Restructuring Business
Spring 2017

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Dining out – a recipe for failure?
Foreword – Spring 2017

Welcome to the Spring 2017 issue of Restructuring Business – and, once again, the news in the last quarter has been pretty extraordinary. As new President Trump tears up the rule book on how a US President behaves, Britain moves towards Brexit with no one having any real idea as to the effect of leaving the EU. The UK economy seems to be holding its own – but with some storm clouds ahead. But then again, people have been saying that pretty much every year for at least the last seven …

We’ve left the Brexit debate for this issue, focusing instead on topics of interest where things are a little more certain. We look at the restaurant sector where grand expansion plans for new chains can sometimes come unstuck. How do you preserve value when they do? Steve Cottee and Andy Robertson present a recent case study. Further education is an area where consolidation is required by Government – and a new insolvency regime for FE and sixth form colleges has been established to assist with this. Nick Gavin-Brown examines this in depth on page 5. Also in this issue, Richard Tripp and Laurie Murphy examine farming restructuring and insolvency and Richard Williams and Raj Sharma consider proposed changes in pensions regulation.

Add to that our usual review of the most interesting court decisions, Horizon Watch, diary room and our team news, there’s plenty to read in this first issue of 2017. We hope you all enjoy it!

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Dining out – a recipe for failure?

Steven Cottee and Andrew Robertson look at the increasingly challenging restaurant sector and provide some useful tips on preserving value in a distressed sale of a restaurant business.

New insolvency regime for the further education sector

Nick Gavin-Brown discusses the new insolvency regime for the further education sector proposed in the Technical and Further Education Bill.

Farming partnerships – when the chickens come home to roost

Richard Tripp and Laurie Murphy consider some of the challenges facing lenders in light of increasing levels of distress in the agricultural sector.

The Commons Committee says pensions regulation isn’t working

Richard Williams and Raj Sharma examine recent high profile pension schemes and the proposals for change in pensions regulation.

Brief Case

Members of the team summarise some key cases from the past few months, focusing on the implications for restructuring professionals.

Horizon Watch

A look at upcoming dates involving legal developments.

Diary Room

Our latest guest to get quizzed is one of our new Practice Development Lawyers Sally Williamson.

Team News

Our usual round-up of team news across the UK.
Dining out – a recipe for failure?

Having recently completed the pre-pack sale of national burger chain Ed’s Easy Diner alongside KPMG, Steven Cottle and Andrew Robertson look at the landscape for the restaurant sector; increasingly challenging as a result of rising costs, greater competition and changing consumer habits. They also provide some useful tips on preserving value in a distressed sale of a restaurant business.

It was the famous American writer M.F.K. Fischer who wrote “first we eat, then we do everything else”. Banks, investors and restaurant owners alike have relied on this sentiment in recent years to underpin a boom in the restaurant sector.
Ed’s Easy Diner was a prime example. Having opened its first store in London in 1987, between 2008 and 2016, Ed’s expanded from three restaurants in London to a network of over sixty restaurants and concessions throughout the UK. Such growth was possible in the backdrop of record-low interest rates and cheaper finance, consistently low levels of food inflation, more flexible employment rules in the sector and a consumer appetite to eat out more.

Ed’s was not the only brand that benefitted. The UK burger market has been one of the great success stories in the sector in recent years. Chains such as GBK, Byron, Five Guys, Honest Burger and others have flooded towns and cities across the UK, resulting in great variety and choice for the consumer. A similar pattern has been seen across the sector more generally.

However, in the last year, as well as the failure of Ed’s, we have seen closures of a number of restaurants operated by leading brands including Frankie & Benny’s, Chiquito and Garfunkels. A recent report from Moore Stephens suggests that over 5,000 restaurant businesses have at least a 30% chance of insolvency in the next three years.

So why is this happening? There are a number of key factors which, together, present a recipe for failure in the restaurant sector and we think will lead to an increase in the number of restaurant insolvencies in the coming years.

**Competition**

With increased supply comes increased competition and restaurants are finding it more difficult to cope. According to the Financial Times, in the last year, over 200 new restaurants have opened in London alone but 76 have also closed. It is clear that the bar is being raised all the time and with greater choice (including pop up restaurants), people are less loyal to their favourite restaurant or the big names that may have dominated custom previously.

**Rising costs**

Rising rents and rising business rates are hitting restaurants hard, especially in London and the South East. The recent changes in the valuations attributable to business rates means that average rates will go up by 14% in London in 2017, and many businesses in the West End and in places like Shoreditch and Old Street, on the edge of the City, will suffer far higher hikes in rates.

Outside of London, larger towns and cities in the south such as Reading, Croydon, Guildford, Cambridge and Milton Keynes will all suffer average increases in excess of 20% and in some cases, a lot higher. The impact of these rates revaluations further north is less drastic and in some places such as Liverpool, rates will fall, but if like Ed’s Easy Diner, you are trying to run a chain of restaurants across the country or if your business is based primarily in London and the South East, this will have a huge impact on profitability.

Increases in the national living wage are also eating into restaurants’ profits. Earlier this year, the Government raised the national living wage from £6.70 to £7.20 per hour and it is due to rise again to £7.50 per hour from April 2017. In a sector where staff are often only paid the minimum wage, businesses now have to absorb these increased staff costs.

The final ingredient for restaurant owners is that the de-valuation of sterling following the decision to leave the European Union in June means that it is now more expensive for restaurants to import food and alcohol or pay suppliers who do so.

As a result of these rising costs, restaurants face a difficult balancing act between absorbing costs and reducing margins or increasing prices for the consumer and risk pushing custom away in an already overly competitive environment. We feel that it will become increasingly difficult for some restaurant businesses to continue to manage this balance successfully and avoid getting into financial distress.

**Changing habits and the rise of technology**

M.F.K. Fischer was right in her assessment of how people view the importance of food, but how people consume food is changing.

People are eating out less and eating in more. The advent of technology from companies such as Deliveroo and Uber Eats means that people can quickly and easily order online from their favourite restaurants or takeaways – when average spend is lower – and have dinner delivered to their door. In addition, supermarkets are now stocking a far greater variety of alcohol at much cheaper prices than pubs and restaurants and – according to the British Beer and Pub Association – people are now buying more boozie from supermarkets than pubs for the first time.

The combination of these changing habits means that pubs are losing even more trade (and continue to close at an alarming rate) and restaurants are losing out on the impulsive discretionary spend on drinks, starters and desserts which people only buy when they actually eat in a restaurant. Add to this the increased demand for healthy eating, to which restaurants have to respond by adding additional variety and complexity to their menus, the relative stagnation in the average disposable income in the UK, and it does not make good reading for restaurant owners, or those who invest or have exposure in the sector.

**Preserving value in a distressed restaurant business**

If you are advising a restaurant group or business that is facing financial distress, and it is not possible to restructure the business in order to absorb the rising cost base or successfully propose a CVA, it may be necessary to effect a pre-pack sale of some or all of the business in order to preserve jobs and value. In the case of Ed’s Easy Diner, through careful, practical and flexible planning, the administrators were able to secure a pre-pack sale of over half of the existing sites, preserving jobs for nearly two thirds of the existing workforce.

This was achieved, in part, by identifying and managing key risks to value including in the following areas.

**Beware pre-emption rights in operating leases**

It is increasingly common to see restaurant leases, especially where the sites are in retail outlets or shopping centres, to contain pre-emption rights in favour of the landlord. Such rights allow the landlord to control the mix and quality of its tenants across multi-unit sites. The pre-emption rights will require the existing tenant (the seller) to offer to sell or surrender the existing lease to the landlord before the lease can be assigned or transferred to a buyer (the statutory moratorium in administration only protects the lease from forfeiture (without the permission of the administrator or of the court); it doesn’t strip the landlord of its pre-emption rights under the lease). The value payable by the landlord is often based on a market value and can be subject to complex calculations. This means that a landlord could step in and prevent a buyer from taking an assignment of the existing lease.
In completing its due diligence, a buyer may identify pre-emption rights as a major risk to it completing a purchase of particular sites and this may impact value for the overall sale as a result. Whereas a buyer may ordinarily be confident of reaching agreement with a landlord on the basis of its strong financial covenant alone, if the landlord has the benefit of pre-emption rights and a wish to take back the site, it could be difficult for the buyer to persuade the landlord not to exercise this right.

In order to reduce the risk of pre-emption rights impacting on value, the administrator should look to apportion a fair value to the relevant lease, including the equipment and materials situated within the property, to ensure that the landlord has to match or beat this value in order successfully to exercise the pre-emption. Alternatively, a buyer may wish to defer elements of the consideration until it successfully obtains an assignment of certain leases. This will be less attractive for the administrator as it provides less certainty of payment and is more difficult for an administrator to assess in terms of whether or not the deal represents best value for creditors.

As an aside, advisors should also ensure that the demise within leases fully covers the areas operated by the restaurants – i.e. to ensure that outside dining areas for example are covered within the relevant lease and not a separate licence which would be vulnerable to termination upon an administration.

**Cash, payments and stock**
Managing the collection and apportionment of cash and card payments is critical on a multi-site restaurant business. In many cases, in an effort to remain competitive, restaurants now open early morning for breakfast and do not close until late in the evening. Both administrator, as seller, and buyer will want the sale to complete outside of business hours to avoid disruption to the business.

The parties will need to agree a mechanism for apportioning cash, card payments and a value to stock either side of completion, which will normally be a fixed point in time. The administrator will want to ensure that it obtains the benefit of all pre-completion trading and the buyer will want to ensure that it can continue to use the existing card payment systems for an interim period as soon as the restaurants open for business after completion.

The value of stock will need to be estimated across a multi-site business as it will not be possible or cost effective to undertake a stock take of each site between the restaurants closing (at which point completion will occur) and re-opening under the buyer’s ownership the following morning.

**Premises licences**
If the seller company sells alcohol and goes into administration, premises licences for sites in England will automatically terminate and the buyer will have a small window to apply to the local council or authority to reinstate the licences. This is a risk for the buyer and it should prepare the relevant transfer forms in advance of completion to ensure that the applications can be made as soon as possible after completion.

If any restaurants are based in Scotland or Northern Ireland, the situation is more complex in an insolvency scenario. In Scotland, the existing licence does not terminate and will remain in the name of the insolvent company. In order to transfer the licence to the buyer, the licence must first be transferred into the name of the administrator and then on to the buyer. This could present a risk for the administrator who could be responsible under the licence until the licence is transferred, but will not be trading from the relevant premises. The administrator should insist that the application to transfer into his or her name is immediately followed by the application to transfer to the buyer in order to mitigate this risk.

In Northern Ireland, the transfer process requires two separate court hearings and can take many months. An interim order is required to allow the buyer to trade without a full licence in its name before the main hearing for the licence transfer takes place. It is an offence for the buyer to trade without the protection of an interim order and so the buyer should prepare its application before completion so that the interim order can be obtained as soon as possible after completion.

**Conclusion**
We believe that the restaurant sector will face increased stress over the next 12 months. It is difficult to see the political or economic landscape changing in the short to medium term in order to alleviate the increasing cost pressures that restaurants now face. If advisors can be approached early enough, then recoveries can be enhanced through careful pre-planning and an understanding of some of the legal and commercial complexities that arise when dealing with businesses in the restaurant sector.

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New insolvency regime for the further education sector

Nick Gavin-Brown discusses the new insolvency regime for the further education sector proposed in the Technical and Further Education Bill.
The Technical and Further Education Bill 2016–17 (“Bill”) introduced in October 2016 proposed (amongst other things) a new special education administration regime designed to protect students (referred to as learners) within further education bodies in England and Wales, following a Government consultation that concluded last summer. The Government’s current intention is that the new regime should be in place for the start of the 2018–19 academic year.

Background
Over recent years the Government’s austerity agenda and comprehensive spending review programmes have cut funding to the further education sector resulting in an increase in financial stress to further education bodies. The further education sector is also facing increasing competition with the impact of the apprenticeship levy and in-house training. In response to this, in 2015 the Government launched a programme of area reviews with the aim of ensuring “high quality, sustainable provision capable of meeting the future needs of learners and employees” as well as reducing the potential for future financial failure through mergers and consolidation.

The Further and Higher Education Act 1992 created much of the law establishing the further education sector. However, it did not provide direction for insolvency scenarios (as if the colleges were on the State’s balance sheet). It is, for example, unclear whether all further education bodies fall within the definition of “statutory corporation” under the Insolvency Act 1986 (“Insolvency Act”). This has created uncertainty regarding the extent to which normal corporate insolvency procedures can apply to further education bodies (now that they have become commercial enterprises).

Objectives and timetable of the proposed regime
The Government’s high level intentions for the new insolvency regime are to “establish a clear insolvency framework for further education colleges and sixth form colleges which will focus on learner protection through continuity of provision, while recognising the interests of creditors and ensuring taxpayers do not provide indefinite financial support to failing colleges”. This outlines the difficult balancing act being made between learners, creditors and the taxpayer.

A consultation regarding the proposals was launched in July 2016 with the results published in October. The first reading of the Bill was in late October and the proposals were debated by a Public Bill Committee in December with the intention that the new regime should be finalised and in place for the 2018–19 academic year.

Who does the proposed regime apply to?
The Bill includes within the definition of “further education body”: further education corporations and companies conducting designated further education institutions in England and Wales, and sixth form corporations in England. The three further education institutions run by charitable trusts will not be subject to the proposed regime because they cannot technically become insolvent, given that they have no legal identity separate from their trustees. It was concluded that the complications of applying the regime to them balanced against the likelihood of them becoming insolvent justified their omission.

Key features of the proposed regime
Insolvency Act procedures
As a starting point the Bill brings insolvent colleges within the framework of the Insolvency Act and broadly seeks to treat colleges as corporates. Specifically, company voluntary arrangements, administration, creditors’ voluntary winding-up and court-based winding-up procedures are permitted for colleges. The provisions relating to receivers and managers of property are also now allowed to apply to further education bodies. The Bill contains the power to adapt the provisions of the Insolvency Act relating to these insolvency procedures so that they work for further education bodies.

The application of these Insolvency Act procedures should help alleviate the procedural uncertainty surrounding the insolvency of further education bodies; however in the majority of cases creditors will be unable to follow these procedures owing to the introduction of a new special administration regime for colleges.

Education administration orders and the 14 day notice period
Overlaying this insolvency regime is the ability for the Secretary of State to apply to court for an education administration order where:

• a further education body is unable, or likely to become unable, to pay its debts (within the meaning of section 123 of the Insolvency Act); or

• a further education body’s creditors, or the body itself, are petitioning for another type of insolvency regime under the Insolvency Act.

Education administration must be commenced by court order and only the Secretary of State can apply for an order. Once the order has been granted the Secretary of State must notify the further education body and any other person specified in the rules (as yet unspecified).

If an education administration order has not already been made and a party wants to apply for an ordinary administration order or petition for winding-up they must first give the Secretary of State 14 days’ notice. During that time the Secretary of State has the discretion to apply for an education administration order. A moratorium of enforcement of security applies during the notice period, and it is worth noting that, while the 14 day period is the maximum time that the Secretary of State can take to decide to apply for an education administration order, in practice it is hoped the process will take less than 14 days. An ordinary administration order or petition for winding-up cannot be made once an education administration order has been made.

There is currently no time limit set on an education administration as, according to the Government, “the length of time a college may need to be in special administration will depend on the particular circumstances
relating to that college." Indeed, if new homes cannot be found for all the students, the education administration may need to continue until their courses are completed.

The education administration order provisions enable the Secretary of State to intervene into any potential insolvency scenario for a further education body. Education administration will not, however, apply to further education bodies which have already entered into ordinary administration or liquidation before enactment.

Special education administration and the special objective

The key feature of the new special education administration regime ("SEA") is "the special objective to avoid or minimise disruption to studies of existing learners and to ensure that it becomes unnecessary for the education body to remain in administration for that purpose" ("Special Objective"), which overrides other objectives for the education administrator.

"Existing learners" protected will include students at the college when the education administration order is made, or people who have accepted a place on a course at the college when the education administration order is made.

The options for the education administrator to achieve the Special Objective will include:

• rescuing the college as a going concern;
• arranging the transfer of the provision of education to another provider; or
• allowing learners to transfer to another provider or to complete their courses before the college is wound up and dissolved.

In a college insolvency, the optimal solution to meet these criteria would seem to be for a swift transfer of students to nearby colleges offering equivalent courses (which will be easier in metropolitan areas than more rural locations). However, where this is not possible, continuing courses for a further three or more years may be the only option.

Funding, guarantees and indemnities

The Government’s expectation is that institutions will still be responsible for their own finances; however where an administration order is made, the Secretary of State is given the power (but not the obligation) to provide indemnities, guarantees, grants or loans in support of the SEA as they consider appropriate. No clarity is provided on whether such funding would be subordinated to existing lenders or potentially enjoy some super-priority status.

The Government has stated in its consultation response that it “does not intend to commit, now or through proposed legislation, that funding will be provided on any particular terms or to achieve any particular outcome for creditors”. The response also highlights that a restructuring facility is available to further education bodies through the area reviews programme, adding that “whilst the [SEA funding] will provide a necessary safety net for colleges and their learners, its use will be exceptional”.

Whilst the Government could not write a blank cheque to underwrite any SEAs, ultimately where a SEA needs to be funded to look after learners to completion of their courses (where transfers cannot be completed), Government funding seems the only realistic option.

Governor liability

The Bill gives the Secretary of State the power to create regulations that apply to governors of further education bodies ("Governors") similar to those that apply to company directors under the Company Director Disqualifications Act 1986. Wider powers are also given to make regulations providing for “any legislation about insolvency to apply” in relation to further education bodies.

The Government stated in their consultation response that the intention of the new legislation, as far as possible, was to follow the principles of company insolvency and will include extending liability for wrongful trading and fraudulent trading under the Insolvency Act to Governors. The full extent of Governor liability is to be included in secondary legislation along with detailed supporting guidance; however, the Government has indicated that fraudulent trading may extend to members of college staff and wrongful trading may extend to college principals and shadow or de facto Governors.

Although potential direct liability is a key feature of corporate insolvency for creditor protection, it may be alarming to Governors acting in a voluntary capacity.

What’s not included?

The Government has stated the intention is that a “full suite of tools” should be available to deal with an insolvent further education body (and the tools available to an education administrator will in fact be greater than the usual suite). There are, however, no provisions in the Bill clarifying the decision-making process whereby SEA is initiated, although the Government has stated that the SEA will probably apply “in most cases”. It is therefore difficult to assess how often the standard Insolvency Act procedures will actually apply (and in particular, whether pre-pack administration could still be an option for a quick sale).

Members’ voluntary liquidation has not been included, as the Further and Higher Education Act 1992 already deals with the dissolution of solvent further education bodies and the Government has assumed that members’ voluntary liquidation would rarely be required in the case of an insolvent further education body.

Although Insolvency Act administration provisions are applied to further education bodies by the Bill, there is no provision allowing for the challenge of an education administrator on the basis that they are not carrying out their functions in accordance with the Special Objective. The Government stated in their consultation response that they will address this omission in a subsequent draft.

The Bill contains no provision regarding the requirements to be put forward as an education administrator; however in their consultation response the Government stated that their expectation is that the education administrator will be a licensed
insolvency practitioner who has sufficient expertise in the education sector, and that secondary legislation will follow including further clarification.

**Impact on creditors**

The introduction of education administration orders will reduce the control creditors have over the timing and conduct of the administration of a further education body.

Although an education administrator has a subsidiary duty to carry out their functions so as to achieve the best result for the college's creditors as a whole (so far as this is consistent with the Special Objective) the proposed regime risks a change in creditor appetite to lend into the sector. Historically, although nominally commercial bodies, lenders have tended to view further education colleges as enjoying an implicit state guarantee. The Government has acknowledged this risk in their consultation response, but has made the judgment that this risk would be worth the extra benefit provided to learners.

In addition to empowering an education administrator to transfer the provision of education to another provider, the Bill allows an education administrator to transfer property, rights and liabilities that could not otherwise be transferred, which could include, for example, college buildings, equipment, bank loans, pension liabilities and staff contracts. Creditor banks have expressed concerns that transfers of loans without their consent could cause issues with ‘know your customer’ and ‘anti money-laundering’ regulatory requirements. As assurance against this the Government issued a response that affected creditors would be given “sufficient notice” should such a transfer take place, and that “it is very unlikely that the education administrator or Secretary of State would permit a scheme proposal that would breach those regulatory obligations.”

The position of local authority pension schemes has also not been clarified. State schemes could potentially crystallise a significant claim in a college insolvency. Transfers of assets could also interfere with lenders’ security rights. A request by lenders to permit floating charges over colleges to offset some of the non-creditor friendly provisions was not adhered to.

**Market reaction to the proposals**

The Government consultation results to the draft Bill were published in October 2016. Sixty-three responses were received, including various college associations, creditors and professional advisers.

The Association of School and College Leaders responded by saying that the proposals were “complex and significant” but that there is a danger that the introduction of the regime will undermine confidence in the sector, which has been “singled out” when in fact “the majority of colleges have extremely good financial management”.

One lender suggested that colleges, creditors and learners would be better served if SEA was not introduced and ordinary corporate regimes were simply supplemented by a new duty on administrators to seek to protect existing learners.

Over half of the consultation respondents were concerned that the increase in risk to the Governor role would introduce difficulties in recruiting or retaining people with suitable expertise.

**How will the new proposals work in practice?**

It remains to be seen if the Bill will be passed in its current form (particularly given the impending pressure on parliamentary time) or if any market reaction will be taken into account.

The Special Objective of protecting learners is clearly a noble one; however unintended consequences may play out over time. Questions still remain over the effect on lender appetite (where security rights and their insolvency position is unclear) and Governor appetite (where faced with the directors’ duties and wrongful trading).

Whilst the Bill has created certain apprehension in the sector given the potentially significant powers of a SEA, ultimately we will have to wait for the first SEA to operate to see if, in practice, the Government foots the bill to ensure the Special Objective is met. We may not have to wait too long, as mergers and consolidation put in place under the area reviews are likely to leave some casualties.

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Farming partnerships – when the chickens come home to roost

Richard Tripp and Laurie Murphy consider some of the challenges facing lenders in light of increasing levels of distress in the agricultural sector.
Over recent years we have seen ever increasing levels of distress in the agricultural sector. Pressures on pricing in supermarket supply chains, as they aggressively compete to keep their own prices low, and rising costs have left many farmers over-leveraged and unable to meet their creditors’ demands. With uncertainty as to how EU subsidies will be replaced post Brexit and no sign of the supermarket wars ending, it appears likely that the agricultural sector will continue to struggle going forwards.

Many farming businesses are structured as farming partnerships. These are predominantly unincorporated general partnerships made up of a number of generations of the same family. Ignoring potential reputational issues, the legal framework of general partnerships poses a number of issues for lenders and their advisors both at the point of offering new lending and/or as they seek a strategy to rescue a customer’s business or exit lending and/or as they seek a strategy to advise both at the point of offering new framework of general partnerships poses potential reputational issues, the legal governance:

In absence of a written partnership agreement, general partnerships are governed by the somewhat archaic 19th century Partnership Act 1890 (“Act”).

No formal agreement or filing of paperwork is required to create a general partnership, you simply need two or more persons “carrying on a business in common with a view to profit” (Section 1 of the Act). As such, general partnership can be created without the partners explicitly agreeing to create a partnership.

Each of the partners acts as an agent of the partnership and can bind the partnership in any acts carried out in the ordinary course of business. The partners are jointly and severally liable for all of the debts of the partnership. However, a partnership is not, in itself, a recognised legal entity and is therefore unable to hold property in its own right.

Partnerships are free to govern themselves by virtue of a partnership agreement that can, in some circumstances, contract out of the Act. However, partnership agreements are not common in farming partnerships which can complicate matters as identified in further detail below.

**Partnership property – What’s mine is yours**

Generally, one or more of the partners in a partnership will hold the legal title to the partnership’s assets for the benefit of the rest of the partners. In many cases, it is clear whether an asset is a partnership or an individual asset and this may well be detailed in a formal partnership agreement. However, complications can arise when partners dispute whether an asset is individually owned or owned by the partnership.

Under Section 20(1) of the Act, partnership property is described as:

- all property originally brought into the partnership stock; and
- all property acquired, whether by purchase or otherwise, on account of the partnership, or for the purposes and in the course of the partnership business.

There is a presumption under section 21 of the Act that “unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm”.

However, notwithstanding the presumption of ownership, in the absence of an explicit agreement, the matter of ownership can be a contentious one and will ultimately be decided by the intention of the partners and the evidence available to support each partner’s contention. This has to be considered on a case by case basis as no one piece of evidence (unless an explicit agreement) is likely to be conclusive. However, some examples of points considered by the courts include:

**Accounts**: the inclusion or exclusion of an asset in the partnership’s accounts is persuasive but not conclusive as to whether an asset is or isn’t a partnership asset. The partnership’s accountants may have included or excluded certain assets in error (or for tax reasons) without considering ownership implications;

**Trading premises**: 
- the fact that a partnership trades from a property registered in the name of one or more partners does not in itself make the property a partnership asset even where rent is not being paid by the partnership to the partner i.e. the partnership could simply be trading from the property rent free;
- similarly, a partnership paying rent on a lease held in a certain partner’s name does not mean that the lease is a partnership asset; the partners could simply have agreed that the partner should be indemnified against the rent due under the lease while the partnership trades from the property;
- money spent by a partner or the partnership to improve an asset or property does not make the asset a partnership asset, the asset could be being loaned to the partnership and the improvements were simply necessary for the partnership to continue to trade (although a court is likely to make an allocation for a partner who has funded the improvement of an asset owned by an individual partner to prevent an injustice); and
where a partner seeks to separate an asset from their interest in a partnership and/or from partnership assets in their will and leaves it to someone who is not a partner in the partnership, this may support an argument that it had been the intention of the partners that that the particular asset was individually owned.

Why does it matter?
On insolvency there are two sets of assets; partnership assets that are available to meet partnership liabilities and individual assets that are available to meet the individual partner’s liabilities. Similarly there are two sets of creditors. To the extent that a partnership creditor is not repaid in full from the partnership assets, they are entitled to pursue the individual partners who are jointly and severally liable for the partnership’s debts. However, if you are a creditor of an individual partner only, the ownership of the property may have a significant impact on the amount you recover i.e. all value in the relevant asset may be used to repay partnership creditors leaving nothing for the creditors of the individual partners.

To avoid any ambiguity on the point, lenders would be well advised to consider ownership before lending to a new customer as this may impact on the security that needs to be put in place. For example, if a property is registered in the name of two members of a larger partnership but it is agreed between the partners that the property is their personal asset rather than a partnership asset, the lender should really be taking third party security to secure the partnership’s liabilities (although a first party all monies security (although a first party all monies security (although a first party all monies security (although a first party all monies security (although a first party all monies security (although a first party all monies security (although a first party all monies security (although a first party all monies security (although a first party all monies security should, in any event, secure the relevant liabilities, provided this is clear at the time the security is taken).

The ownership of assets is also an important point in the event that the partnership is placed into administration or liquidation as it will dictate what the insolvency practitioner is able to control and realise. Negotiations may need to take place with the individual partners, or more likely their trustee in bankruptcy, to facilitate the sale of individually owned assets alongside partnership assets. Such assets may be crucial to the business (such as land adjacent to the partnership’s land or plant and machinery) or may make the sale generally more attractive to a buyer. This could result in assets being held to ransom (unless the bank has taken security) and detailed consideration would need to be given to the apportionment of value.

Death and dissolution
Unless there is a partnership agreement in place which adequately deals with the situation, upon the death (or bankruptcy) of a partner, a general partnership will automatically dissolve (section 33(1) of the Act). The partnership should, in theory, then be liquidated so that all of the partnership’s creditors can be repaid with any remaining money or assets being distributed to the partners.

Practically, this is not going to be a viable proposition for a farming partnership and rarely happens especially where the business is being passed down the family and there is no intention to cease trading. However, the problem for any lender is that the estate of a partner who dies (or who becomes bankrupt) is not liable for any partnership debts contracted after the date of death (section 36(3) of the Act). This poses a number of concerns for the partnership’s lender:

- the deceased partner’s estate will not be liable for any new facilities granted or monies advanced on an overdraft after the relevant date. Noting the implications of Clayton’s case, lenders may find that the entire of an overdraft will be considered as ‘new monies’ if sufficient time passes between the date of death and action being taken by the lender; and
- the lender’s security may become susceptible to challenge in respect of any new monies advanced particularly if the secured liabilities are referred to as those of the now dissolved partnership rather than the new partnership.

In order to allay these concerns, and provided the lender is prepared to continue to support the new partnership, the ideal position is that all of the old partnership’s assets are transferred to the new partnership (assuming that the deceased’s will provides for everything to be left to the continuing partners), the old partnership facilities are repaid using new facilities which are granted to the new partnership and new security is taken from the new partnership (with the existing security remaining in place).

Unfortunately, the likelihood of such a restructure taking place quickly and efficiently is very low, not least because probate can often be complicated and lengthy therefore delaying the transfer of the legal interest in assets to the new partnership. In addition, it is commonplace for lenders to be kept in the dark in relation to the death of a partner until the partnership is seeking a renewal/extension of its facilities and/or is in financial difficulties. As such, years can pass and thousands of pounds advanced before the lender has the opportunity to protect its position.

Further complications can arise if the deceased has left their interest in the partnership and/or any partnership assets to someone outside of the new partnership. In these circumstances, there’s a real risk that the third party beneficiary would seek to challenge any attempts by the lender to rely on its security over the particular asset in respect of new monies. Moving forward, the lender would also need to be comfortable that the new partnership’s assets provide sufficient security for the purposes of its lending.

How can lenders protect their position?
In the event that the refinancing position can not be achieved quickly, lenders may be able to mitigate their position by requiring the partners of the new partnership, and any other beneficiaries of the deceased’s estate (to the extent they are not partners of the new partnership and have been left an interest in a partnership asset) and potentially the trustees of the deceased’s estate (as appropriate), to enter into a short “side letter” agreement (with appropriate independent legal advice) to confirm that the lender’s security remains in place to secure all liabilities of the old and new partnerships.
Side letters may not be viable in every circumstance and each case needs to be considered on its own facts. The issues are very rarely identical and some are much more complicated than others (particularly if there have been any family disputes or divorces). It is also worth noting that the dissolution of a partnership will not automatically render a lender’s security invalid in respect of any new monies advanced, instead, it creates a risk that should be mitigated insofar as possible.

The existence of a partnership deed that properly deals with the death of a partner will make the reorganisation process somewhat easier; however ultimately a lender will want to ensure that all monies already advanced, and any monies to be advanced, are to the correct partnership and secured properly. Therefore, side letters may still be appropriate even in a scenario where a partnership agreement is in place.

To take away
General partnerships can be fraught with complications and issues many of which are beyond those considered in this article. The Act and the common law that governs general partnerships are also complicated and is in need of modernisation.

However, that doesn’t mean that lenders should not consider such partnerships as viable customers, far from it. But it is important that the potential issues (such as individual ownership, the death of a partner or a dispute between the partners) are identified either at the outset (insofar as possible) or as soon as possible thereafter such that they can be mitigated and guarded against.

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The Commons Committee says pensions regulation isn’t working

A restructuring perspective

Richard Williams and Raj Sharma examine recent high profile pension schemes and the proposals for change in pensions regulation.
At our annual conference in October, we were privileged to host a roundtable of eminent panellists involved in the pensions sector. One of the questions they were asked to consider was whether there was a need to reinforce the current moral hazard powers of the Pensions Regulator (“tPR”). The majority of the panel expressed a view that the current powers were probably adequate, but more efficient and better use needed to be made of them.

Just before Christmas 2016 the Commons Works and Pensions Committee (“Committee”) published its report following an inquiry into defined benefits (“DB”) pension schemes. This enquiry had followed on from a previous inquiry into the actions and conduct of the owners and operators of BHS. In the course of that work the Committee said that they had developed considerable concerns about the wider DB sector and its regulation. At the same time, other high-profile cases including British Steel, Halcrow and Bernard Matthews had come to their attention. The objective was to make recommendations for changes that would reduce the chances of cases such as BHS occurring again.

**BHS**

BHS was bought by Sir Philip Green in 2000. On 11 March 2015 it was sold to Retail Acquisitions Limited (“RAL”), owned by Dominic Chappell. BHS went into administration on 25 April 2016 due to its inability to trade on in the face of accumulating losses. BHS’s pension scheme liabilities are now, without further support, likely to be absorbed by the Pension Protection Fund (“PPF”), the parachute fund for DB schemes relating to insolvent companies and which is funded by levies from other DB schemes. The overall buy out deficit has been widely reported to be £571 million, with the deficit to be covered by the PPF (in view of the caps imposed on the amounts payable to individuals from the PPF) reported to be about £300 million. Although Sir Philip Green told the previous joint committee in June 2016 that the issue of the deficit was “resolvable and sortable”, no solution has yet been forthcoming (although recent reports suggest that a conclusion may be close).

Warning notices have been issued (see below).

The report from the previous Inquiry concluded that:

- Sir Philip Green cut costs, sold assets and paid substantial dividends offshore to the ultimate benefit of his wife, but failed to invest sufficiently in stores or reinvent the business;
- Sir Philip Green knew that Dominic Chappell was a wholly unsuitable purchaser but overlooked or made good each of Mr Chappell’s shortcomings and proceeded regardless;
- Mr Chappell failed to recruit a retail expert despite his own lack of experience; failed to secure funding on commercial terms; failed to address BHS’s property leases in a timely way; and failed to address the company’s long-term underperformance; and
- tPR was reactive and slow-moving.

**British Steel**

The British Steel pension scheme was inherited by Tata Steel UK in its takeover of Corus in 2007. It has approximately 130,000 members, and its buy out deficit is reported to be in the region of between £2bn and £6bn. The deficit has been a significant issue for Tata’s British business (most visibly the Port Talbot Steelworks which came under risk of closure). The members were told in May 2016 that it seemed increasingly likely that without more the scheme would go into the PPF. The trustee said that a better outcome could be achieved by providing modified benefits at levels which, for the vast majority of members, would be better than PPF compensation. The modifications would be made using a scheme rule that allowed future pension increases to be reduced.

Such a change would have required a change in pensions legislation (which was requested by the trustee), and a government consultation was therefore launched and concluded towards the end of June 2016. However, the possibility of this change happening drew fierce criticism from several quarters in view of the possible far-reaching consequences. The collapse in the value of sterling following the Brexit referendum then led to a significant reduction in the deficit. Despite reports in September 2016 that the Government had shelved the possibility of new legislation, the issue continues.

Latest reports in January 2017 indicate that Tata Steel UK is in discussions with the tPR about the possibility of concluding a regulated appointment arrangement (“RAA”) (essentially a deal approved by tPR) which would enable the scheme to be hived off and then supported by Tata Steel UK on this modified basis, rather than fall into the PPF (which would normally be the result of a RAA). However tPR has reportedly not accepted that insolvency is inevitable (in the light of the changed circumstances and a recovery in steel markets) which is one of the key criteria to be applied for an RAA to be acceptable. A vote of workers on the proposal has been favourable. The Scheme’s entry into the PPF remains a significant possibility in the absence of a deal.

**Halcrow**

Halcrow Group Limited (“HGL”) was acquired by CH2M Hill (“CH2M”) in 2011 when it was already making losses. At the time of the deal, it was believed that the purchase improved the level of financial support available to the scheme. There was no legal obligation on CH2M to fund the scheme, and a guarantee could not be imposed as part of the deal.

Following the purchase, CH2M supported HGL, but both it and the scheme remained under pressure. In late 2014, CH2M and HGL formulated a proposal as an alternative to the scheme entering into the PPF. The proposal involved the bulk transfer of all members (without their consent) to a new scheme with reduced benefits. By April 2015 the trustees had agreed in principle to the proposal but were only prepared to implement it if a court approved it. The court subsequently ruled that members would have to consent to their transfer on this basis.

The proposal to the tPR in December 2015 involved an RAA:

- offering members the chance to transfer to a new scheme guaranteed by CH2M up to £50m that provided benefits above the PPF cap but lower than the scheme benefits;
- with non-consenting members transferring to the PPF; and
- with a cash payment from CH2M of £80m, together with an equity stake of 25% to 45% in HGL.

The tPR found that the criteria required for an RAA (inevitable insolvency without it, a better return than on such an insolvency, and no other alternative being better than the RAA) to exist and agreed to it. In relation to possible use of its anti-avoidance powers, tPR said in its subsequent report that it had concluded that it would not be reasonable to use them, both at this time and at the point of sale. This RAA is particularly exceptional because the scheme will continue in some form.
Bernard Matthews

Bernard Matthews was sold via a pre-pack out of administration in September 2016. The scheme, with approximately 700 members, went into the PPF with a deficit of £17.5 million. In a paper written for the Committee in October 2016 it was said that the sale proceeds would be used to make full or substantial payments to lenders and owners. In contrast, the scheme was likely to receive 1p in the pound at best. The paper concluded that “the administration strategy seems to have been carefully crafted to enable secured creditors and controllers of Bernard Matthews to extract maximum cash from the company and dump the pension scheme and other liabilities. No attention has been paid to the hardship caused to retired and existing employees.” The funding of the scheme and the sale are now under investigation.

The pensions regulator’s current powers and the Committee

tPR’s anti-avoidance powers are contained in sections 38–56 of the Pensions Act 2004. These powers are to seek a contribution from a relevant entity that wishes to confirm that it will not be subject to either a CN or FSD following a proposed transaction which may be “materially detrimental” to a DB pension scheme. Clearance is voluntary and the onus is on the applicant to approach tPR. Amongst its recommendations regarding what the tPR should be doing and what it should be empowered to do, the Committee said the following in relation to anti-avoidance:

- clearance had the clear benefit of enabling tPR to tackle potential moral hazard implications of corporate transactions head-on rather than after the event, while providing comfort and certainty to the scheme members and sponsoring firm. The incentives to seek clearance were currently weak. Some unscrupulous sponsors may well be calculating that they are better off risking a protracted anti-avoidance battle than coming to an immediate pension settlement. They recommended that the Government consult on proposals to require advance clearance from tPR for certain corporate transactions that could be materially detrimental to the funding position of a DB scheme. The circumstances in which clearance was compulsory would have to be narrow. They might include a sale or merger where the pension deficit is higher than a fixed proportion of the value of the company.
- under tPR’s existing anti-avoidance powers, an employer seeking to avoid its position of a DB scheme. The circumstances materially detrimental to the funding should have provided to the scheme in the first place. They recommended that the Government consult on giving tPR powers to add punitive fines to CNs and FSDs. These fines would have to be set at a high level to ensure they incentivised sponsors to properly fund pension schemes and seek clearance for corporate transactions which may be to a scheme’s detriment. Fines that could treble the original demand should be considered. The intention would be that such fines would not need to be imposed: they would act as a nuclear deterrent to avoidance. The Committee said that with this “nuclear deterrent” they doubted formal enforcement action would ever have been required in the case of BHS.

Next steps and perspective

The Government is due to publish a green paper in early 2017, which will then go out for consultation. In the meantime tPR has reacted to the Committee’s report by announcing a review of its regulatory remit and operations that is expected to take until the early summer to complete. tPR has also said it might need more resources. In our view this is a clear signal that relevant parties can expect tPR to be more proactive both in relation to activities that occur pre-insolvency, and in pursuing FSDs and CNs.

Perhaps the most startling recommendation of the Committee is the suggestion of punitive fines. It is difficult to believe that those remedies to exist they would not be sought.

Yet it is far from certain that the prospect of a nuclear deterrent will deter activity that is detrimental to DB schemes in the future. It is clear from the Committee’s findings and the excerpts from witness statements that there is a general feeling that the current deterrents are largely illusory, not because they are not sufficient, but because they are too slow and cumbersome to operate, and tPR, for whatever reason, has not intervened on enough matters. In the authors’ view ensuring that tPR is sufficiently resourced, with the right expertise, and that it is prepared to pursue matters, even where the outcome might not be certain, is more likely to lead to a check on pre-insolvency activity. It is the operation of the powers more than the powers themselves that need to improve. What should not happen in our view is a process whereby people become fearful of the level of liability rather than the risk that action may be taken. In the run up to a restructuring, when matters often move very quickly, it would be unfortunate if the prospect of a nuclear liability, designed to protect members’ interests, actually led to job losses due to unwillingness to proceed with a restructuring in the face of such a risk.

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Brief Case

Members of the team look at some key cases from the past few months and consider the implications for restructuring and insolvency professionals.
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Two’s company

Re BHS Limited (In Administration) [2016] EWHC 1965 (Ch)

What has happened?

The BHS administration has attracted significant media interest, raising questions surrounding the sale of the BHS Group for £1 prior to its collapse. The Chancery Division of the Companies Court has approved an order appointing concurrent administrators of BHS Limited. The court ruled that the appointment of additional administrators, appointed concurrently with the existing administrators of BHS Limited, was in the best interests of creditors. It would enable an investigation into possible claims the company might be entitled to bring against former and current directors of the company in the most timely and efficient manner.

Relevant background

Paragraph 103 of Schedule B1 to the Insolvency Act 1986 allows for the appointment of concurrent administrators alongside existing administrators.

The existing administrators of BHS Limited applied to the court for the approval of an order appointing concurrent administrators to the company. The existing administrators and the prospective concurrent administrators proposed a protocol allocating responsibilities between them. The proposed protocol was that once the concurrent administrators were appointed, the existing administrators would deal with closing out trading the business and making asset realisations. The proposed concurrent administrators would carry out investigatory work into the company’s affairs.

The application was supported by the company’s creditors and was made at the request of the company’s largest creditor, the Pension Protection Fund. The Pension Protection Fund wanted alternative administrators/liquidators to carry out the investigatory work given that the existing administrators had been appointed by the directors of the Company with the consent of its previous owner.

The decision

The court granted the application, holding that:

• The court had jurisdiction to approve a concurrent appointment and to make an order making the existing and concurrent administrators’ proposed protocol a formal part of the appointment.

• The appointment was in the best interests of creditors because it would enable investigation into possible claims against current and former directors of the company to take place in the most timely and efficient manner. Appointing the concurrent administrators would allow those investigations to progress before the company entered liquidation and enable the company to delay going into liquidation in order to conclude its trading in the administration.

• The protocol provided that the two sets of administrators would have unfettered access to all the documents generated during the course of the administration by either set of administrators in their capacity as agents for the company. The protocol also included a provision to allow for its terms to be amended by agreement. It made good practical sense that the administrators as a whole could agree variations to the protocol and, provided any variations were minor in nature and the administrators did not consider it necessary, variations would not need court approval.

• It was not anticipated that there would be a significant increase in the overall cost of the administration due to there being two sets of administrators. Accordingly, the appointment would not materially add to the costs already estimated in the administration.

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What has happened?
The High Court has declined to make administration orders over two companies even though the statutory pre-conditions to an order were satisfied.

Background
Two companies were the freehold owners of hotels, and operated a business model whereby they sold off individual hotel rooms and common parts to lessees on long leases. The companies were not hotel operators, but carried on business effectively as property developers.

The applicants were purchasers, who had acquired leases on terms which entitled the leaseholder to repurchase the lease from the relevant company in given circumstances. Several leaseholders had given notice exercising their right to repurchase.

The applicants made an application to the court for the appointment of administrators over the companies under Schedule B1 to the Insolvency Act 1986, claiming that, when they had purchased their leasehold interests, they had been given extravagant promises of a guaranteed return which had been more than optimistic and possibly reckless or wantonly misleading.

For the application to be allowed, the court must find, on the balance of probabilities, that two statutory pre-conditions are satisfied:

• that a company is, or is likely to become, unable to pay its debts (i.e. it is, or is likely to become, balance sheet insolvent and/or cash flow insolvent); and
• that an administration order is reasonably likely to achieve the purpose of administration.

The question for the court was whether the pre-conditions were satisfied in respect of each of the companies and, if so, whether the court should exercise its discretion to grant administration orders over the companies.

The decision
The court found that the pre-conditions were satisfied in respect of each of the companies; however it declined to make an administration order on the grounds that this would be ‘premature’. It determined that it was preferable that the companies be afforded an opportunity to turn their fortunes around of their own accord without a formal insolvency process. In making its decision, the court also weighed up the significant costs that would be incurred if administrators were appointed.

Comment
It is interesting to note that the court exercised its ‘commercial discretion’ in coming to this decision, taking the ‘wait and see’ approach. Applicants seeking to place a company into a formal insolvency process need to be aware that the court may exercise this discretion even where the pre-conditions are met. The court noted that firm evidence of fraud (as opposed to a suspicion of past fraud) on the part of those in control of a company would strengthen an application for an administration order. An appeal is due to be heard in the Court of Appeal on 27 or 28 June 2017.

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Contingent assets excluded from balance sheet test

Evans & Another v Jones & Another [2016] EWCA Civ 660

What has happened?
The Court of Appeal has ruled that contingent assets are to be excluded when assessing balance sheet insolvency in the context of a preference claim.

Background
Prior to a company entering creditors’ voluntary liquidation in April 2011, payments totalling £448,672.73 were made in repayment of directors’ loans (between June 2010 and March 2011) and a dividend of £75,000 was declared and paid to the company’s shareholders (in June 2010). It later came to light that the dividend paid to the shareholders had been unlawful owing to insufficient distributable reserves and as such was repayable by the shareholders to the company.

Following the entry of the company into liquidation, the liquidators sought to challenge the loan repayments to the directors on the basis that they constituted preferences. It was accepted that the repayments were preferential in nature and occurred within the relevant period prior to insolvency (i.e. 2 years in the case of connected parties). However, a susceptible preference cannot be set aside unless the company was at the time unable to pay its debts or became unable as a consequence. A company is deemed unable to pay if liabilities exceed assets. The directors argued that the company’s liabilities did not exceed its assets (taking into account the contingent asset of the unlawful dividend repayable by the shareholders to the company) and therefore the repayment of the directors’ loans could not be set aside as a preference.

The Court of Appeal had to determine whether the £75,000 in respect of the unlawful dividend should be treated as an asset on the company’s notional balance sheet in assessing its solvency at the time that the directors’ loan repayments were made. If the sum could be taken into account as an asset on the dates in question, then the value of the company’s assets would exceed its liabilities and the repayment of the directors’ loans could not be set aside as a preference.

The decision
The court ruled that the company’s claim for the repayment of the dividend was a contingent asset: it was an “unknown unknown” and was contingent, firstly, on being discovered and, secondly, on being pursued (which was unlikely so long as the directors remained in control of the company which, in effect, made the asset contingent on the company’s insolvency). The court ruled that a contingent asset should not be taken into account in the balance sheet test when assessing the company’s solvency in the context of the preference action.

Comment
This decision builds on the judicial guidance provided in Eurosail and reinforces the principle that assets and liabilities should be assessed in a way that reflects commercial reality for the purpose of the balance sheet test. The decision will be of interest to insolvency practitioners in the context of investigating antecedent transactions and also to those providing pre-insolvency advice on the risks of challenge to transactions in the event of a subsequent insolvency.

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When an agent becomes insolvent – withdrawal of authority and constructive trusts

**Background**

D&D Wines International Ltd (“D&D”) was employed by Angove’s PTY Limited (“Angove’s”), an Australian winemaker, to sell Angove’s wines to shops in the UK. On each sale, D&D would pay the price received from the shop, less D&D’s agreed commission, to Angove’s. The arrangement was documented by an agency agreement. The agreement could be terminated by either party if an administrator or liquidator was appointed to the other, although the termination clause provided that termination of the agreement would not affect the “accrued rights or remedies” of either party.

D&D entered administration on 21 April 2012 and went into liquidation on 10 July 2012. Angove’s terminated its agreement with D&D by notice on 23 April 2012. After receipt of the notice, D&D received roughly A$875,000 from two shops for wine delivered to them before D&D entered administration. Angove’s asked to be paid this money (less D&D’s commission) in line with the agreement. The liquidators declined, saying that the money should be held for D&D’s creditors, and that Angove’s should prove for their debt in D&D’s winding-up.

The liquidators’ argument, based on a line of previous case law, was that D&D’s authority as agent could not be withdrawn, because D&D needed that authority to collect their commission. Angove’s disagreed, arguing that the case did not qualify as an exception to general rule that an agent’s authority can be withdrawn at any time.

Angove’s also argued that even if D&D’s authority had not been terminated, the money should be held on constructive trust for Angove’s in any event. A constructive trust is a type of implied trust that can arise where it is “unconscionable” for a person to deny another beneficial ownership of an asset. Angove’s claimed that it would be unconscionable that Angove’s should only receive a dividend in the insolvent rather than the (much larger) amount that was ultimately due to it under the agreement, particularly given that at the time D&D had received the money it would have known that it would be unable to meet its obligations under the agreement.

In 2014, the Court of Appeal had found that D&D’s authority to receive collections from the two shops had survived the termination notice. The logic was that it was an “accrued right” which the parties had expressly agreed would be unaffected by termination of the agreement. The Court of Appeal also found that there was no constructive trust, as the outcome wasn’t sufficiently unconscionable to justify imposing a trust; it was simply an unfortunate result of D&D’s insolvency. Angove’s appealed to the Supreme Court.

**What has happened?**

The Supreme Court has allowed an appeal against a decision of the Court of Appeal, in finding that, on a correct reading of an agency agreement, the agent’s authority to collect payments was validly withdrawn by the principal soon after the agent went into administration. Helpfully, the court also clarified when the insolvency of an agent might cause a “constructive” trust (a type of implied trust) to arise over money collected by the agent on behalf of the principal.

**The decision**

The Supreme Court reversed the decision on the agency point, holding that D&D’s authority had been terminated by Angove’s notice. Clarifying the law on when a principal can withdraw an agent’s authority, it said that in order for authority to be irrevocable, there must be an agreement that it should be irrevocable, and the authority must have been given to secure a legal interest of the agent. In this case, the court was not satisfied on a true construction of the agreement that the parties intended for either condition to exist. As a result, the money should be paid directly to Angove’s, and not distributed to D&D’s creditors.

Although it wasn’t relevant to the outcome, the Supreme Court also considered the constructive trust point – i.e. had Angove’s not terminated D&D’s authority, should the money be held on trust because it was received when D&D’s administrators knew that the insolvent would prevent it from fulfilling its obligations as agent? Like the Court of Appeal, but for slightly different reasons, the Supreme Court’s answer was “no”.

The Supreme Court ruled that where a party receives a payment made with the intention of transferring the entire beneficial interest in the payment to that party, to create a constructive trust it is necessary to show that either (i) the intention is flawed or somehow corrupted (i.e. it is based on mistaken or false grounds) or (ii) the money has come into the wrong hands in the sense that it represents the fruits of a fraud, theft or breach of trust or fiduciary duty.

The threshold for establishing a constructive trust is therefore high and it had not been met in this case. In reaching this conclusion...
the court criticised certain established cases, including the decision in Neste Oy v Lloyd’s Bank Plc [1983] 2 Lloyds Rep 658.

Comment
The decision on agency is welcome as it helps clarify (in the highest English court) the law on when an agent’s authority can be withdrawn. The key take-away for commercial parties is to ensure the scope of the agent’s authority and the circumstances in which it can be withdrawn are thought through and properly documented.

Angove’s actions in seeking to terminate D&D’s authority promptly following D&D’s administration have effectively been vindicated by the decision, and a principal in a similar situation would be well advised to take similar steps. It would also be sensible to consider at an early stage, before any insolvency has arisen, what practical steps a principal can take to intercept third party payments if necessary. Although note that each case will be different and legal advice should be sought before implementing any such steps.

Meanwhile the decision on constructive trusts is perhaps more relevant for the insolvency market, where creditors will often look to “jump the queue” by claiming a constructive trust over an insolvent debtor’s assets. Insolvency practitioners and the majority of creditors should welcome the judges’ narrow statement of the test for a constructive trust here. It clarifies the position and reduces the scope for individual creditors to claim funds that would otherwise be available to the general body of creditors should be ring-fenced for them. As the court said in delivering its judgment:

“The onset of corporate insolvency almost invariably causes hardship to those that have dealt with the company […] these results may seem capricious at first sight but they are necessary in order to achieve the object of any insolvency, which is a proper rateable distribution of the company’s assets between its creditors at a single common date”.

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Validation orders

Express Electrical Distributors Ltd v Beavis & Ors [2016] EWCA Civ 765

What has happened?
The Court of Appeal has narrowed the circumstances in which a validation order will be made under section 127 of the Insolvency Act 1986 ("Act") where a person supplies goods to a company at a time when, unbeknown to that person, a winding up petition has been issued in relation to that company.

In one of the leading cases on validation orders, Re Grays Inn Construction Co Ltd [1980] 1 WLR 711, the Court of Appeal had previously explained that the court may normally validate a payment made by a company subject to a winding up petition if the payment is made in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented. The Court of Appeal has now cast serious doubt on that principle.

Section 127 of the Act provides:

"In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void."

Where a winding up order is made on the basis of a winding up petition, section 129(2) of the Act provides that the winding up is to have commenced on the date of presentation of the petition. Absent a validation order, any payment in the period after presentation of the petition by the company will be treated as void under section 127 and must be returned to the company to be shared among its creditors. This idea is based firmly on the pari passu principle, or the fundamental rule that an insolvent company's assets should be distributed rateably between creditors of a particular class.

Background

Edge Electrical Limited ("Edge") installed electrical equipment in high value properties. Express Electrical Distributors Limited ("Express") was a wholesaler of electrical goods and a supplier to Edge.

Following a downturn in trading conditions in early 2013, Edge was struggling to pay its suppliers. On 22 May 2013, one of Edge's other suppliers issued a winding up petition against it. On 29 May 2013, Edge, who subsequently claimed not to be aware of the petition, made a payment of £30,000 to Express in respect of goods previously delivered to Edge. Express then supplied further goods worth about £13,000 to Edge in early June. The winding up petition was advertised on 17 June 2013 and a winding up order was made on 15 July 2013. The order was given effect from the date of the petition, in the usual way.

The liquidators demanded repayment of the £30,000 from Express as a void disposition under section 127. Express applied for a validation order in response. Express argued that it had only become aware of the winding up order against Edge on 17 June 2013, and that it received the payment in good faith in the ordinary course of business. On this basis, following the general rule in Re Grays Inn, the payment should be validated.

Express's application was dismissed by the District Judge at the first hearing and on appeal to the High Court. Express then appealed to the Court of Appeal.

The decision

The Court of Appeal upheld the previous decisions of the District Judge and the High Court and declined to grant a validation order. In doing so, the court scrutinised the judgment in Re Grays Inn.

The Court of Appeal found that the suggestion in Re Grays Inn that the court should generally validate a payment made in good faith in the ordinary course of business at a time when both parties are unaware that a petition has been presented, was ill-conceived. The court explained that it was potentially at odds with the pari passu principle and the key notion that any validation should not prejudice unsecured creditors. The court struggled to follow the reasoning in Re Grays Inn and concluded that the court in Re Grays Inn had not meant to lay down a binding rule.

The court stated that a validation order should, save for "exceptional circumstances" only be granted if the transaction in question was, as a result of "some special circumstance", for the benefit of the general body of creditors. Examples would include where the disposition is required to fulfil the company's obligations under a particularly profitable contract, or to make the company a more attractive proposition ahead of a sale of the company as a going concern. Such circumstances might justify a departure from the pari passu principle.

Express argued that the payment of £30,000 ensured continuation of supply – Edge had received the further £13,000 of goods in early June, which was of benefit to creditors as a whole. The judge dismissed this argument. There was no evidence that the purpose of
the £30,000 payment was to ensure continued supply. Rather, it appeared that Edge only paid Express in order to continue to carry on its business for as long as possible. Further, the additional £13,000 of goods hadn’t been provided on particularly favourable terms and wasn’t, for example, necessary to ensure completion of any particularly profitable contracts.

**Comment**

The case represents a significant development for anyone dealing with companies close to insolvency, who might receive a payment from a company in good faith after the presentation of a winding up petition against the company.

Whereas previously creditors might have relied on *Re Grays Inn* to obtain a validation order in respect of such payments, they will now need to show that the payment was for the benefit of the general body of creditors. In future applications for validation orders, clear and credible evidence of this benefit will be required.

For banks, who may receive payments into an overdrawn account after a petition is filed, maintaining the robustness of covenant testing, to flag early warning signs of insolvency, will remain crucial. Likewise, conducting regular checks with the courts in respect of borrowers thought to be in financial difficulty is recommended, as is taking prompt action to freeze accounts in the usual way as soon as a petition is filed.

For suppliers, the best solution may be to tighten credit terms or look to rely on retention of title (if practicable).

For officeholders, the decision means that steps to recover void dispositions under section 127 are less likely to be thwarted by applications for validation orders in reliance on the *Re Grays Inn* principle.
Postponing the sale of a bankrupt’s home in exceptional circumstances

Grant and another v Baker and another [2016] EWHC 1782 (Ch)

What has happened?
On appeal, the Chancery Division has upheld a district judge’s decision that the occupation of a bankrupt’s property by his adult daughter who had Global Development Delay, dyspraxia and obsessive compulsive disorder, amounted to exceptional circumstances for the purposes of section 335A of the Insolvency Act 1986 (“Act”). However, the court ruled that the district judge was wrong to impose an indefinite postponement of the sale and ordered a postponement of 12 months.

The order for sale was granted. However, the judge’s view was that there were exceptional circumstances in that the bankrupt’s 30-year old daughter, who required constant care, resided at the property.

Therefore, the presumption set out in section 335A(3) of the Act, which provides that where an application for an order for sale is made after the end of the period of one year beginning with the first vesting of the bankrupt’s estate in a trustee, the court shall assume that the interests of the bankrupt’s creditors outweigh all other considerations, was rebutted.

As a consequence, the judge ordered that the sale should not take place until such time as the bankrupt’s daughter no longer resided at the property or no longer needed it as her home.

The trustees appealed the decisions on the grounds that (1) there were no exceptional circumstances and (2) an indefinite long-stop date was an incorrect use of the judge’s discretionary powers.

The Appeal
Mr Justice Henderson agreed with the district judge that there were exceptional circumstances in this case in order to rebut the presumption in section 335A(3) of the Act. He noted that precedent case law left very little scope for interference by appellate courts with the district judge’s value judgment on this point.

However, he overruled the indefinite long-stop date and ordered a postponement of a further 12 months. In coming to this decision, Mr Justice Henderson ruled that, where a trustee brought an application for an order for sale of a bankrupt’s home, it was for the court to enable the sale in order to release funds for distribution. Therefore, an indefinite postponement was at odds with the statutory scheme.

Comment
This decision should provide trustees in bankruptcy with some comfort that postponements to the sale of a bankrupt’s residence should not, in most circumstances, go on indefinitely.

Although the postponement was still granted, Mr Justice Henderson was clear that effect should be given to the statutory scheme even if the proceeds are to be swallowed up by meeting the trustee’s costs.

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Administration application rejected on the basis of a disputed debt subject to an arbitration clause

Fieldfisher LLP and Pennyfeathers Limited [2016] EWHC 566 (Ch)

What has happened?
The court has rejected a law firm’s application for an administration order against a former client in relation to a disputed debt which was allegedly due to the law firm under a conditional fee arrangement (“CFA”). The CFA contained a clause requiring the parties to resolve any disputes by way of arbitration. Although the court agreed that the law firm was a creditor under the CFA and was entitled to make the application for an administration order, the court would not use its discretion to make the order and allow the law firm to avoid the arbitration clause in the CFA.

Who does this affect and how?
This case is relevant to any party to a contract which contains dispute resolution provisions requiring the parties to resolve disputes through arbitration before being permitted to commence any other legal process against the other counterparty. Arbitration clauses are common in contracts in the construction sector and in litigation funding agreements.

Parties should be mindful of arbitration clauses and the impact they will have on a party to the contract who wishes to commence administration or winding-up proceedings against the other counterparty, where the underlying debt is disputed. The fact that a debt is disputed will not preclude a creditor from making an application for an administration order (in the same way that it should in relation to issuing a winding-up petition). However, if the contract giving rise to the debt contains an arbitration clause, this process will need to be completed first, unless there are “wholly exceptional circumstances” as to why insolvency proceedings should take precedence.

Relevant background
Fieldfisher LLP acted for Pennyfeathers Limited in successful litigation under a CFA. Under the terms of the CFA, Fieldfisher was entitled to a substantial uplift following the successful outcome of the litigation. However, the litigation itself had been funded by a third party under a litigation funding agreement. The CFA and the litigation funding agreement were subject to a priorities agreement which gave the third party funder priority over receipts from the litigation and provided that Fieldfisher would not be paid certain sums until the funder had received all of the monies it was entitled to under the funding agreement.

The receipts from the claim were insufficient fully to pay the monies due to the funder and, therefore, Fieldfisher faced a significant shortfall on the sums it was entitled to under the CFA; Pennyfeathers disputed certain elements of those sums. Fieldfisher made an application, as a creditor under paragraph 11 of Schedule B1 to the Insolvency Act 1986, for an administration order in respect of Pennyfeathers.

The court extended principles previously established in relation to winding-up proceedings to the application for an administration order: that the court will not interfere, where a debt is disputed, with the rights and obligations of two parties who have agreed to arbitrate by contract unless there were “wholly exceptional circumstances”. To do so would be contrary to public policy and the principles of the Arbitration Act 1996 (encouraging parties to resolve disputes outside of formal court proceedings).

The court was not satisfied that Pennyfeathers was insolvent on any other basis and therefore refused to make the administration order.
Betting the farm – Marshalling of security over agricultural assets

**McLean & Anor v Trustees of the Bankruptcy Estate of Dent & Ors [2016] EWHC 2650 (Ch)**

**What has happened?**
The High Court has ruled that the principle of marshalling applies to agricultural charges. This meant that an individual who lent money to a farming partnership could claim in the proceeds of the sale of farming assets which the partnership had secured to another lender (but not the individual) under an agricultural charge.

**Legal background**
Marshalling is a long-standing equitable principle. It applies where two creditors are owed debts by the same debtor. One creditor can enforce his claim against more than one security interest, the other can resort to only one. In these circumstances the principle gives the second creditor a right to require that the first creditor be treated as having satisfied himself as far as possible out of the security to which the latter has no claim. By extension, in practice, this means that if the first creditor satisfies his debt out of the property over which the second creditor holds his only security interest, the second creditor is thereby effectively subrogated to the rights of the first.

An agricultural charge is a fixed and floating charge over farming assets, including livestock, crops, vehicles and machinery, created under the somewhat archaic regime set out by the Agricultural Credits Act 1928 (“Act”). As a point of interest, the agricultural charge is unique in that it is an exception to the general rule that an individual cannot grant a floating charge.

**Facts**
Three partners set up a haulage and farming business. The partnership was funded by Barclays Bank PLC and an individual, Lady Morrison. In exchange for the working capital provided by Barclays, Barclays received (i) an “all-mones” agricultural charge over the assets of the partnership (which included livestock (551 head of cattle and one dog), vehicles, tractors and implements); and (ii) third party legal mortgages over two farms at Penrith which belonged to the members of the partnership individually. In exchange for her funding to the partnership, Lady Morrison received second-ranking third party legal mortgages over the Penrith farms (only).

The partnership’s business deteriorated and on 18 February 2014 administrators were appointed to it. In April 2014 bankruptcy orders were made against each of the partners and the bank appointed LPA receivers to the farms. In October 2014 the receivers sold the farms, discharging the bank’s debt in full, but leaving a debt of £192,000 due to Lady Morrison.

**Questions considered by the court**
The administrators asked the court whether the asset realisations from the bank’s agricultural charge should be distributed to Lady Morrison or shared between the general body of unsecured creditors.

**The decision**
The judge decided that marshalling applied and Lady Morrison was therefore entitled to the asset realisations from the agricultural charge. The equitable principle was triggered, because the bank elected to use the mortgages over the farms for repayment of the partnership debt due to it, the benefit of the agricultural charge went effectively unused, and the proceeds of sale from the farms that would otherwise have been available to Lady Morrison were taken by the bank.

The trustees in bankruptcy of the partners had argued that the nature of an agricultural charge is such that it can only be granted in favour of a bank, and therefore Lady Morrison as an individual (as a non-regulated entity) should not be entitled to benefit from it. The judge dismissed this argument on the grounds that there was no restriction in the Act against the assignment of agricultural charges, inferring from this that if the security created under the Act could be assigned, there was no reason why it could not be marshalled, and in any event marshalling is simply an accounting exercise; it did not result in Lady Morrison actually becoming charge-holder, or being able to enforce the charge (in fact the charge had already been enforced).

**Comment**
The case serves as a useful reminder of the principles of marshalling. It should also reassure creditors and officeholders alike as it shows the court taking a common-sense approach to uphold an equitable principle that ensures fairness between secured creditors, in the face of the somewhat esoteric law created by the Act.

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ATE policy deemed sufficient for security for costs for companies in liquidation

(1) Premier Motorauctions Limited (in Liquidation) and (2) Premier Motorauctions Leeds Limited (in Liquidation) v (1) PricewaterhouseCoopers LLP and (2) Lloyds Bank plc [2016] EWHC 2610 (Ch)

What has happened?
The High Court refused an application for security for costs under the Civil Procedure Rules part 25 against insolvent claimant companies where they had obtained after-the-event insurance.

Background and application for security for costs
Premier, acting by its liquidators, had brought a claim against its former administrators and the bank who appointed the administrators claiming that the defendants were joined in a conspiracy which resulted in loss to Premier. The defendants made an application for security for costs against Premier on the basis that they are in liquidation and have no assets and therefore the defendants “have reason to believe that the companies would be unable to pay their costs should they be ordered to do so” (the so called “jurisdictional threshold”) in accordance with part 25. The claimants obtained ATE insurance policies which they contended provided sufficient security for costs.

Decision
The court dismissed the application for security for costs as the defendants had failed to show that the jurisdictional threshold had been crossed. The ATE insurance policy could and should be taken into account when applying the jurisdictional threshold test:

- where an ATE insurance policy is in place, the question is not whether it provides the same security as cash, a bank guarantee or a deed of indemnity but whether there is reason to believe that the insurer would not pay under the policy when called to do so. The defendants had not demonstrated this in the present case for the following reasons:
  - the ATE insurance policies had been put in place by joint liquidators who were independent insolvency practitioners. The liquidators would have objectively scrutinised the terms of the policies before taking them out and had every incentive to adhere to their terms as they would be aware that the defendants might apply for a costs order personally against them if the policies failed;
  - the court considered that the ATE market had now matured. It was unlikely that there would be any commercial incentive for the insurance companies to take an unusually defensive line and withdraw the policies in order to avoid liabilities;
  - adverse costs orders usually rank for payment ahead of other claims in liquidation. In particular in this case the joint liquidators confirmed that they would provide an express undertaking to hold any proceeds of the ATE insurance policies for the sole purpose of paying the defendants; and
- the fact that the two insurers in question were based in Gibraltar and did not have a credit rating was not enough to establish that they were uncreditworthy. The claimants had produced substantial evidence in relation to one of the insurers of their previous track record. There was therefore no reason to doubt its ability to pay. There was no such evidence for the second insurer, and the judge commented that if the second insurer stood alone his judgment may have differed.

Comment
The judge’s comments surrounding the expansion and maturity of the ATE insurance market in the insolvency sector are interesting. In particular, the court noted that there was a public interest point in permitting ATE insurance when applying the jurisdictional test: a key reason behind ATE insurance is to provide access to justice, and as is the case here, access to justice for insolvent companies under the control of responsible officeholders. This is a useful case, highlighting the successful standing of ATE insurance; creating one less obstacle for officeholders to pursue claims on behalf of companies that have little to no assets. However, the defendants have applied for permission to appeal, so watch this space!

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Trustees in bankruptcy cannot require bankrupts to draw down their pension

Horton v Henry [2016] EWCA Civ 989

What has happened?
This was an appeal to the Court of Appeal against a decision of the High Court which dismissed an application by Mr Horton, the trustee in bankruptcy of Mr Henry, for an income payments order in respect of income from Mr Henry’s undrawn pension. Mr Henry had the right to compel his pension provider to make payments under the policy. His trustee wanted him to make that election for the benefit of his IPO. Mr Henry did not want to, instead wanting to preserve his pension for his reasonable domestic needs and his children after his death.

The High Court had considered this issue before in Raithatha v Williamson (a bankrupt) [2012] EWHC 909 (Ch) where the court ruled that a bankrupt’s entitlement to make elections in respect of his undrawn pension was included in the assessment of his income under s.310 of the Insolvency Act 1986 ("Act"). However at the hearing in Horton v Henry, the judge reluctantly declined to follow the Raithatha decision (which had been widely criticised) and held that Mr Henry’s uncrystallised pension rights were not included as part of his “income”.

The Court of Appeal was asked to determine whether a pension entitlement in respect of which a bankrupt has a right to elect to draw down, but has not done so, falls within the definition of income “to which he from time to time becomes entitled” when applying section 310 of the Act in making an IPO.

Mr Horton argued that the judge at the first hearing had interpreted the words “becomes entitled” too narrowly and that too much emphasis had been put on the requirement to elect. Instead he argued that the mere fact Mr Henry had the power to compel payment meant that he was surely entitled to the income.

The Court of Appeal asked itself three questions:

1. whether section 333(1) of the Act (Duties of bankrupt in relation to trustee), read in conjunction with section 310, enables a trustee in bankruptcy to require a bankrupt, who has reached the age at which he is contractually entitled to draw down or “crystallise” his pension (but he has not done so), to elect to do so, so that the trustee may apply for an IPO;
2. if so, what criteria apply to determine the manner in which, and the extent to which, the bankrupt may be required by the trustee to draw down his pension; and
3. how, if such a power exists, it should be exercised in the case of Mr Henry, having regard to his reasonable domestic needs.

The Court of Appeal ruled, dismissing Mr Horton’s appeal, that a trustee does not have the right to require a bankrupt to make elections and draw down his pension – income to which a bankrupt becomes entitled can only be linked to pensions already in payment.

In the judgment, the Court of Appeal helpfully explained (at paragraph 48):

“The words ‘becomes entitled’ are hardly apt to describe rights under a pension which is not yet in payment, since the individual may, as in the present case, have had those rights before and throughout their bankruptcy, where, as here, the pension holder had already, prior to bankruptcy, reached pensionable age under the terms of the relevant scheme. In those circumstances it is difficult to see how it can be said that he ‘from time to time becomes entitled’ to the ‘payment’, if indeed ‘payment’ is to be equated with a vesting right. [Mr Henry’s] construction that s.310 only applies to pensions in payment sits far more easily with the statutory language”.

Comment
This judgment had been eagerly awaited and it was hoped it would finally resolve the conflicting judgments in Horton v Henry and Raithatha v Williamson. In fact, many IPO applications issued in light of the Raithatha judgment were stayed pending the outcome of the appeal. Those applications can now proceed and any IPO applications based on uncrystallised pensions will fail.

The decision might cause some creditors to investigate likely assets in a bankruptcy estate before they petition for bankruptcy. For example, they might try to find out a debtor’s pension entitlement and be reluctant to petition if his asset base is minimal and a pension is not yet in payment.

Whilst a disappointing result for trustees in bankruptcy and creditors, this is welcome news for debtors when planning their retirement. The author agrees with the Court of Appeal’s decision, which reflects the intention of Parliament to remove pensions from the bankruptcy estate.

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Horizon Watch

We set out some upcoming dates involving legal developments likely to be of interest to restructuring and insolvency professionals.*

* Information and dates based on publicly available information at the time of going to press. You must take specific advice on deadlines and impact if you are affected by any of the issues raised.
## Horizon Watch

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<tr>
<th>Date</th>
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<tr>
<td>End of March 2017</td>
<td>Article 50 may be triggered.</td>
<td>Theresa May has pledged to trigger Article 50 by the end of March 2017 which will start the United Kingdom’s two year notice period to exit the EU. With the publication of its White Paper, the government now seems determined to achieve this self-imposed deadline.</td>
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<tr>
<td>6 April 2017</td>
<td>Insolvency (England and Wales) Rules 2016 will come into force.</td>
<td>They replace the Insolvency Rules 1986; consolidating and modernising them and represent the largest legislative change to insolvency since the introduction of the Enterprise Act 2002. Save for some minor transitional provisions they will apply to all existing and future insolvency cases from 6 April 2017.</td>
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<td>25 April 2017</td>
<td>Compulsory use of HM Courts &amp; Tribunals E-Filing Service in the Rolls Building of the Royal Courts of Justice (London).</td>
<td>From 25 April 2017 all claims and applications will need to be issued and documents will need to be filed electronically using the court’s dedicated website in the Rolls Building which houses the Chancery Division with responsibility for bankruptcy and insolvency matters.</td>
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<td>26 June 2017</td>
<td>Recast EC Insolvency Regulation (EU Regulation 2015/848) will apply to all EU member states with the exception of Denmark.</td>
<td>The Recast EC Insolvency Regulation will apply to all insolvency proceedings commencing on or after 26 June 2017. The original EC Regulation will continue to apply to proceedings opened before 26 June 2017.</td>
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<td>October 2017?</td>
<td>Insolvency (Scotland) Rules 2017?</td>
<td>The Insolvency Service is working with the Scottish Government to modernise the existing Insolvency (Scotland) Rules 1986. They have said that they expect new rules to apply to compulsory voluntary arrangements and administrations in Scotland from October 2017.</td>
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<td>September 2018?</td>
<td>Technical and Further Education Bill 2016–2017</td>
<td>A bill to introduce an insolvency regime for the further education and sixth form college sector is currently passing through Parliament. The bill includes a special administration regime aimed at protecting learners from disruption to their courses. It is intended that the new regime will be in place for the start of the 2018/2019 academic year.</td>
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Diary Room

Sally Williamson joined us at the end of 2016 as one of our two practice development lawyers. She bares all to Diary Room.
Diary Room

In this edition, we quiz Sally Williamson on those important life questions…

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Favourite hobby
I like walking, running and going to the gym

What would you be if you weren’t a restructuring lawyer?
A make-up artist

Pet hates
Invading personal space and noisy eating!

How would your friends describe you?
Caring, patient, geeky, sensible (when I don’t have a glass in my hand), opinionated and with a complete and utter lack of a sense of direction

Favourite film
At the moment Zootropolis – with two young children anything that gives me an hour’s peace and quiet is on my favourites list! I prefer TV series to films and am currently enjoying The Man in the High Castle and The Walking Dead

A fact not many people know about you?
I used to have purple hair (I’ve burned all the photographs before anyone asks)

If your house was on fire, what item – not person – would you save?
Rosie – our pet budgie

Three desert island items
My kids, my laptop (even desert islands have wi-fi these days) and a massive bar of chocolate

Favourite book
The Annotated Guide to the Insolvency Legislation of course!! In terms of fiction, I’m not one to read a book more than once so I tend to read books that come in series. My favourite is A Song of Fire and Ice (which are the books on which the Game of Thrones TV show is based)

Ideal dinner party guests
After making Christmas dinner for 13 this year, my ideal guests would be a chef, a waiter, a cleaner and an entertainer – dinner guests are expected to muck in and help the host at my house!
Team News

Here is a round-up of news from our national offices.

**Birmingham**

Following months of advising the business during financial uncertainty, the team assisted the board of All Leisure Group in appointing administrators over its Cruises and Tours business divisions over the Christmas period. Whilst the Tours division was rescued by a pre-pack sale to G Adventures (UK) Limited following a neck-and-neck contract race, saving over 200 jobs and safeguarding over 13,500 tours holidays, the business’s Cruises division could not unfortunately be similarly salvaged. The team continues to assist the administrators in ensuring that the business’s affairs are wound up smoothly.

Amy Flavell has been advising the board of a major telecommunications operator on its options in association with a solvent sale of certain of its business and assets to a third party purchaser and restructure of its banking facilities In addition, the team has been acting for the administrators of Vantage Design & Build Limited (in Administration). The company was building flats and houses on various sites throughout Southern England and its insolvency has given rise to a large number of complex issues.

**Glasgow**

Claire Massie and Michael Thomson are working with the pensions team on the settlement of a pensions litigation where our clients, the trustees, have taken court action to recover sums loaned to members of the pensions scheme under a “pensions liberation”. The settlement agreement will involve the appointment of administrators and liquidators in early 2017 to implement the settlement agreement and recover funds.

Using our award-winning Smart Delivery software, Jen Marshall, Stephen Murphy, Kevin Mulligan and Ross Cooper have been leading a team reviewing a clearing bank’s documentation for their internal ring-fencing project. Stacey Bairner and Stephen are also starting work on a similar task for another major bank. Stacey also led the team acting for a fund on the property elements of the acquisition of Quercus Care Home portfolio (75 Care Homes mainly based in Scotland) worth c£260m. Andrew Robertson and James Armshaw in London also assisted.

Michael and Claire remain very busy on a number of distressed oil and gas businesses. Michael is now spending several days a week in our Aberdeen office.

**Leeds**

Richard Tripp and Laurie Murphy completed the pre-pack purchase of the business and assets of RIM Scaffolding Event Services Limited for Arena Event Services Group Limited. RIM provides worldwide event security and fencing at major sporting events including F1 Grand Prix.

Dawn Allen and Emily Turnock completed the pre-pack sale for the administrators of Evolve Polymers Limited (a plastics recycling company) to Clean Tech Europe Limited (a new subsidiary of Plastipak Inc). Dawn has also been very busy advising the Rugby Football League on the administration of the Bradford Bulls.
London

Steve Cottée, Nick Gavin-Brown, Bhal Mander, Dawn Allen, Andy Robertson and Jack Isaacs spent much of Christmas and the first two weeks of January negotiating the various pre-pack sales of law firm King & Wood Mallesons. The largest UK law firm insolvency yet, the administration has been covered extensively by the legal and business press. This assignment further bolsters the team’s reputation as experts in professional practice restructuring.

Nick Gavin Brown and Stephen O’Grady have continued to advise Abengoa Group’s UK board through the Spanish renewable energy Group’s €6bn restructuring, including the UK company’s recently-approved CVA and Chapter 15 recognition in the US.

Steve, Bhal, Andy and Jack completed the pre-pack administration sale of Ed’s Easy Diner Group, a nationwide burger chain, to restaurant group Giraffe rescuing two thirds of the stores and preserving hundreds of jobs.

Nick Pike and Jack Isaacs advised a consortium of eight major airlines at Gatwick Airport concerning the administration of the Aviator ground handling business.

Tom Withyman and Andrew Robertson acted for major US house-builder, Champion Enterprises Inc., on the sale of its UK arm.

Manchester

James Cameron and Louise Kappes have completed a share sale of the New Earth Solutions waste management group to Panda Waste, an Irish group and new entrant to the UK mechanical biological treatment (MBT) market. The sale concludes a successful turnaround following the acquisition of the business and five processing centres out of administration four months earlier.

James and Sam Latham have been Instructed by the administrators of Dean House Limited, supplier of fitted kitchens and bedrooms under the Betta Living brand. They completed the sale of the order book and IP to a newco formed by management and have been instructed on the sale of a property and the assignment/surrender of various leases.
The Pinsent Masons Restructuring and Insolvency Conference, now an annual event firmly marked on restructuring professionals’ autumn calendars, will be held at London’s Brewery in October.

Our 2017 conference is set to be the best yet, with a wide range of speakers drawn from Pinsent Masons and the industry speaking on the topics which are of most relevance to insolvency practitioners and their staff. We have something for everyone, including a choice of sessions in the afternoon.

Our conference includes not only up to the minute analysis and comment from leading lights in the industry, but also a comprehensive set of seminar notes to keep as a work of reference, full online access to all the presentations and an excellent food and beverage service, from breakfast prior to the conference through to the drinks reception after it.

All of us in the Pinsent Masons Restructuring and Insolvency team look forward to welcoming you to our 2017 event on Tuesday 3 October.

Keep the date free – bookings open in the Spring!
# Key Contacts

## UK Offices

<table>
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**Restructuring helpline**

For urgent queries call our 24 hour helpline in order to speak to one of our partners: +44 (0)20 7418 8280.

For more general or technical and legal queries email us at: restructuringhelpline@pinsentmasons.com

*While we take every care to confirm the accuracy of the content in this edition, it is not legal advice. Specific legal advice should be taken before acting on any of the topics covered.*