

In this issue of *Rescue*, we discuss the question of time limitation and its possible serious consequences.

We highlight some noteworthy decisions in the banking and security sector.

With time running out in the granting of new licences for the pub and restaurant trade, we examine the new Licensing Act.

We guide our readers through the new legislation that protects pension members.

We present a Benedict Mackenzie Case Study, "A Lamb's Tale"

Your guide to the latest insolvency statistics at a glance.

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## A question of limitation

The European Court of Human Rights delivered a judgement in 2000 which has serious consequences for insolvency practitioners and lawyers alike.

The case in question was *GI v Luxembourg*. The European Court of Human Rights held that the administration of a corporate insolvency by the Official Receiver in Luxembourg which took six years to complete, constituted an unreasonable delay in the applicant shareholder's right under Article 6 to a determination of his civil rights and obligations within a reasonable time. The consequence was an award of damages against the state.

Could this Judgement actually be replicated in England? It is quite conceivable that a similar result could be obtained where a bankrupt or shareholder in an insolvent company being wound up by the Court, could sue the Government for damages in the event that the insolvency process is unduly protracted. Although the Luxembourg Judgement is not binding in English Courts, it will undoubtedly be persuasive culminating in grave consequences for insolvency practitioners and their lawyers.

For example, insolvency practitioners who allow a Court supervised insolvency to drag on indeterminately before taking action may find that certain of the claims they make are dismissed on the basis of Article 6 challenges.

These challenges could succeed even if the claims are made within the relevant limitation period and even where the claim is proprietary with no limitation period at all. Insolvency practitioners might find themselves the subject of criticism at best or misfeasance at worst by angry creditors, indeed, the damages sought could be as much as the value of the underlying claim plus with the costs of the failed litigation.

Similar claims could be made even if the delay is not entirely attributable to the present office holder; perhaps where, for instance, the Secretary of State has delayed the appointment of a trustee in bankruptcy.

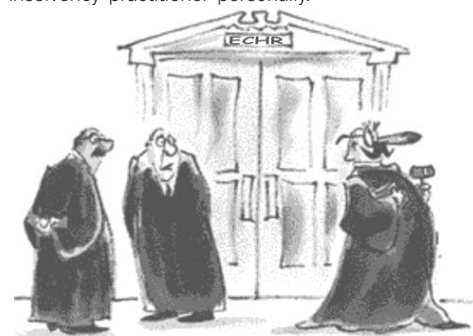
Undoubtedly, the Humans Rights Act has profound implications for the way in which insolvencies should be administered.

The lesson is that insolvencies should be completed expeditiously.

Once the insolvency practitioner has completed his investigations, a decision as to whether or not to commence proceedings should be taken as early as possible. The consequences to individual insolvency practitioners of an unreasonable delay may well be quite severe.

If a decision is taken not to proceed, then practitioners should retain detailed notes setting out reasons why, together with legal advice obtained, in the event that a defence to an action brought under Article 6 is required.

In the event that proceedings are commenced at a later date, the sanction of the Court or a creditors' committee sanction should be obtained in order to offer some protection should a misfeasance claim be launched against the insolvency practitioner personally.



"IT WILL BE MY CONTENTION THAT WHEN CONFLICT OCCURS, POLITICAL CORRECTNESS OVERRIDES ESTABLISHED PRECEDENTS"

## Life after Spectrum

The effect of the Spectrum Judgement which ruled that standard bank debentures gave a floating charge, not a fixed charge over book debts is likely to force banks to reconsider their lending policies.

In typical fashion, the House of Lords confirmed that it was possible to create a fixed charge over book debts but gave no guidance as to what level of control over the debts must be exercised by the banks to achieve this. As a result, an increasing number of businesses without valuable fixed assets and which have large working capital requirements, may have to turn to Factoring companies to obtain finance. Factoring companies differ from the banks in that they take assignments of book debts rather than charges over the security. As a result, they are likely to charge significantly greater fees for their facilities than those historically charged by a main clearing bank and they may not offer the same level of support to customers experiencing financial difficulties.

### Directors' guarantees

A large number of directors who have given personal guarantees to support corporate borrowing are likely to find that their guarantees are called upon as a result of this Judgement. Under a floating charge, book debt realisations will need to be paid firstly to any preferential creditors, and where these are significant, there may be an unforeseen shortfall to the bank. The effect of this lessens in respect of insolvencies which commenced after 15th September 2003 since the number of creditors qualifying as preferential has been greatly reduced. Nevertheless, many directors may face a battle to defend their assertion that they only gave guarantees on the basis that the bank had a fixed charge on book debts and therefore there was little chance that the guarantee would be called upon.

# Banking and Security

There has been a number of Court decisions over the past few months. We highlight those which are particularly noteworthy.

In the case of *(Fraser v Oystertec Plc (2004))* the Court refused to grant a final third party debt order against Yorkshire Bank plc where the monies standing to the credit of one of the accounts was held as specific security for the defendant's liability under a guarantee in favour of a third party. The Court considered that, until the guarantee was discharged, the money in the account was not payable to the defendant or held to his order and that given that the bank had a contractual right of set off in respect of the defendant's liability under a loan facility; it would be unjust to make the third party debt order final.

## Freezing injunctions

Dangers for banks receiving notice of freezing injunctions were highlighted in a recent Court of Appeal decision (*Customs & Excise v Barclays Bank plc (2004)*). A bank owes a duty of care to a claimant upon

receiving notice of a freezing injunction to ensure it does not permit a defendant to disobey it. Here the bank was held in breach of that duty for failing to stop transfers of substantial sums by acting on direct transfer instructions from the customer via its BACS pay system. The instructions were sent to a payment centre rather than the branch and, accordingly, the transfers were not stopped.



The extent of a bank's liability in negligence for a claimant's loss may be significant depending on the amount of the claim and the funds paid out of the frozen account. Banks need to ensure that they have adequate systems and procedures in place so that accounts are stopped immediately upon notice of a freezing injunction being received.

In another case (*Technocrats International) Inc v Fredic Limited (2004)*) the Court interpreted the requirement for the provision of 'security' in a standard form freezing order to be security only against the risk that the defendant might remove its assets and not as security against the defendant's subsequent insolvency. Accordingly, the monies deposited by the defendant with the claimant's solicitors were available to the insolvency practitioner appointed as administrator and the claimant had no security over them.

# Time is running out

Sweeping changes in the granting of licences for the sale of alcohol have, to date, largely been met with a wall of silence. We set the scene.

For transitional purposes, local authorities began the task of dealing with applications to convert existing licences to new licences on the 7th February 2005. The old licensing regime ceases on the 24th November 2005. However, local authorities have failed to receive the number of applications they expected to allow businesses to continue trading from that date at which time all existing licences will cease to exist irrespective of their current validity.

One of the reasons why so few applications have been received is that many businesses are still failing to realise that the new Licensing Act applies to them. This is because the scope of the new Act is much greater than the existing licensing legislation.

## Late Night Refreshment

Not only does the new Act apply to the supply of alcohol and the provision of

regulated entertainment but also to the provision of late-night refreshment which is defined as the supply of hot food or hot drinks to the public for consumption on or off the premises between 11pm and 5am or the supply of hot food or hot drinks to any persons between those hours on or from the premises to which the public has access. This means that in addition to clubs, pubs and restaurants, there are a number of other businesses which have never been affected by licensing legislation but which will be covered now and will, therefore, require a licence to continue trading.

Operations such as late-night takeaways and cafes, supermarkets and garages which heat food or drink to be consumed and even some burger vans which have regular or temporary pitches will require a Premises Licence from the 24th November.

While the Act does provide for a number of supplies to be exempt, they are limited.

Exemptions include the provision of hot drinks by vending machines in certain circumstances; where hot food and drinks are supplied free of charge; or where supplied by a registered charity.

With time running out, it is absolutely essential that affected businesses act with all due haste if they intend to continue trading after 24th November. Failure to achieve conversion will mean that the premises and individual will be unlicensed and it is an offence to carry on licensed activity without the necessary licence, the penalty being a fine of up to £20,000 and or six months imprisonment.



"WHAT DO YOU HAVE TO DO TO GET A DRINK AROUND HERE?"

# The new pensions regulator

We guide our readers through the new legislation that protects pension members and allows business to continue

**T**he Pension Regulator, established on 6th April this year, is the regulatory body for work-based pension schemes in the UK and replaces OPRA.

The Pensions Act 2004 gives The Pensions Regulator a set of specific objectives:

*(a) to protect the members' benefits of work-based pension schemes.*

*(b) to reduce the risk of situations arising that may lead to claims for compensation from the Pensions Protection Fund.*

*(c) to promote good administration and understanding of work-based pension schemes.*

Before 11th June 2003, solvent and insolvent companies had an exposure to their pension scheme which under statute was defined by reference to the scheme's minimum funding requirement.

A debt calculated on this basis was the amount which needed to be paid in if the scheme wound up. Not only was this amount often not demanding, but the circumstances in which it was relevant to directors carrying out their day to day duties was often not clear or obvious.

The Pensions Act 2004, the introduction of the Pension Protection Fund and new regulations regarding the deficit on wind-up has changed that.

Now the debt owed to the pension scheme when it winds up, regardless of the employer's status as solvent or insolvent, is calculated on a full buy-out basis (the amount estimated by the actuary that is needed to secure the pensions promised with an insurance company).

This has made the cost of pensions obligations much clearer and much higher, and has introduced a steep learning curve for directors, trustees, financial stakeholders and professional advisors.

The majority of defined benefit pension schemes are in deficit on a full buy-out basis. Therefore, to protect scheme members' benefits and to ensure that employers do not avoid their pension liabilities, The Pensions Regulator has been

given specific powers to deal with two particular situations:

## Contribution Notices

*Where there is an act or failure to act, which prevents the recovery of all or part of the pension debt.*

The contribution notice is for the full amount of the buy-out debt and can be issued against individual directors as well as persons connected or associated with the scheme employer. It should be emphasised that the regulator takes a wide view and could include, for example, refinancing, payment of dividend, sale of businesses or companies, company restructuring.

## Financial Support Directions

*When the employer in relation to the scheme is a service company or insufficiently resourced.*

These directions may be issued against another group company and require the recipient company to take over the regular contributions to the scheme, ie to stand behind the scheme, but not to have to find the full buy-out cost of the scheme in one payment. There is no end time on a financial support direction in the legislation so this could be a considerable burden for a significant period.

The Pensions Regulator may also deploy other powers in these situations, for example by appointing an independent

trustee or by using one of its powers in relation to scheme funding. Additionally, The Pensions Regulator will seek to prevent problems from developing by adopting a risk-based approach to monitoring pension schemes.

Company directors and pension scheme trustees will have a statutory obligation to notify The Pensions Regulator of specific events which could indicate warning signs of trading difficulty - notifiable events.

## Clearance procedure

During the passage of the Pensions Bill, a statutory clearance procedure was introduced to give greater certainty to those who were considering transactions involving companies with defined benefit schemes or corporate finance and restructuring transactions.

The intention is that those concerned could gain assurance via a clearance statement that the action they intended would not be found later to fall foul of the legislation.

The underlying aims of clearance are:

*(a) protection of jobs, particularly where clearance is needed to prevent the employer becoming insolvent.*

*(b) continuation of appropriate deal activity involving employers with defined benefit schemes.*

## MG Rover's pension scheme will be taken into the Pension Protection Fund



# A Lamb's Tale

## A Case Study - Benedict Mackenzie to the 'rescue'

**S**et in compact premises near the College of Law and the University of London, Lamb's Bookshop had a proud tradition of supplying countless students with their medical and legal textbooks for many years.

The business was successful until the advent of internet shopping. The College of Law decided that it would provide for all the textbook needs of its students thus halving, at a stroke, the bookshop's turnover. The death knell sounded when the landlord gave the business six months' notice of the termination of the lease of the shop.

The company became insolvent and early retirement loomed large for the proprietor. It seemed that the company would have to go into liquidation and its book stock sold off cheaply. Furthermore, the cessation of trading would have meant the loss of statutory compensation payable on the enforced termination of the lease.

There were bank borrowings secured by a debenture

and the director's personal guarantee. She had resigned herself to having to find up to £30,000 out of her lifetime's savings.

Fortunately, our London office spotted an opportunity to utilise the fast track administration procedure brought in by The Enterprise Act. We reasoned that the company could continue trading for three months by selling off the stock at half price and so collect the statutory compensation from the landlord.

So, it came to pass. Trading was at a profit largely because the director worked without pay and the bookshop remained open until the compensation day dawned.

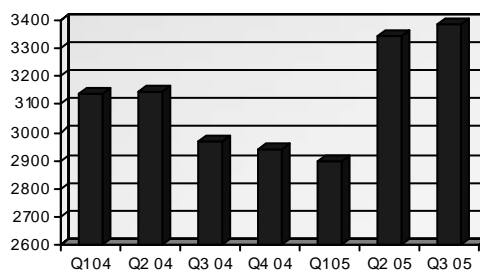
Despite the Administration involving trading, the administrator, Ian Williams, maintained a light touch with the result that our fees were kept to a minimum and the bank borrowings were substantially repaid.

The director then settled her guarantee and had the debenture and the few remaining stocks assigned to her. These have been sold through the internet with the director keeping the proceeds so reducing further her personal loss.



## Insolvency Statistics

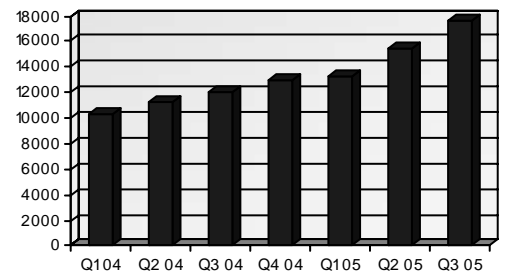
### Company Insolvencies in England & Wales



Source: Department of Trade & Industry

The latest figures show that there were 3,389 company insolvencies in the third quarter of 2005, an increase of 0.3% on the previous quarter and an increase of 14.2% on the same period a year ago.

### Individual Insolvencies in England & Wales



Source: Department of Trade & Industry

There were 17,562 individual insolvencies in the third quarter of 2005, an increase of 11.5% on the previous quarter and an increase of 46.0% on the same period a year ago.

#### Offices at:

**Crawley**, telephone 01293 447799 .. **London**, telephone 020 7247 1174 .. **Sutton**, telephone 020 8642 2252 .. **Tunbridge Wells**, telephone 01892 514451  
**Cheltenham**, telephone 01684 773799 .. **Bristol**, telephone 0117 3736222

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