes, procedures, pitfalls and problems for those seeking to buy a distressed business.**

## Course directors & speakers

**James Nicholls, Nicholls & Co:**

- solicitor with19 years of experience in the insolvency industry (KPMG, BDO Stoy Hayward);
- runs a boutique practice focusing on insolvency and restructuring.

**Robert Schneiderman, Quiddity Investments Limited:**

- chartered accountant and licensed insolvency practitioner;
- worked for KPMG and Hilco;
- has just establish his own £15m turnaround fund.

## Dates & locations

29 September 2009 - London

22 October 2009 - Manchester

## Timings and prices

09.15 – 12.15 (CPE: 2.75 hours)

Prices start from £180 + VAT

## Comments from last year's delegates include:

"Overall content was good and anecdotes were particularly helpful to illustrate practicalities."

"Excellent practical background and commercial content. Very useful for future contract drafting!"

**For more information and to book a place:**

Visit our website: **www.r3.org.uk**
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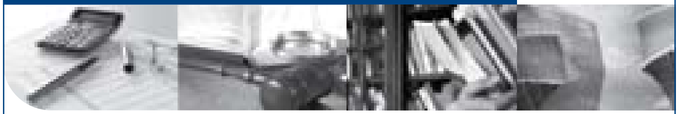

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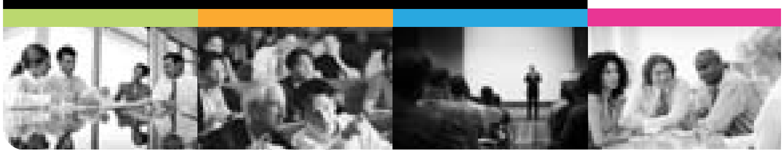

**As the leading provider of education and training for insolvency and business recovery professionals, R3's national one and half day courses keeps you up to date on the latest technical and legal requirements.**

## Partnership Insolvency

| | |
|---|---|
| Cheltenham | 24 September |
| Manchester | 01 December |
| London | 10 December |

Partnerships are different, straddling personal and corporate insolvency. This recession will bear heavily on the professional services sector and thus on partnerships. This course will consider partnership insolvency techniques, sector specific issues and relevant case law. *(Half day course)*

## Buying a Business

| | |
|---|---|
| London | 29 September |
| Manchester | 22 October |

This course is aimed at business people and their advisers and deals with the practical and legal aspects of buying a business from an insolvency practitioner.
The sessions will examine the opportunities, research /targeting and due diligence as well as the process and procedures including the offer and expectations. The course will end with legal & practical issues. *(One day course)*

## Litigation – the IP's Perspective

| | |
|---|---|
| London | 20 October |
| Leeds | 12 November |
| Bristol | 24 November |

This one day course is aimed at insolvency practitioners, bankers and lawyers with some experience of litigation and will cover the planning, funding and strategy for successful resolution of major disputes. The course is designed to be highly practical but will also update participants on the most important legal decisions in recent years. *(One day course)*

## Practical Pensions & Employment Issues

| | |
|---|---|
| Cheltenham | 24 September |
| Manchester | 01 December |
| London | 10 December |

Given that the position of employees and their pensions is critical in any restructuring, this course will look to cover recent topics and challenges that have been faced by insolvency practitioners over the last 12 months. The course will cover how to deal with the PPF, Trade Unions, Employment / Pension law update & case studies. *(Half day course)*

## Personal Insolvency

| | |
|---|---|
| Huddersfield | 06 October |
| Birmingham | 03 November |
| London | 17 November |

With the experts predicting an increase in traders entering insolvency, this course will focus on the realisation processes, assets, potential rescue and partnerships, together with updates, regulatory matters and the bonus of considering whether human rights is still an issue that insolvency practitioners need to address. *(One day course)*

**Half day course prices start from £155 + VAT**
**One day course prices start from £245 + VAT**

Association of Business Recovery Professionals

Tel: **020 7566 4234**
Fax: **020 7566 4225**
Email: **courses@r3.org.uk**
Website: **www.r3.org.uk**

# R3 events, courses and conferences

| Date | Event title | Venue |
|---|---|---|
| **September** | | |
| 03 | North West Region Golf Day | |
| 07 | North West Regional Meeting | |
| 08 | South West & Wales Regional Meeting | |
| 09 | North East Regional Meeting | Ward Hadaway, Newcastle upon Tyne |
| 10 | Student Workshop 1 – Liquidations | Novotel City South, London |
| 11 | Student Workshop 2 – Personal Insolvency | Novotel City South, London |
| 15 | Introductory Programme – Liquidations 1 | etc Venues, London |
| 15 | Introductory Programme – Liquidations 1 | Deloitte, Birmingham |
| 16/17 | Scottish Smaller Practice Conference | Dunkeld Hilton Hotel |
| 17 | Introductory Programme – Liquidations 1 | Irwin Mitchell, Leeds |
| 17 | Student Workshop 3 – Administrations, Receiverships & CVAs (Part 1) | Novotel City South, London |
| 17 | Midlands Women's Group Relaxation Evening | |
| 18 | Student Workshop 4 – Administrations, Receiverships & CVAs (Part 2) | Novotel City South, London |
| 24 | Practical Pensions & Employment Issues | Chase Hotel, Cheltenham |
| 24 | Partnership Insolvency | Chase Hotel, Cheltenham |
| 24 | Yorkshire Regional Meeting | |
| 26 | North West Region Annual Dinner | |
| 30 | Midlands Regional Meeting | |
| 30 | Yorkshire Women's Group Legal Update | |
| **October** | | |
| 06 | Personal Insolvency | Cedar Court Hotel, Huddersfield |
| 08 | Eastern Regional Meeting | |
| 08 | East Midlands Region Annual Dinner | |
| 13 | Introductory Programme – Liquidations 2 | etc Venues, London |
| 13 | Introductory Programme – Liquidations 2 | Deloitte, Birmingham |
| 15 | Introductory Programme – Liquidations 2 | Irwin Mitchell, Leeds |
| 15–16 | SPG Forum | Chesford Grange, Warwickshire |
| 20 | Litigation – the IP's Perspective | Hilton Tower Bridge, London |
| 21 | North East Regional Meeting | |
| 22 | Southern Region Women's Group Dinner | |
| 29 | Scottish Region Annual Dinner | |
| **November** | | |
| 03 | Personal Insolvency | Novotel City, Birmingham |
| 03 | South West & Wales Regional Meeting | |
| 10 | Introductory Programme – Liquidations 3 | etc Venues, London |
| 10 | Introductory Programme – Liquidations 3 | Deloitte, Birmingham |
| 11 | Southern Regional Meeting | |
| 12 | Introductory Programme – Liquidations 3 | Irwin Mitchell, Leeds |
| 12 | Litigation – the IP's Perspective | Met Hotel, Leeds |
| 17 | Personal Insolvency | Hilton Tower Bridge, London |
| 19 | Yorkshire Regional Meeting | |
| 23 | London & South East Regional Meeting | |
| 24 | Litigation – the IP's Perspective | Marriott Hotel, Bristol |

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the full 2009 programme. Alternatively, call the Courses team on 020 7566 4234 to request a programme by post.

regional events | R3 events

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**Women's Group** ............see www.r3.org.uk/womensgroup

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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 *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 examination of the Joint Insolvency Examination Board (JIEB) or Certificate of Proficiency in Insolvency (CPI). Pass students of these exams 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.

# Industry announcements

Bridge
BUSINESS RECOVERY

## Big boost for Bridge Business Recovery in London and South East

Corporate recovery boutique Bridge Business Recovery has strengthened its presence in London and the South East with the appointment of two well-known partners.

**Rob Horton** and **Tony Murphy**, who arrive from Smith & Williamson, specialise in asset-based lending, particularly debt finance, and have successfully worked on a number of high-profile restructuring and recovery assignments, including PRG Powerhouse, prior to making the move.

Both licensed insolvency practitioners, with some 40 years' combined experience, they are expected to add further strength in depth to Bridge Business Recovery – one of the premier independent business recovery practices in London and the South East.

Bridge Business Recovery specialises in providing hands-on, pragmatic solutions to businesses of all sizes with financial problems, their proprietors, funders and creditors. It currently employs over 30 people and has recently taken more space at its headquarters on Shaftesbury Avenue to accommodate its expansion.

Says James Bradney, Managing Partner, Bridge Business Recovery: "Both Rob and Tony are highly capable individuals, with a track record of success, and I am sure they will prove a major asset to the firm moving forward."

**Bridge Business Recovery**,
3rd Floor, 39-45 Shaftesbury Avenue, London W1D 6LA
T: Rob Horton: 07831 650692 E: rob.horton@bridgebr.co.uk
T: Tony Murphy: 07771 834 522 E: tony.murphy@bridgebr.co.uk
W: www.bridgebr.co.uk

WILKINS • KENNEDY
CHARTERED ACCOUNTANTS & BUSINESS ADVISERS

## WILKINS KENNEDY APPOINTS NEW HEAD OF CLIENT SERVICES

Leading chartered accountants and business advisers Wilkins Kennedy have appointed **Colin McPhail** as Head of Client Services as of 7th July 2009.

With 17 years experience in the asset based lending and banking sectors, Colin joins Wilkins Kennedy from Bank of Scotland where he held the position of Director of Major Corporates.

As Head of Client Services, a newly created hybrid role, Colin will be responsible for bringing together the corporate finance and restructuring and recovery areas of the business.

**www.wilkinskennedy.com**

Kingston Smith & Partners
Licensed Insolvency Practitioners

Kingston Smith announces the appointment of corporate recovery partner **Mike Solomons**.

Mike Solomons has been appointed as a partner within Kingston Smith & Partners LLP, the corporate recovery and insolvency arm of top 20 UK accountancy firm Kingston Smith LLP.

Mike is a licensed insolvency practitioner with 20 years' experience in corporate, personal insolvency and recovery work. He has advised businesses in a number of industry sectors and recently traded a large mail order company via administration.

"In these difficult times for British business, I'm looking forward to working for a firm committed to providing struggling companies with the best possible solution to their needs," said Mike.

Mike is a Fellow of the Insolvency Practitioners Association and a Fellow of the Association of Business Recovery Professionals.

**For further information, contact:**
Mike Solomons, partner,
Kingston Smith & Partners LLP
Tel: 020 7566 4020
Email: msolomons@kingstonsmith.co.uk

**PR enquiries:**
Layisha Laypang
Tel: 020 7566 3574
Email: llaypang@kingstonsmith.co.uk

## Leading City Insolvency Partner Joins Baker Tilly's Restructuring and Recovery group

David Hudson joins Baker Tilly Restructuring and Recovery LLP on 14 September as head of our core insolvency team for London. In his role, David will be servicing a range of debt and equity stakeholder interests.

David is a long-standing member of the corporate insolvency market with an extensive range of experience across all sectors. He joins us from Begbies Traynor where he has spent his career to date in the London and Southend offices. This culminated in his appointment as head of Begbies' London insolvency team in 2007.

Tracey Callaghan, Head of Baker Tilly Restructuring and Recovery LLP, welcomes him to the firm:

*"In David Hudson, we have an outstanding partner joining Baker Tilly, who has an excellent reputation and proven track record. We are very pleased to strengthen the team with one of The City's leading insolvency practitioners at a time when our investment in the best people and proven expertise is paramount."*

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BAKER TILLY

# Advertisers' index



IBC = inside back cover, IFC = inside front cover,
OBC = outside back cover.

**Inserts:** Alvarez & Marsal, BPP, Sweet & Maxwell

# Industry announcements

## PKF is delighted to welcome new Partner Matt Howard to our Great Yarmouth office

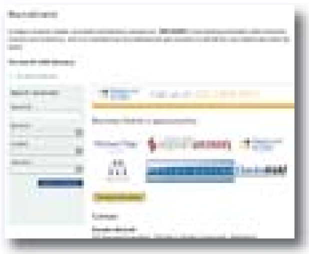
Matt, previously a partner at Larking Gowen, has extensive experience in dealing with both corporate and personal insolvency cases. He studied accountancy at the University of East Anglia and went on to qualify as an Insolvency Practitioner in 2001. He is a Fellow of the Insolvency Practitioners Association and the Association of Business Recovery Professionals (R3) and became a partner before the age of 30. He is also a member of the Turnaround Management Association.

**Matt Howard**
**Tel:** 01493 382547
**Email:** matt.howard@uk.pkf.com

**www.pkf.co.uk**

PKF
Accountants & business advisers

## Recruitment online



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**www.shlegal.com**

sh
STEPHENSON HARWOOD

"Stephenson Harwood has outstanding insolvency and restructuring experience."
Legal 500

International law firm Stephenson Harwood are delighted to announce the appointment of Stuart Frith as head of its corporate insolvency and restructuring practice.

Stuart has extensive experience in both corporate and individual insolvency, advising supervisors under CVAs and IVAs, liquidators, administrators, administrative receivers and trustees in bankruptcy. He also undertakes insolvency related litigation.

Stephenson Harwood has been involved in many of the major insolvencies and restructurings in recent years and acted on most of the high profile insolvencies of the last recession.

Stephenson Harwood
One, St Paul's Churchyard,
London EC4M 8SH
+44 (0)20 7329 4422
**www.shlegal.com**

Guangzhou · Hong Kong · London · Paris · Piraeus · Shanghai · Singapore

Begbies Traynor

Begbies Traynor the leading business rescue, recovery and restructuring specialist is pleased to announce the appointment of Paul Mather as Partner in its London office.

Paul had retired from professional life in May 2008; however he was tempted out of retirement to join Begbies Traynor as Head of the Insolvency Department in the London office.

Mark Fry, Regional Managing Partner said: "We are delighted to have persuaded Paul out of retirement, he has a lot to offer to the team, given his wealth of knowledge and contacts within the industry".

Paul's comments: "These appear to be interesting times in the market place at present and I am looking forward to working with the young, dynamic team at Begbies Traynor".

**www.begbies-traynor.com**
**Offices across the UK (including Channel Islands) and overseas.**

## PROFESSIONAL SERVICES

In Tune With Your Insurance, Risk Management And Health & Safety Needs.

Jardine Lloyd Thompson Corporate Recovery Risks has been a leading provider of insurance and risk management solutions to Insolvency Practitioners since 1988.

We are the largest UK quoted insurance broker and are one of the UK's leading providers of integrated insurance and risk management solutions.

JLT offer a broad range of solutions for all of your assignments ranging from global turnaround to bankruptcy.

**We listen. We design. We deliver.**

**For general insurance issues, please contact:**

**Ed Brittain**
0121 626 7821
Ed_Brittain@jltgroup.com

**Jayne Reeves**
0121 626 7893
Jayne_R_Reeves@jltgroup.com

JLT

CORPORATE RECOVERY RISKS WWW.JLTGROUP.COM

4862_08/09


## Bonds for a one off premium

Willis provide specific bonds for the duration of the case at a one off premium. This saves you administrative costs and reduces the risk of compliance problems.

It can save both you and the case money, call the Willis bond team today on 0118 949 8081.

Willis also provide specialist PI covers for IVA and other insolvency firms as well as the widest open cover scheme available in the market.

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First class service is often hard to find. As the only insurance broker with a national network of experienced Insolvency professionals, we believe our hands on approach delivers the Insurance and Risk Management solutions Insolvency Practitioners should expect.

For more information please contact:

**NOTTINGHAM**
George Pritchard
0115 948 7025
george.pritchard@uk.lockton.com

Adam Loveitt
0115 948 7023
adam.loveitt@uk.lockton.com

**LONDON**
Robin Bradford
020 7933 2680
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Mark Patching
020 7933 2868
mark.patching@uk.lockton.com

**GLASGOW**
John Stewart
0141 248 9740
john.stewart@uk.lockton.com

**MANCHESTER**
Ailsa Townsend
0161 242 5167
ailsa.townsend@uk.lockton.com

**Or visit www.lockton.com**

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Insolvency Risk Services is part of Lockton Companies International Limited. Authorised and Regulated by the Financial Services Authority. A Lloyd's Broker.

## Insolvency advertising services

### Courts Advertising Limited

*Tel: 01268 494140 Fax: 01268 544358*

**Leading insolvency advertising specialists.** Bob Andrews, Media House, Christy Close, Southfields Business Park, Basildon, Essex SS15 6EA

### Reynell STATUTORY ADVERTISING

Save time and money, call the specialists.

**Contact Ewan Clydesdale on tel: 020 8527 6100, fax: 020 8531 8305, DX 38408 Highams Park or email: infostatads@tmpw.co.uk**

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## Investigations

### Lasker Investigations UK

Private and Commercial Investigators. Complete professional investigation service including, surveillance, de-bugging, tracing, asset location, due diligence and general enquiries. Discreet and confidential service.

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Lasker Investigations UK, 30 Borough High Street, London, SE1 1XU

## Surveyors, auctioneers & valuers

### Edward Symmons

2 Southwark Street, London Bridge, London SE1 1RQ
Tel: 020 7955 8454

### Valuation & Realisation of Assets

Property, Plant and Machinery, Chattels, Inventory
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### GVA Grimley

30 plant & machinery and property valuers dedicated to insolvency throughout the UK
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### Hilco Appraisal Europe

3 St. Helen's Place, London, EC3A 6AB
Tel: + 44 (0)8453 130 140 See our advert on page 45

### JPS Chartered Surveyors

Worth House, Unit 32 Stanley Road, Whitefield, Manchester M45 8QX
Tel: 0161 767 8001 www.JPSsurveyors.co.uk

## Wanted

### Autex Graphic Machinery Ltd

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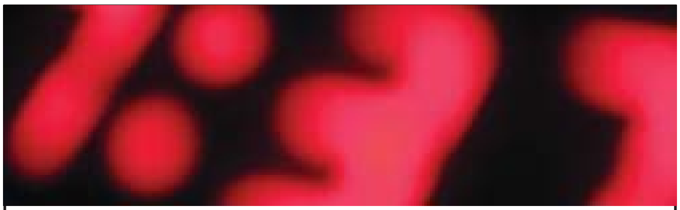





# WWB - A Fresh Approach

We are the North's number one Independent Insolvency Recruitment Company, providing recruitment solutions to the Corporate Recovery and Personal Insolvency market.

Our job is to find you the right role, without the sales pitch - a job that is exactly right for you. We provide a personal and discreet approach, and with our unrivalled knowledge of this market we will provide you with sound advice.

If you are contemplating a move, or would like confidential career advice then call Insolvency Divisional Director, Russell Corrie on **0161 904 8069** or email him on **rcorrie@wwbrecruitment.com**

Recruitment

0161 904 8069
wwbrecruitment.com

## Some of our current vacancies are:

| | | | |
|---|---|---|---|
| **Insolvency Cashier** | Top 20 Firm | Up to £20K + bens | Manchester |
| **Corporate Recovery Administrator** | Top 10 Firm | Up to £25K + bens | Manchester |
| **Corporate Recovery Executive** | Top 10 | Up to £35K + bens | Manchester |
| **Corporate Recovery Analyst** | Niche Firm | Up to £35K + bens | Manchester |
| **Corporate Recovery Manager** | Niche Firm | Up to £50K + bens | Northwest |
| **Business Development Manager** | | Up to £50K + bonus | Midlands |
| **Insolvency Practitioner** | IVA Business | Up to £80K + bonus | Northwest |
| **Corporate Recovery Partner** | Top 10 Firm | £Neg + extensive benefits | Manchester |

FTI

**FTI Consulting is a leading corporate finance and restructuring practice, providing solutions to stakeholders and corporates where value is at risk.**

FTI's European practice has grown rapidly over the last 2 years, benefiting from the market leading position FTI holds in the US and its enviable client relationships in both the US and Europe. It has attracted some of the leading talent from the top tier restructuring practices. The European practice is headquartered in London with offices in Munich and Madrid and currently consists of over 60 professionals who provide advice and solutions on strategic, operational, financial and capital needs of businesses.

Due to continued expansion and ongoing success, FTI is now looking to recruit ambitious Directors and Managing Directors with recovery and restructuring experience to its London based team. The individuals will provide technical expertise and experience at an advanced level, lead the delivery of assignments, participate in managing client relationships and develop the practice.

The right individuals will have:

- An exceptional track record within a top tier Restructuring / Recovery practice or special situations team, with a blend of restructuring advisory, transactional and insolvency experience.
- Technical expertise and experience at an advanced level, ability to lead assignments, supervise and guide consultants, manage client relationships and develop the practice
- A passion for the strategic element of their work.
- The desire and ability to lead a wide range of restructuring assignments – financial restructuring advisory, contingency planning, strategic insolvency, pension restructurings, accelerated M&A.
- Individuality and ambition. Apart from the quality of clients and asignments, what stands FTI out is the entrepreneurial, innovative and ambitious team.
- A network of client relationships within the distressed and special situations community.
- JIEB qualification is highly desirable.

This will be a well rewarded role with excellent basic salary, bonus and benefits.

**For more information, please contact Jaimie Noble at Investigo Search on 02030093492 or email at jaimie.noble@investigo.co.uk**

INVESTIGO

# DaviesKidd

**RECOVERY RECRUITMENT SINCE 1991**

Established in 1991, during a major recession, Davies Kidd has become a name synonymous with Recruitment in the world of Insolvency, Corporate Recovery, Corporate Restructuring and Turnaround. We have forged long lasting relationships with 'Big 4' and other international practices as well as with boutiques and a range of independent Insolvency Practitioners.

Through major recession, boom times and, more recently, a credit crunch the field of Corporate Recovery, Restructuring and Insolvency has continued to offer a challenging and rewarding career path to candidates at various levels and with varied backgrounds.

Whilst we deal with all levels of vacancies from Administrator through to Partner, we are particularly experienced in handling senior level appointments at Senior Manager, Director and Partner level, including teams and practice mergers, where we fully appreciate the need for tact and discretion in the close-knit world of the Insolvency Practitioner. We are also highly skilled at providing a bespoke search service on behalf of the candidate, often introducing them to organisations where vacancies may not be overtly advertised.

We provide full coverage of the UK mainland market as well as offering international experience, having made successful introductions throughout England, Wales and Scotland as well as overseas in locations as diverse as Germany, Australia, Hong Kong and Kenya. In addition to being long term regular advertisers in quality journals such as R3 we are also able to maximize global coverage through our unique website, **www.big4careers.com**

Much of our success at Davies Kidd has been based on repeat and referred work, both from a client and candidate perspective so whether you are a prospective job seeker looking for a career move or an employer seeking additional staff please feel free to contact one of our Partners on **020 7812 6688**
or e-mail **chris@davies-kidd.co.uk** or **jeff@davies-kidd.co.uk**
Alternatively, log on to **www.big4careers.com** for more information.

**All enquiries will be treated in the strictest of confidence.**

## Recruiting For Staff?

If you are recruiting for staff at any level in the Restructuring, Recovery and Insolvency fields why not register your vacancy with us to see if we can help. We will happily advertise it for free on our own recruitment website **www.big4careers.com** which attracts candidates looking for career moves both to and from the 'Big 4' as well as among non 'Big 4' firms. With nearly 20 years Senior level recruitment experience behind us we are also highly skilled and discrete in handling opportunities at Senior Manager, Director and Partner level.

## 'Big 4' Recovery Opportunities Assistant Manager to Director Level

London / South East £45,000 – 6 Figures

As a result of the well documented economic conditions our client, a 'Big 4' firm, is experiencing significant growth in its Recovery practice and is consequently looking to make a number of key appointments to its team in London and the South East. They are interested in talking to dedicated specialists at all levels from Assistant Manager to Director. Suitable candidates will be qualified accountants, JIEBs or equivalent with a strong experience in Insolvency, contingency planning and independent and pre-lending business review work.

## Senior Insolvency Administrator

Central London £30-40,000

Excellent opportunity for a part or fully qualified CPI or ACCA with at least 3 years Corporate Recovery experience to join a leading non 'Big 4' practice in Central London. You should be able to handle cases with minimal supervision. The successful candidate will benefit from a good range of Corporate experience in a friendly, supportive team environment with good ongoing career prospects.

### Cayman Restructuring Opportunities Assistant Managers to Senior Managers

$US80-130,000 Tax Beneficial

Our client, a worldwide professional services firm and a leader in the provision of global Restructuring and Recovery Services, is currently seeking to recruit at Assistant Manager to Senior Manager levels in their Grand Cayman office. As local work is largely based on UK Law you should find no problem in adapting providing that you can cope with the unfamiliar situation of year-round sunshine. Suitable candidates must hold a professional accounting qualification and / or JIEB and must have relevant experience gained in the Restructuring / Recovery department of an accounting firm or in a specialist Insolvency practice. In addition to strong technical ability you should also possess the interpersonal skills prerequisite to living, working and developing business relationships in the close-knit and finite community of a small island. You should also be willing to commit to a minimum 2 year 'tour of duty'.

### Senior Manager / Director

Sussex £Negotiable

Great opportunity for a qualified Accountant and / or JIEB to join a leading national and international Recovery and Restructuring team. Ideally you will have at least 5 years post qualification experience, preferably gained in a Top 10, Big 4 or Boutique firm with exposure to a broad range of corporate Insolvency and Restructuring situations. You will be encouraged to push towards becoming an Appointment-taking Director.

### Business Restructuring Director

Central London £Negotiable

Outstanding career opportunity for a heavily experienced Restructuring specialist to assume a key role in the Implementation team of a leading non 'Big 4' firm. Working closely with Partners on the strategic direction and management of the team the ideal candidate will be a qualified accountant and / or JIEB with proven management and technical skills, including a sound understanding of regulatory and statutory requirements, and the ability to take the lead on complex and high profile Business restructuring and Insolvency assignments.

### Corporate Restructuring Director

Scotland £Negotiable

Outstanding career opportunity in an international firm awaits a qualified Chartered Accountant / ACCA and / or JIEB with several years' deep and broad experience of aiding and advising distressed companies. The role will offer you the chance to become a key and influential member in a leading international Recovery and Restructuring practice with exposure to a wide variety of work situations including investigating the causes of underperformance through preparing independent commercial and financial reviews, advising and supporting in the design of restructuring solutions, preparing financial turnaround plans, and managing trading administrations. You will also be instrumental in practice development via staff leadership, marketing, management and identification of potential business opportunities through contacts and networking. Based in Glasgow or Edinburgh you will be offered a competitive market package, career-enhancing experience and a first class environment in which to exercise your technical, commercial and business development skills.

### Corporate Recovery Manager

Birmingham £45-60,000

Great opportunity for a qualified accountant and / or JIEB to join a growing independent firm. The role is likely to suit a self-starter with a shirt-sleeves approach who is looking for a busy all-round role with a largely corporate focus.

### Corporate Restructuring Manager / AD

Leeds £Negotiable

A first class career opportunity in the Leeds office of an international firm awaits a qualified ACA / ACCA and / or JIEB. Ideal candidates will be currently working at Manager or Senior Manager level with between 3-10 years post qualification experience gained in a medium to large firm or boutique. Your experience will benefit from exposure to a full mix of Restructuring, Recovery and Corporate Insolvency work and will fully exercise your technical, commercial and softer skills in project and case management, staff mentoring, marketing, networking and identification of potential new business opportunities.

### Senior Administrator / Assistant Manager

Central London £38-48,000

International firm offers exposure to all types of corporate recovery and insolvency engagements for a newly or recently qualified ACA, ACCA, JIEB with at least 3 years relevant experience who is looking for the ideal opportunity to develop their career and experience. Reporting to Management and Partners you should be able to take responsibility for your own caseload as well as assisting junior staff and helping in the team's marketing activities.

For a confidential discussion on the market or any of these positions contact:
Jeff Davies on 020 7812 6688 or email jeff@davies-kidd.co.uk
Christopher Kidd on 020 7812 6688 or email chris@davies-kidd.co.uk

## Corporate Restructuring Manager / AD
Manchester £Competitive

Exciting and challenging career opportunity to join the Manchester office of a multinational firm and market leader in the field of Corporate Restructuring and Recovery work. The role is multifunctional and is likely to cover all facets of casework and advisory work relating to distressed companies in Restructuring, Recovery and Insolvency situations. To apply you will need to be a qualified Chartered Accountant / ACCA and or JIEB with between 3-10 years post qualification experience, preferably gained in the Restructuring or Recovery team of a medium to large firm or in a specialist Restructuring or Recovery practice.

## Corporate Restructuring Manager / AD
Newcastle £Competitive

This leading international firm seeks a qualified ACA / ACCA and / or JIEB to join the Newcastle office of its busy, expanding Northern region team. You are likely to have between 3-10 years post qualification experience gained in a medium to large firm or boutique including experience at Management level. You will enjoy exposure to a full mix of Restructuring, Recovery and Corporate Insolvency work and should be experienced in project and case management, staff mentoring, marketing, networking and identifying potential business opportunities.

## Corporate Recovery Partner / Team
Anywhere in UK £Negotiable

This small but growing independent practice already has a presence in Birmingham, Manchester and London and is interested in expanding its UK coverage by recruiting an additional Partner(s) or team(s). The firm is looking to grow and is open on location and is happy to consider Partners with viable propositions in any part of the UK.

## Restructuring Senior Manager
Central London £Negotiable

Great opportunity to join the Senior Management team of a leading national and international firm. Reporting directly to Partners you will be given the lead on larger and complex assignments. You will be responsible for planning, monitoring and reviewing work as well as assisting in client relationship management and marketing opportunities. The ideal candidate will be a qualified Accountant and / or JIEB with strong management and technical skills, preferably gained in the Restructuring team of a medium to large firm or a specialist Restructuring practice.

## Recovery / Insolvency Technical Manager
Central London £Negotiable

Excellent opportunity for a hands-on Business Restructuring specialist with strong Technical skills to become a focal point within the Restructuring team of a leading national and international firm. Working closely with the Technical Director and supporting the national Restructuring service line you will be responsible for overseeing compliance and providing technical advice. The ideal candidate will be a qualified Accountant, Solicitor and / or JIEB with strong management experience who excels in the challenges of legal, technical and best practice developments in the world of Restructuring and Insolvency. A strong working knowledge of IPS will also be expected.

## Corporate Restructuring Manager
Central London £55-65,000

This career-enhancing role will suit a qualified accountant and / or JIEB who is receptive to both learning from senior colleagues and mentoring / knowledge-sharing with junior colleagues. You'll need at least 2 years post qualification experience specialising in Corporate Recovery and Restructuring assignments and should be at a stage of your career where you can plan, monitor and review all types of corporate case work, manage relationships with clients and develop contacts with work referrers.

## Business Recovery Manager
London £Negotiable

This growing, niche Recovery boutique offers an exciting opportunity to a qualified accountant with at least 2 years post qualification experience in IBRs and Admins in the mid-markets sector. Great opportunity to grow with the firm for someone who enjoys responsibility and is able to think on their feet. The role may well suit someone coming from a larger firm who is seeking more direct involvement in the shaping of a practice.

## Restructuring & Recovery Specialists
London £50,000 – 100,000 +

This leading international Consulting firm has a thriving Restructuring team and is looking to further strengthen its growing London presence by hiring high performing specialists at Consultant, Manager, Associate Director and Director levels. Ideal applicants will be qualified Chartered Accountants, or equivalent, who are able to demonstrate a strong record of achievement working on major Corporate assignments in a Restructuring or Recovery capacity. In all probability you will be a high-performing team player currently working within the Restructuring team of a 'Big 4,' large firm or leading boutique. You will be offered a highly rewarding career path, not only financially, but also in terms of richness of experience and personal and professional development.

## Greenfield Set-Up Opportunities
Belfast • Dublin • Leeds • Birmingham • Scotland • South West

With a number of Restructuring and Recovery specialists looking to expand their service offering and office networks throughout the UK and Ireland, several exciting business opportunities have arisen for entrepreneurial practitioners to set-up operations with leading firms and boutiques. Suitable applicants are likely to be existing Partners or Directors, as well as Partner-led teams, with strong contacts and proven business generation and team building skills. Current opportunities are available in Belfast, Dublin, Leeds, Birmingham, Scotland and the South / South West of England. All enquiries and applications will be treated in strict confidence.

## 'Big 4' London Managers & Directors
£Competitive

Outstanding career opportunities for dedicated Recovery specialists in the London City office of this 'Big 4' firm. There has rarely been a better time to gain exposure to a fascinating range of distressed situations, some often well-publicised and high profile. Despite the demand for services entry criteria are strict – you will need a strong profile of academic and professional achievement with a proven track record of handling Corporate Recovery assignments. Ideal candidates will be ACA, ACCA and / or JIEB qualified with at least 1-3 years ( Managers ) and 5- 10 years+ ( Assistant Directors and Directors ) relevant experience, gained in a leading professional services firm or boutique. Your skills should encompass case management, project management, staff management and marketing. Successful applicants will be heavily involved in providing an extremely varied range of services to stakeholders of underperforming businesses including investigations, reviews, restructuring / turnaround planning and insolvency procedures.

## Corporate Recovery Senior Manager
Bristol £Negotiable

International network firm with a strong reputation in Corporate Recovery and Restructuring offers a fully involved all-round role to an experienced Senior Manager. You will need to be a qualified accountant and / or JIEB with at least 5 years' post qualification experience encompassing all types of corporate cases and with a working knowledge of IBRs and strategic reviews. As a key member of the Senior Management team you will be responsible for planning, monitoring and reviewing work, casework and project management, staff mentoring, client relationship management, marketing and practice development.

## Corporate Restructuring & Recovery Managers, Senior Managers, Directors
Australia $AUS Competitive

Excellent opportunities for qualified Chartered Accountants or equivalent with Corporate Recovery / Restructuring experience to join a leading international Restructuring practice in Australia. Openings exist from Manager through to Director level throughout their Australian network including Sydney, Melbourne, Brisbane, Perth and other locations. Previous Recovery / Restructuring experience in an internationally recognised professional services firm will be desirable

## Corporate Insolvency Administrators
London – City £25-35,000

Outstanding career opportunities in a leading firm await Insolvency Administrators with 2-4 years Corporate Insolvency experience. The roles will suit someone who is looking for an all-round role in a progressive, professional and supportive team environment, ideal for CPI, ACCA studiers who can handle casework with minimum supervision.

## Corporate Recovery Manager
Manchester £Competitive

Corporate Recovery team of a leading national practice seeks a qualified accountant and / CPI / JIEB with proven Recovery experience at Managerial level. You will enjoy full involvement on a varied range of corporate casework.

## Corporate Recovery Senior Manager
Manchester £Negotiable

Great opening for a proven Recovery professional to join a leading practice. Working closely with Partners you will need to be a qualified accountant and / or JIEB with several years' relevant experience including proven management skills, marketing ability and a strong background in administration and business review work.

## Corporate Recovery Manager
Midlands £Competitive

Excellent career opportunity for an established Manager to join a leading Recovery team. Covering the Midlands region between Birmingham and Milton Keynes, you will benefit from exposure to a wide range of Corporate Recovery assignments and a busy, friendly professional environment. The ideal candidate will be a qualified accountant or JIEB with good all-round Recovery skills including previous exposure to Bank work and marketing activities.

## Recovery Executive & Manager
Northern Home Counties £Competitive

Leading national / international practice with a strong Corporate Recovery coverage seeks an Executive and a Manager to join its growing team in the Northern Home Counties region. Successful applicants will benefit from a great range of experience. You will need a professional qualification ( ACA, ACCA, JIEB or equivalent ), with relevant experience of Corporate Recovery assignments. The Manager will also need previous Managerial experience.

## Banking Advisory Specialists
Leeds £Negotiable

This international firm is keen to recruit qualified accountants with good all-round Corporate Restructuring and Recovery skills to include practical experience of Bank-led Advisory work in the form of Investigations, Strategic and Independent Business Reviews. Your experience is likely to have been gained in the Restructuring department of a medium to large accounting firm or specialist boutique and applications are welcomed from newly / recently qualified level through to experienced Management levels.

## Corporate Recovery Professionals
London £Competitive

This leading international boutique is expanding its Recovery and Corporate Insolvency team and is keen to recruit additional professionals with strong relevant experience gained in a 'Big 4,' leading mid-tier or specialist Insolvency practice. Suitable candidates are likely to be qualified accountants and / or JIEB with 3-10 years Corporate Insolvency experience.

## Cr Assistant Manager / Manager
M4 Corridor £Flexible

Expanding Corporate Recovery team of a leading professional firm is able to offer a challenging and rewarding career opportunity to an Assistant Manager or Manager with between 2-5 years Recovery experience gained in the Mid-Market sector. Based in a local office on the M4 corridor between South Wales and the Thames Valley ideal candidates will be ACA / ACCA and / or JIEB qualified and keen to contribute to and benefit from a stimulating work environment.

## Working Capital Management Assistant Directors and Directors
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Outstanding career opportunities in a growth area of a 'Big 4' firm for experienced professionals with Senior Manager or Director level experience in leading Working Capital and Cash Management initiatives for multinational companies. You will need previous relevant experience gained in a leading Financial Consulting or Strategy House or from within a large professional services Restructuring team. With a strong international emphasis fluency in other major European languages would also be a considerable asset.

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# Specialist insolvency appointments in the UK

## Insolvency Practitioner
Manchester ▪ £70-100,000

This fast growing and well established personal insolvency firm is keen to recruit a licensed insolvency practitioner. The position suits a commercially minded licensed insolvency practitioner with a personal insolvency background who can demonstrate the flexibility to work both autonomously and as part of a team. In return, you will be provided with the perfect platform to showcase your mix of interpersonal and commercial skills in this dynamic and rewarding environment. Ref: 3691911
**E susan.pangburn@hays.com T 0161 480 4959**

## Insolvency Manager
Central London ▪ £40-55,000

This is a rare opportunity to run a portfolio cradle-to-grave of 40 to 50 cases and supervise juniors. You will report directly to partners and handle more technically complex, challenging cases. Modern systems, a dedicated practice director and high calibre staff are some of the invaluable tools that help you with your responsibilities. Ideally, you will have several years' corporate recovery experience and be able to demonstrate the ability to strategically manage volume and complex caseload. Ref: 7895584
**E shaila.verma@hays.com T 020 7250 5961**

## Senior Insolvency Administrator
Central London ▪ £40,000

This is a fantastic opportunity for an insolvency senior administrator to join a progressive firm renowned for its staff training and its personal touch. This role would see you handling a mixed corporate and personal caseload of CVAs, IVAs, MVLs, and compulsories. If you are looking to better your current work/life balance and get more enjoyment out of your career in insolvency, this role would be ideal for you. Ref: 7895358
**E sarah.toogood@hays.com T 020 7250 5961**

## Senior Corporate Recovery Executive
West Yorkshire ▪ £30-40,000

A fantastic opportunity exists for an experienced senior corporate recovery executive to join a rapidly expanding business. Taking responsibility for a varied portfolio of corporate insolvency cases, of which most are liquidations and administrations, this is an excellent opportunity to join a business offering fantastic career potential. You will possess outstanding communication and client facing skills and will have the drive and potential to progress quickly. Ref: 917915
**E elise.kay@hays.com T 0113 2468 363**

## Corporate Recovery Senior Manager
Midlands ▪ To £65,000 + excellent benefits

This is a key appointment with a high profile Big 4 corporate recovery practice. You will have responsibility for the management of corporate insolvency assignments including the drafting of statutory and stakeholder reports, management of trading issues and business sales. Ideally you will be JIEB qualified with post ACA (or equivalent) experience of managing a busy caseload and sizable project teams.
Ref. 924433
**E nick.boulter@hays.com T 0121 212 1979**

## Corporate Senior Administrator
Manchester ▪ To £35,000 + study support for CPI/JIEB

Working in a growing team you will control a portfolio of up to 30 cases including CVAs, IVAs, administrations, CVLs, MVLs and bankruptcies (IVA experience not essential). Ideally you will be CPI qualified and have solid corporate recovery experience. You must have a good understanding of how to carry out an insolvency investigation, understanding relevant sectors of the Insolvency Act. In return, you will be involved in a broad range of insolvency work and control the whole case. Ref: 931750
**E susan.pangburn@hays.com T 0161 480 4959**

## Corporate Recovery Senior
Bristol ▪ £26-35,000

This is an exciting new role within a growing recovery team with a strong profile in the South West, that has capitalised on its good reputation in today's economic climate. You will gain exposure to a range of cases, primarily within its corporate portfolio. Working directly with senior management, your caseload will mainly involve administrations and liquidations. You will be offered full study support if required. Ref: 934421
**E helen.robson@hays.com T 0117 929 8911**

## Temporary Insolvency Senior Administrator
London ▪ £20.00-£22.49 per hour

This is a great opportunity for an senior to join this top tier insolvency boutique based in central London. Having taken on a new and substantial job, the firm are looking for an experienced temporary to join the team. This will be an immediate start working on a large trading administration. Ideally, you will have experience at a senior insolvency administrator level and gained exposure to trading administrations. Ref: 7893142
**E matthew.woodford@hays.com T 020 7250 5961**

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# Interview with Natascha Engel MP

**A new All-Party Parliamentary Group aims to provide MPs with a guide to help their constituents in financial difficulties. Will Black interviews the chair of the Group.**

Natascha Engel MP launched the R3-supported All-Party Parliamentary Group (APPG) on insolvency on 15 July at the House of Commons in the presence of a number of parliamentarians. These included Ian Lucas MP, who has responsibility for insolvency in government, and Vince Cable MP, the Liberal Democrat Shadow Chancellor of the Exchequer as well as many R3 Regional Chairs and Council Members. *RECOVERY* went to meet the MP for North East Derbyshire.

From the left: Steven Law, R3 vice-president, Natascha Engel, MP, and Peter Sargent, R3 president.

### Why did you agree to chair the APPG on insolvency?

With the massive spike in the number of struggling business owners coming to my surgeries, I was quite surprised by the lack of information on insolvency. People come to see me with only days before their business collapses and this is one of those vitally important non-partisan issues. You don't have to be a Tory, Lib Dem or Labour voter in order to experience insolvency; it cuts across all political parties. Yet in Parliament there was no specific APPG dealing with insolvency.

### How will chairing this group affect what you do within your constituency?

My constituency is very rural and the businesses that are closest to insolvency at any one time are the small businesses, the 'father and son' outfit. Working with R3 has already brought benefits, with R3 North West Chair Matt Dunham attending a business breakfast and giving my constituents some invaluable advice.

We're lucky here as the Derbyshire Business Link, the Derbyshire and Nottinghamshire Chamber of Commerce, Citizens Advice and the Federation of Small Businesses are all linked in. However, these organisations can't do anything unless people approach them. That's why it's so important to get a guide to MPs so they know how to signpost people and it would be great to replicate these networks on a national level. Better still, if you have one small business telling another of positive experiences with an insolvency practitioner, this is a thousand times better than being pitched at by someone else.

### Is insolvency poorly understood in the UK generally?

Very much so. The word 'insolvency' terrifies people to such an extent that it puts them into denial. We need desperately to take away that terrible stigma that's attached to insolvency and make people understand that IPs are trying to prevent businesses going under.

"With the massive spike in the number of struggling business owners coming to my surgeries, I was quite surprised by the lack of information on insolvency."

### This is quite an ambitious brief. What would you consider an 'achievement' for the APPG on insolvency?

Firstly to give parliamentarians information with which they can help their constituents. Secondly, developing links between local business networks and IPs. Thirdly, for the Group to discuss pertinent issues and come up with recommendations or support an enquiry. As a general aim, achieving a better understanding of what insolvency is and the fact that it can affect every single person.

### Have you seen an increase in the number of questions from MPs?

Certainly there has been an increase in the number of questions MPs are asking in Parliament, and that's a reflection of casework from businesses and individuals coming into constituencies' surgeries.

### Why do certain business rescue tools such as pre-packs attract negative publicity?

The media prefer covering negative things. Companies not going bust and jobs not being lost is not interesting.

### What financial advice do you give to your children?

Well, my children are only five-and-a-half, four and one! However, children at a really young age are exposed to sophisticated advertising and peer pressure. Explaining financial matters to a five-year-old has to be done in simple terms that provide tremendous clarity. I believe in giving kids a small pot of money early on, so they can experience budgeting themselves. People do have to take personal responsibility for the financial decisions they make.

### You have written about the pressures of balancing being an MP and having a family. Do you recommend this as a career?

This job is no more difficult than that of any other full-time working parent with young kids. If we want to have a diverse Parliament, not just women but men with young children, we must seek to be family friendly.

In terms of recommending it as a career, it's a very strange job but it's the single most satisfying job I've ever done. The majority of the time when people see you about problems you can do something about them, which is very rewarding. ☐

**Will Black is communications manager at R3.**