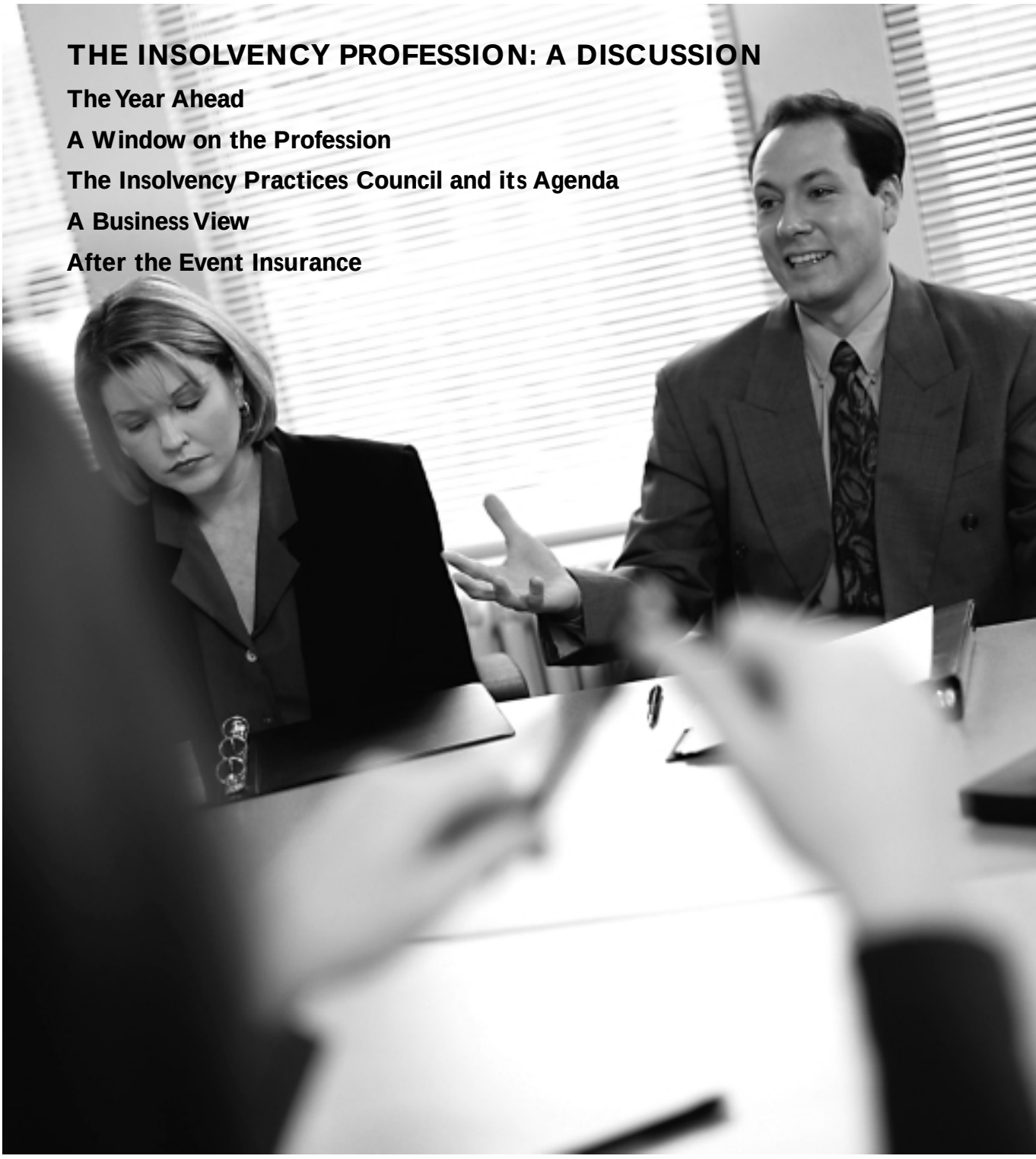
IPANEWS

SUMMER 2000



THE INSOLVENCY PROFESSION: A DISCUSSION

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THE NEWSLETTER OF THE INSOLVENCY PRACTITIONERS ASSOCIATION

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IPA News, the Newsletter of the Insolvency Practitioners Association, keeps members informed of the latest developments in the profession. Coverage of IPA News is complemented by editorial features on range of subjects. Whilst IPA is keen to provoke discussion, it should be understood that the views expressed in IPA News are not necessarily those of IPA.

President's report – the year ahead

By Tony Benedict, President

First of all, on behalf of all of us in the Association, I would like to thank Colin Bird for the enormous effort that he has put into his work as President over the last year. He has managed to keep our Association in the forefront of the insolvency business, and has handled effectively all the problems faced by the IPA over the last year.

As I contemplate the year ahead I am very conscious of the amount of activity affecting our profession. Even without any new initiatives we will all be involved in analysing, consulting on, or reacting to pronouncements by the various insolvency bodies and legislation both from Parliament and the European Union. (For example, bankruptcy proposals, consultation paper on company rescue mechanisms, Insolvency Bill 1999, Office of Fair Trading competitiveness review of lawyers and accountants and the all embracing Human Rights Act.)

Additionally, we must continue to respond to the changes at the Association of Business Recovery Professionals (R3) and I am committed to improving the working relationship with them. We will develop further alliances with the ICAEW and RICS, and make a determined effort to establish closer working relationships with other relevant RPBs.

I am pleased to report that at the AGM held on 28 April resolutions were passed approving the Association's new Memorandum and Articles of Association, together with new committee rules and guidance notes. We are grateful to David Sapte and the Constitution Committee for their work in bringing the revision of our constitution to fruition. These changes will enable the Association to deal more effectively with the challenges which lie ahead.

My aim as President for the coming year is to ensure that we, the IPA, concentrate on consolidating our position as the insolvency regulator of choice. To that end I intend to ensure that the IPA is adequately resourced to deal with demands placed upon us by you the members, government and market forces.

I am encouraged by the dedication of our committee chairmen and by the contribution they make to the smooth running of the IPA's business. I have, where possible, introduced new members who have not previously served on committees with the objective of balancing experience with new blood. I have also seen to it that both larger and smaller firms are fairly represented. The running of the IPA requires considerable resource on committees and I pay tribute to all those members who give freely of their time to deal with committee matters. However, new volunteers are always welcome – there is no shortage of work to be done.

Committee chairmen 2000/2001

Committee	Chairmen
President's advisory & future plans	Colin Bird
Finance & general purposes	Vivian M Bairstow
Constitution	David R F Sapte
Membership & authorisation	Colin M T Haig
Investigation	Richard W J Long
Publications & PR	Maurice Moses
Disciplinary	Gerald A F Coward
Examination & training	Jonathan M Birch
Practice guidance standards & ethics	Malcolm P Fillmore

Last year we identified that the secretariat was overstretched and so we have now recruited additional assistance – more may be required in the future. We will continue to work with the secretariat to improve efficiency wherever we can, and that will include exploiting the opportunities of electronic communication. Using email to communicate with members about day to day issues will save the IPA a considerable amount of money. Most of us already use email in the normal course of our business and we are proposing that by this time next year most IPA communications will only be distributed by email.

When we consider the links we have with other organisations it is surprising how often the word 'joint' appears. This is not by accident – it reflects our efforts to develop a level playing field for all insolvency practitioners. Together with the ICAEW and RICS we include 75% of our profession and we will strive to increase this percentage throughout the coming year.

I am honoured to be elected as your President and will, throughout the coming year, do my best to serve the Association to consolidate our position at the forefront of insolvency practice.

Committee members 2000/2001

President's advisory & future plans
A P M Benedict (IPA president)
J C M Bishop
C D Faulds
M P Fillmore
N S Hill
M Moses
I P Phillips
K A Ross
D R F Sapte
F A Simms
A P Supperstone

Finance & general purposes
H C Brunt
T E Callaghan
C D Faulds
K D Goodman (IPA vice president)
N R Hood (vice chairman)
D R W Smith

Constitution
G A F Coward
M P Fillmore
J Robertson
S R Wethered

Membership & authorisation
H Brunt
L Denney (Investigation Committee link)
S S Goderski
C Laughton
N G Mallett
Lay members:
N Graham
R Northcott
ILC members:
L Gatoff
A Katz
R Marsh
T J Thompson
I E Walker
ILC Lay members:
H Page
A Sellers

Appeals
I D B Bond
P R Gordon-Saker
R Smith
J Verrill
Lay members:
D J Barnes
T Hutson
A K P Jackson
T James

Investigation
R Bajjon
L Denney (M & A Committee link)
R E Floyd
K D Goodman (IPA vice president)
N G Mallett
A Marlor
A R Menzies
P I Newman
I P Phillips
W F Ratford
D R F Sapte
H Smithson
A P Supperstone
Lay members:
M Clark
T Nicholson

Publications & PR
C Bird
M E Cork
C D Faulds
I P Phillips
F A Simms

Disciplinary
C Bird
J C M Bishop
T Frid
B A Guilfoyle
P A Lightfoot
N J Pike
Lay members:
F M Miller
B J Richards

Examination & training
J Branson
K Caesar
N J De'Ath
M Fry
J R Hodkin
J C H Lee
J D T Milsom
D R Thornily
R H Ward

Practice guidance standards & ethics
I D B Bond
A M Menzies
J Robertson
R Robinson
M J Shaw
F A Simms

Publications & PR committee report

By Maurice Moses, Chairman of Publications & PR committee

Our agenda for the coming year focuses strongly on current governmental issues of relevance to the insolvency profession and our ongoing programme of serving members needs. The P&PR committee looks forward to consolidating and developing PR strategies with our new president Tony Benedict.

External issues

There is a great deal of insolvency related activity in the public arena which the P&PR committee needs to assess, to gauge the potential impact on members. The Insolvency Practices Council was created in December last year and is expected to report at the end of this year. We view this as a very positive move, making the activities of insolvency practitioners more open to external scrutiny so more accountable. The profession will be further examined by the government's competition review. The Office of Fair Trading is looking into professional anti-competitive measures, focusing on lawyers and accountants and is also expected to report at the year's end. As insolvency practitioners are likely to be scrutinised it is important that we keep up to date with the consultation process.

The Insolvency Bill, bankruptcy consultation paper and the expected company rescue mechanisms consultation document are all developments indicating a change of emphasis for the profession, as the government consolidates its stance on the rescue culture.

Internal issues

- IPA aims

  We want to bring all IP monitoring under one roof and will work hard to progress this over the coming year. We believe the quality of IPA's monitoring and regulation makes it the regulator of choice.

  The JIMU monitoring system has proved very effective and we will continue to monitor to ensure it meets the high standards we set for it. We want to help members improve their firms' efficiency.

  The IPA could develop contacts with a business school, which could confer a variety of mutual commercial benefits. For example, we could commission sector reports to develop key business issues for insolvency practitioners and the IPA.

- E-business, the IPA website and development

  The new IPA website was launched in November last year, and we are continuing to develop it as a key service to members. Information on the site is being constantly updated, with password protected IPA committee minutes available on the site, for the benefit of committee members. IPA proposals and copies of IPA News are also on the site. We are developing an email based service, through which members will be personally notified of any relevant IPA information.

  Further improvements include a direct news-link to the DTI and 10 Downing Street, and a new student section giving career information to potential insolvency practitioners.

  The website is there primarily to serve its members, so we have incorporated the ability to email the secretariat and committee chairs direct from the site. The bulletin board is a more interactive feature: enabling members to post comments on which opinions can be given, which all members can view.

Our goal is to increase member usage of the site in the coming months; so members can benefit from its key functions as a communication facilitator and means of keeping down costs, for example distribution. Any queries about the website can be directed to p&pr@ipa.uk.com. The IPA website can be accessed at www.ipa.uk.com.

The Insolvency Practices Council (IPC) and its agenda

By Graham Kentfield, IPC chairman

After retiring from the post of Chief Cashier at the Bank of England, I took up the post of IPC chairman in December 1999. It is essentially a new field for me, but I hope that 35 years of grappling with practical and policy issues in the Bank will be relevant in getting to grips with the issues before the IPC. In particular, I believe my previous experience of representing the Bank of England to a wide range of audiences all round the UK will help make the role and duties of insolvency practitioners better understood by the public.

IPC Background

In 1997 the insolvency practitioners and DTI decided it was time to review the working of the 1986 Insolvency Act, by then ten years old, and as a new Insolvency Act was being discussed. In particular, the review was to consider whether practitioner regulation was appropriate and effective. The review concluded that, broadly speaking, the profession would benefit from a wider public interest being brought to bear. The review therefore recommended creation of the IPC, a review body which can really recommend change. As a public interest body, it can examine the insolvency profession objectively – making regulators more accountable.

In fact, the professional licensing bodies have high standards and generally take a tough line if members fall short of them. However, public perception is very important and we hope that the creation of the IPC will assure the public that an independent group is considering such matters. The IPC is not an executive body and cannot take direct action, but its annual report will carry weight. The council is funded by the profession (the insolvency regulatory professional bodies contribute funds), but is not in the profession's pocket. It is an independent public interest body, and if the profession doesn't like its findings, that's too bad!

Lay Members

Robert Bertram – Edinburgh solicitor, member of the Competition Commission and former member of the Scottish Law Commission.

Caroline Bradley – technical adviser to the Association of Corporate Treasurers and until 1996 Group Treasurer at Anglian Water plc.

Gill Hankey – Principal of the Hull-based Bankruptcy Advisory Service.

Max Lewis – Director of Marsh and McLennan Securities, multinational insurance brokers.

Roger Page – Cardiff-based management consultant. Previously held senior management positions with Midland Bank plc.

Insolvency Practitioner Members

Philip Wallace – London based KPMG partner, council member of the Association of Business Recovery Professionals.

Brendan Guilfoyle – Begbies Traynor partner in Leeds and past President of the Society of Practitioners of Insolvency, (now R3, the Association of Business Recovery Professionals).

Peter Horrocks – recently retired as Lovell White Durrant partner and a past President of the Insolvency Lawyers Association.

The IPC comprises the chairman, five lay members and three practitioner members.

Agenda

Five or six council meetings will precede our annual report. At the first meeting there are three issues I am planning to address: unregulated debt advisors ('ambulance chasers'), proposed new bankruptcy legislation and legal and accounting partnerships acting as a one-stop-shop for advice. However, as this is a new body the agenda is not very structured and I want to leave time for council members to raise their own concerns.

Anyone can be a debt advisor – and some are rather 'less good' than others. Although they are generally not themselves insolvency practitioners, there must be practitioner involvement if an IVA is to be established, but this can implicate practitioners in debt advisors' malpractice by association. What must insolvency practitioners consider when taking work from these advisors? How should they advise the 'client'? Although practitioners don't actually have clients as such, there being no overriding client duty; they must treat the debtor fairly, respond to creditors and answer to the courts.

Proposed legislation seems to envisage bankruptcy trustees having to decide which bankrupts are culpable or not. The onus on trustees to make this distinction is likely to be very difficult to exercise.

Legal and accounting firms are starting to offer a one-stop-shop for advice, which may be cheaper but perhaps not impartial? The situation implies a conflict of interest.

The IPC does not intend to look at individual cases as it is not designed to be an ombudsman for individual complaints, although inevitably we shall need to be aware of particular problem cases as these may throw up generic issues.

Access to the IPC

The lay members of the IPC come from a wide range of backgrounds and experience and several members are or have been involved with small businesses and are thus reasonably well aware of consumer concerns. The council's three insolvency practitioners will highlight professional issues to the IPC. The council has a formal link to the profession through the Joint Insolvency Committee (JIC), which will bring together committee representatives from all professional bodies. The JIC will communicate concerns to the IPC and address internal areas of discussion. It will communicate with the working insolvency practitioner, although practitioners and the public can make representations direct. The JIC will be liaising between insolvency practitioners and the IPC, as we don't intend to discuss issues in isolation and then decree what insolvency practitioners should do. We want to interact with the profession and create a good working relationship to help implement our recommendations.

Issues to consider

One area for IPC consideration is likely to be the Office of Fair Trading's anti-competitiveness review focusing on the legal and accountancy professions, and by implication on insolvency practitioners. The insolvency licence restricts access to the profession but do we want to loosen professional standards by lowering barriers to entry?

Two potential areas of conflict, even if only by perception, are investigating accountants acting as receivers and the scale of practitioners' fees. The former requires firms to explain to clients the terms of their appointment and to be conscientious in carrying out their duties, whilst the *obiter dicta* from the Maxwell case and the Ferris report showed that insolvency practitioners' fees were not exorbitant. However, in both cases it is a matter of transparency and of showing value.

The possibility of non-insolvency practitioners conducting CVAs is something the IPC will also be considering. The government has reserved the right to give these professionals CVA work but it is too early to assess potential effects.

I regard it as important presentationally, and indeed in fact, that the council does not only meet in London. I intend that at least one or two council meetings each year should take place outside London, as we want to be seen as a nationally relevant body. I don't see the IPC producing fireworks immediately, as we want to take time to understand the issues. Our report is due at the end of the year so watch this space!

Ethical helpline

The scenario

A corporate finance partner in an accountancy firm was requested by one of his firm's audit clients to undertake due diligence work on a target company, for which this client had made an agreed take-over bid. During this work, the corporate finance partner decided the target company was insolvent and introduced this company to one of his partners, an insolvency practitioner. The practitioner went on to accept an appointment as administrator of the company. As administrator the practitioner sold, apparently at market values, the majority of assets to the audit client – who had requested the due diligence. The practitioner subsequently accepted the office of liquidator of the target company.

The ethical questions

1 Should the insolvency practitioner have accepted the appointment as administrator of the target company?

2 Should the practitioner, as administrator, have sold assets to the audit client?

3 Should the insolvency practitioner have accepted the appointment as liquidator of the target company?

Question analysis

1 In considering whether to accept the appointment as administrator, the insolvency practitioner should have considered the target company creditors' interests, ignoring the interests of his firm's audit client.

The real issue here is the perceived conflict of interest. This is so great that no partner in the firm should have accepted the appointment as administrator under these circumstances without evidencing on file that the issues and potential risks to creditors had been fully considered, including steps that would have been taken to minimise such risks. In this context, a reference by the insolvency practitioner to the appropriate Recognised Professional Body might have been helpful (it is appreciated that this may have taken place).

At minimum, the insolvency practitioner's firm should immediately disclose the situation to the audit client and cease to act for it in relation to the potential acquisition. Safeguards should be implemented to ensure that commercially sensitive information does not pass to what is now only an audit client of the firm. In the absence of such measures, there would be a real conflict as the firm would in effect be wearing 'two hats.'

Reasons for the perceived conflict:

- There would be a perception that the administration was convenient for the audit client, which could buy the assets at a much lower price than if purchased from an impartial party.

- The insolvency practitioner should have known that the audit client would be perceived as eager to buy the assets.

Against this has to be set the following:

- As a result of the due diligence exercise, the insolvency practitioner's firm may well have had relevant knowledge putting the practitioner in a better position than anyone else to conduct the administration – a procedure that can depend on speed.

- Given the proposed take-over's history, it was likely that the firm's audit client was the obvious and best potential purchaser of the assets, to the creditors' advantage.

Nevertheless, the insolvency practitioner should have foreseen the potential for criticism and taken the protective steps outlined above.

2 Once in office, an administrator has a duty to maximise returns to creditors of the company, whether that be through maximising realisations, minimising liabilities or a combination of both.

The use of the words 'apparently at the market rate' implies that the price achieved was appropriate in the circumstances and hence is not in issue.

If the administrator took appropriate steps to market the assets and the highest offer was that received from his firm's audit client, he would be under a duty to accept and complete that offer.

The administrator would, of course, be required to maintain 'Chinese walls' between his actions as administrator and the firm's potential (or perceived) role in advising the audit client. We would expect the firm to refuse to advise the audit client in relation to the transaction from the point of administration, and for the administrator to take steps to ensure that no commercially sensitive information became available to the audit client in any way.

The fact that an appointment has been accepted when a conflict of interest is present cannot affect a sale, as purchasers are protected under s14(6) of the Insolvency Act 1986, as long as they act in good faith and for value.

Disclosure to and the approval of the creditors' committee would be desirable, if there is one. We do not believe that the court would be either willing or an appropriate forum to approve such a sale; it is the administrator's job to exercise appropriate commercial judgement.

3 Following on from the analysis above, the insolvency practitioner should probably not have taken the appointment as liquidator in these circumstances.

This is because the liquidation would be the last point of check on the actions of the recent organs of the company, whether these are directors or administrators.

In our view, in these circumstances, there would consequently be a real conflict of interest for the insolvency practitioner partner to accept the appointment as liquidator.

The existence of a joint appointment, which is mentioned in the statement of facts, does not resolve the conflict. The IPA ethical guide specifically states that when a practitioner is examining a joint appointment, he should be guided by similar principles as when considering a sole appointment.

Conclusions

- The insolvency practitioner should have considered all areas of potential risk to creditors of the target company and ways in which these could be properly minimised, when balanced against potential benefits, before accepting the appointment as administrator. Ethical guidance from the practitioner's RPB would be useful. These considerations should be evidenced.

- Once he was in office, the administrator's duties were set.

- The administrator should not have accepted the appointment as liquidator.

The IPA panel are conscious of the fact that, in this particular scenario, the use of the ethical hotline was probably inappropriate. It is not in existence to seek views on potential conflicts of other members, which might be used against such members and/or the IPA in the future.

The purpose of this service is really for members to seek guidance when they are in doubt about their own nomination, not to seek ammunition to fire at other members, which we trust they will bear in mind, when dealing with this matter.

A window on the profession

Frank Simms and Carl Faulds are both active members of their profession who, by virtue of the periods of time which have shaped their professional lives, have their own views on insolvency and regulation. They discussed their views with us on a variety of topics.

FRANK SIMMS
Founding partner of FA Simms and Partners since 1977, which became FA Simms & Partners plc in 1998.
IPA Committees:

- President's advisory and future plans
- Practice guidance and ethics
- P&PR

Frank started practising in the 70s, against a background of a powerful manufacturing industry and large scale insolvency cases.

CARL FAULDS
Partner at Radfords
IPA Committees:

- President's advisory & future plans
- P&PR

Carl has been practising for 14 years, obtaining his licence through the JIEB exam whilst the country was in a major recession and supports the recent popularity of rescue procedures.

Evolution of the insolvency industry

IPA – How has the insolvency profession developed during your time as an insolvency practitioner?

Simms-The manufacturing sector has been declining since the high point of the 70s and 80s, and you just don't see the same volume of large scale insolvency cases now. The statistics only show the number of cases arising not their asset value, which in some cases are so minimal that they cannot afford an insolvency practitioner's fees. The 1986 Insolvency Act was the start of creating a true profession. However, we are not there yet and still have to set ourselves higher targets. We need to constantly review individuals' performance to ensure professional standards are maintained.

IPA – Can insolvency practitioners counteract the shrinking of their market?
Simms – Practices need to be more forward thinking in developing a future. Faulds – There are less insolvency practitioners these days due to natural wastage, insolvency is a shrinking market, although I have had some good weeks recently! I am trying to introduce other types of work into the practice, such as corporate finance. The insolvency profession is well placed to do more with distressed businesses – providing a broader range of solutions.

IPA – Are smaller practices equipped to

make the change to a broader spread of insolvency work? With many smaller practices specialising in liquidations, perhaps re-education is needed?

Simms – Practices need to create new areas of fee earning work – corporate finance work for example.

Faulds – It is difficult for me to comment on other firms' work, retraining would not necessarily do any harm – and R3 is attempting to do this. It is more down to mindset though, you have to be willing to think laterally.

IPA / regulation issues

IPA – To start with the level playing field, now that IPA and ICAEW are being jointly regulated, where do you see it going from here? In addition, as the IPA charges the highest fees, would insolvency practitioners welcome unification and is this high fee justified?

Simms – I want the IPA's work to continue, as it doesn't make sense for different regulatory bodies to follow different rules. We want to make the profession more accountable – the aim of the 1986 legislation. People do move from IPA to other bodies due to the lower fees but to be honest, I don't believe the other regulators do as good a job as IPA, and have found some of them quite poor from experience. There is also the paradox of the DTI both issuing licences and making the rules, also charging the lowest fee for licenced practitioners.

Faulds – Economies of scale resulting from regulatory bodies combining should reduce the licence fee. As an insolvency practitioner I prefer to belong to the IPA, as it is the only specialist insolvency regulator. This is beneficial if you have a conflict of interest problem or are subject to a complaint as the regulator is more likely to help or understand, knowing the field. Monitoring is more effective, as they are aware of the likely pitfalls! The DTI charges the lowest licence fee, but they don't actually monitor at all. They have a statutory duty to provide a licence, if you are a fit and proper person and only if you commit a serious mistake do they remove your licence. But there is no support on offer, and it raises conflict of interest problems as the government is trying to remove regulation on the one hand, with the OFT anti-competitiveness review; and on the other hand it is regulating through the DTI.

IPA – Do you think that IPA is the right body to take joint regulation forward?

Simms – Yes I do, the IPA is the most effective regulator. In addition, the process of joint monitoring has already commenced with the ICAEW, together they licence about 75% of practitioners already.

Faulds – I definitely feel all practitioners should be regulated by the same body. It is sensible for the IPA to fulfill this role and it has taken steps to unify monitoring. JIMU is the start and other monitoring bodies should join in.

IPA – What are your thoughts on how IPA is organised?

Simms – I have been extremely impressed since joining various committees by the commitment of their members. However, is the younger generation able to spare the same amount of time for such work? To fulfill all its functions satisfactorily, especially if it became the sole regulator, the IPA needs far more financial resources and has to restructure itself so it can continue to progress.

Every organisation has to charge subscriptions to cover costs, but if non-practitioners can do CVAs and IVAs they will not be paying licence fees to the regulatory bodies. RPBs will therefore lose out on licence fees and licence holding practitioners will have to pay more to the regulator – giving non-licenced operators the

opportunity of under-cutting insolvency practitioners on fees. In addition, RPBs are paying for the IPC out of subscription fees to make the profession more accountable – another cost non-licenced operators will not have to bear.

Faulds – when I first joined the profession we didn't have JIMU, the IPA started as a discussion group for insolvency issues, which created a good ethos which is still one of IPA's strengths. The IPA is now more professional, with increased competitiveness within the market making it leaner and more efficient. Regulation and fees have increased with this increased professionalism. These changes have not necessarily been for the better but they have been forced upon us.

At the moment, IPA is under a lot of pressure due to its high workload. Luckily the committees are very active and members give much of their time, free. The secretariat is the hub of this so must be very efficient.

IPA – Do you think younger members of the profession are continuing to contribute to the workings of IPA committees?

Faulds – It is more appropriate for senior members of the profession to join committees, as they are more experienced so can add more to the IPA. I think younger volunteers are still coming forward and I don't see a problem with this continuing – especially if IPA became the sole regulator. The number of IPA licence holders is increasing, and these are composed of the more active members of the profession.

IPA – Do you think that IPA ought to offer anything else as part of its licence fee?

Simms – Not really, it does a good job. They used to have an annual conference, which was started up again last year. I think it is a good opportunity for the profession to get together to talk about regulatory issues.

Faulds – As a firm we have been asking for JIMU to provide copies of its checklists. If we all worked from the same checklists, it would be easier for JIMU to monitor technical compliance. It would also save costs through time savings. The IPA could become a little more proactive rather than reactive in this way.

Firm appointment

IPA – What are your views on the benefits of insolvency firms holding the licence, as opposed to licence holding members?

Simms – Increasingly, practices are becoming incorporated into limited companies, so liability attaches to a company not an individual. If firm licensing were available, it would be much easier for creditors when office holders moved firms, or resigned from their practice. The Insolvency Bill enables cases to be transferred more efficiently, but does not remove the requirement for practices to be responsible as is the case with commercial audits.

Faulds – I disagree completely with firm appointments. If you know malpractice will result in you being personally disciplined, it encourages a sense of individual responsibility, rather than a partner holding a licence for the whole firm. Where this occurs, partners might need to meet to make decisions, which in a fast moving insolvency case is not practical.

IPA – Is this fair on the insolvency practitioner?

Faulds – You shouldn't be an insolvency practitioner if you don't want the responsibility. Discipline is the key – if the IPA have a complaint with a 'big 5' player, it is easier for them to take issue

with an individual rather than a multi-national corporation. The sense of responsibility fostered is greater, leading to better work.

Governmental issues

IPA – As part of the recent bankruptcy white paper, the government propose that the Official Receiver's (OR) office perform IVAs. This is to bring economies of scale, use regional centres for greater accessibility and would allegedly be cheaper than the private sector, freeing more money for distribution to creditors. What are your thoughts on this?

Simms – If the Customs & Excise and Inland Revenue are to merge in 2003 as has been indicated, the government could well be the major creditor in most insolvencies. If CVAs and IVAs are carried out by non-licenced practitioners at the OR's office, the government should ask itself whether they can keep this work in-house while they are the major creditor. I believe all work should be retained by licenced practitioners.

Faulds – The liability aspect is very interesting, you can't sue the crown and therefore the OR for negligence, so they are not accountable when taking commercial decisions. This raises human rights questions. The OR could do an IVA with the crown as preferential creditor voting to approve – against a third party trade creditor who may not get a dividend due to their unsecured status. The creditor is bound by the crown's unaccountable commercial decisions!

IPA – Do you think that the profession is doing enough to communicate with government?

Simms – The professions' comments during the Insolvency Bill consultation period seemed to have little effect on the amending of the draft Bill. The Insolvency Bill is contrary to what practitioners require.

Faulds – The requirement to give notice before appointing an administrative receiver was taken out, but the provision relating to non-insolvency practitioners doing CVAs was left in. I believe this demonstrates that the banks have far greater lobbying power than the relatively small insolvency profession. However, we need to ask whether practitioners want to have a more active role. The level of reaction from members of the profession to regulation issues seems pretty poor. If they want to have a more active role, members should communicate this through the IPA or R3.

The government is, I believe, trying to change the image of insolvency through legislation. In the Insolvency Bill currently passing through Parliament the secretary of state will have the power to authorise non-practitioners to do CVAs. It is almost saying if we are not happy with the way you operate, we will allow other professionals to conduct the procedure. They are trying to create outcomes without full knowledge of the circumstances. As a profession, we approve of steps taken to ensure that abuses of power are kept in check, but this legislation calls into question our ability.

The Insolvency Practices Council

IPA – Do you have any opinions on the new insolvency review body – the Insolvency Practices Council?

Simms – I see it as an ombudsman committee where problems with the profession are brought to light. The IPC is being funded by the insolvency profession, which is another factor the government should take note of when considering further responses to the Insolvency Bill.

Faulds – Its main job should be to reassure the DTI and public that self-regulation of the insolvency profession is effective. The IPC might consider if CVAs are being given proper consultation.

R3

IPA – How well do you think R3 represents the insolvency profession as its trade body?

Simms – R3 is not profound enough with the press, we need to show the constructive side to the profession. R3 need to get out and talk to politicians, people like Stephen Byers, they need to sell the industry.

Faulds – I think R3 is generally very good for the profession but it is very difficult to measure its PR effectiveness as there has certainly been a lot of insolvency practitioner bashing over the last five years and we are an easy target.

IPA – don't you think this negative perception has changed somewhat?

Simms – In the banking sector and within the professions, yes, but we still need to change the public perception of the insolvency industry. We need to consult more with government.

IPA – R3 has decided to welcome turnaround professionals into its membership, do you think they will be attracted to join?

Faulds – Initially yes and I think turnaround members will stay with R3 for at least a few years to get credibility. This helps everyone, as the larger players will bring more in the way of resources and funds into R3, smaller firms will benefit. R3 is doing this so we all get the opportunity to adapt our skills and attract more work. R3 is run by the bigger firms and has their interests at heart, but the critical mass of smaller firms helps them achieve their aims. It is a mutually beneficial system.

Attendance at creditors' meetings

IPA – Why have creditors' meetings become so badly attended?

Simms – People are leaner in business these days and so not many companies send representatives to creditors' meetings. It all costs money, in travel, time etc. and they know that, at the very least, they will get the VAT back so don't bother attending. Also, the insolvency profession is far more organised today in its approach, so creditors know we will do our best to maximise returns.

Faulds – I chaired a meeting of creditors yesterday, and out of 100, 1 creditor attended and he was another insolvency practitioner! If Stephen Byers is worried about regulating practitioners he should encourage creditors to attend meetings. Creditors don't think that attending will be of any benefit and prefer to chase current rather than bad debts. Crown preference means that in most cases there is little to distribute amongst unsecured trade creditors in any event. If the Crown's preferential status was removed, creditors might take more interest in proceedings.

IPA – What are the benefits of attending creditors meetings?

Faulds – A creditor could be appointed to the creditors' committee, by far the most direct way of controlling an insolvency practitioner's fees – although, as a firm, we generally get the fees we ask for as we are able to satisfy creditors that they are reasonable. There is a potential problem, however as creditors can put a practitioner in an awkward position when asking us to investigate directors' conduct; losing sight of the possible returns for the sake of retribution. An insolvency practitioner may feel forced to pursue an avenue knowing it is not cost effective, although often investigation work is productive. It is a delicate balance for the practitioner.

IPA – Thanks to Frank Simms and Carl Faulds for making an interesting comparison of views.

Regulatory reports

Disciplinary Committee reports

On 8 November 1999 a disciplinary tribunal heard a case against a member who is a partner in Grant Thornton and found the following matters proved in relation to a company in Compulsory Liquidation:

1. The partner failed to take adequate steps to recover any of the non factored book debts.

2. The partner failed to obtain information from the director to assist in the recovery of the book debts.

3. The partner failed to attempt to recover the debts directly from the debtors.

Order – Reprimand, Fine £3,500, Costs £35,000

On 20th March 2000 a disciplinary tribunal heard a case against a Member, Solomon Cohen and found the following matters proved against him:-

1. As Liquidator of a company he did not account expeditiously to the Bank for book debt recoveries caught by the Bank's fixed charge nor did he keep the Bank advised of his reasons for so doing, nor how much he was holding.

2. In response to the enquiries of the Investigation Committee he took an unreasonably long time to respond.

Order - Reprimand and Fine £4,500

Investigation Committee report

Consent Order

On 1 March 2000, a member Michael Rimmer, accepted that a Consent Order be made against him as follows:-

That, whilst acting as joint liquidator of a company, he failed to remedy the continuing defaults in the conduct of the liquidation, which had been a matter of record for some considerable time; namely

- Failure to investigate the company's affairs within a reasonable time and report the findings to creditors.

- Failure to hold annual meetings of creditors.

- Drawing unauthorised remuneration.

Order: Reprimand, Fine £3,000, Costs £100.

Consent Order

On 11 February 2000, a member Neil Henry, agreed that the following Consent Order be made against him:-

"That in relation to two Individual Voluntary Arrangements he made modifications without obtaining the prior consent of the debtors."

Order: Reprimand, Fine £3,000, Costs £2,250

Consent Order

In March 2000, a member Peter O'Hara agreed to the following Consent Order:-

"That in relation to a Company in Administration of which he was acting as Administrator he failed timeously or at all to keep the creditors, and in particular, the continuing suppliers to the company informed, of the material change in the circumstances of the company."

Order: Severe Reprimand, Fine £5,000, Costs £1,397

IPA investigation leads to jail sentence for former insolvency practitioner

An investigation by the IPA has lead to a successful conviction and two year jail term for one of its former members, indicating the strength of self-regulation.

Following the IPA investigation, the practitioner concerned, Ian Clark, had his insolvency authorisation withdrawn preventing him from acting as an insolvency practitioner. The findings were so serious that the IPA referred the matter to the police who successfully prosecuted Mr Clark. On 3 May 2000, Ian Clark was sentenced at Knutsford Crown Court on two charges of theft, receiving a prison term of two years. These sentences are to run concurrently.

The Cheshire Constabulary's Fraud Unit praised the IPA for the detail of evidence gathered during its investigation which ensured that a lengthy and costly court trial was avoided.

Musings from the middle

By Peter Newman, Complaints Officer

My previous article was written in an attempt to give you appropriate reassurance that if you are pressurised by a potential complainant, in an attempt by him to obtain benefit to which he is not entitled, you should appropriately stand firm. I am therefore discomforted to find recently whilst talking individually to some insolvency practitioners they still appear to have potential difficulty with this aspect. Indeed the word paranoia was used to describe 'fear' of a complaint being made.

Let me attempt to put the matter in its proper respective. Firstly, I must assume that you are the 'average' insolvency practitioner. Therefore you can expect that I will receive perhaps one complaint against you each year. Statistics show that 90% of complaints having been properly dealt with by the IPA do not require any action to be taken against the insolvency practitioner. Perhaps a further 5% reach an appropriate conclusion, with the insolvency practitioner accepting that he can assist the complainant in an even handed way. This usually occurs when 'encouragement' is given to him by the Association. It often means that an avenue is identified which had not been noticed previously. My style is that I like to have you believe that consequent to correspondence between us, you suddenly spot the way forward. You are happy, the complainant is happy (or properly attended to) and I am happy. Everyone can then move on and it has been relatively painless. Just a few letters and a little time spent by you.

I turn now to my main subject which is again the currently hot potato 'self-regulation'. We all know that we are privileged to retain this status and we also know that for good reasons others are losing their status or are in dire danger of doing so. A main plank of my role as Complaints Officer is to ensure that by keeping alert I will continue to ensure that no sustainable complaints against self-regulation by the IPA will arise.

Essentially I am happy to accept that the complaints desk is the front line for any attack on our self-regulatory status. Therefore, I always have clear in my mind that the insolvency legislation primarily provides a situation of creditor democracy. Obviously administrative receiverships fall into a different category, but even here there is always the creditors' democracy to flow from a subsequently (usually!) appointed liquidator.

With this philosophy in mind I am very conscious of the numerous complaints where the complainant's principal affront is all or any of the following: the failure has happened before, the directors always get away unscathed, the directors buy the assets at a knock down price or they are trading again from the same premises in the same line of business.

Now we all know that there is very effective legislation in place to prevent the above if prohibited names are used without following the appropriate insolvency rule. Just as obvious is the

fact that the creditors are not aware of this legislation. Therefore, in the protection of our valuable self-regulating status I, 'the regulator,' identify the matter for the complainant and I pursue it with the office holder.

I am just amazed that there are some practitioners who then either directly or even through their solicitors cry foul: "Sections 216/217 were not part of the complaint raised by the complainant." Perhaps after publication of this article such responses will cease!

At the time of writing some 10% of my live case load has necessitated me informing the insolvency practitioner that s216 appears to be an issue. The responses vary widely, about which, more later. However in all but two such cases my belief is confirmed, and very interestingly, the remaining two cases have identified that the liquidator has suddenly 'realised' that s217 is an active remedy for creditors in 'his' liquidation. At this point for those who ask for clarification I refer them to my *Window of Opportunity* article, published in the November 1997 edition of this newsletter.

Just a point of added interest here relates to the liquidator's remuneration, properly earned and authorised, but not available in the insolvent estate. Might the liquidator be able to claim under s217 for such payment?

My concern at the responses which I receive, as referred to above, relates primarily to consulting solicitors as to what to do following a breach identified by the liquidator of s216. Is this not simply rubbing salt into the creditors wounds? It appears to me to be a simple process. If you turn particularly to s218(4) the route of action is identified as is the urgency. The word 'forthwith' gave rise to a considerable debate and lengthy correspondence in an earlier, I believe, non 216/217 complaint. The only solace I can offer you, if you have not already reported the matter, by the time that I contact you on the point, is that you might justifiably be able to claim that it had only 'appeared' to you as a problem consequent upon my bringing it to your attention! Incurring legal costs payable out of the estate in relation to s216 advice does seem to sell your creditors short in a situation where they derive no financial benefit.

Some others of the responses I have received I have to say are ingenuous but, in my opinion, do not focus properly on the simple matter in hand.

In clarifying for you my stance on these matters, please also remember that my 'investigation' of complaints is always from the viewpoint of 'creditor democracy legislation' and so therefore do not be surprised that when you receive a copy of the complainant's letter of complaint, which ordinarily you do, you find that I am raising supplementary matters.

A business view

By Richard Baron, Deputy Head of the Policy Unit, Institute of Directors

The Insolvency Bill has ensured a high profile for insolvency issues. Meanwhile, the profession has been re-thinking its own role due to market-place and legislative changes, leading to the formation of R3 in January.

In December 1999, the Institute of Directors sent its members a questionnaire focusing on corporate insolvency and business recovery. 380 members responded. The results indicate opportunities for the profession, but also some remaining image problems.

Advice

Respondents were asked to state the latest time when a company in difficulties should seek external advice. 31% of those with a view picked the earliest point suggested, when the company's overdraft reached an uncomfortable level. 6% were prepared to wait until the company exceeded its overdraft limit. The next trigger-point, when the company had difficulty paying its suppliers on time, was chosen by 35%.

23% were prepared to see a company wait longer, up to the point when it had difficulty in paying its employees, as well as its suppliers, on time. Finally, 5% would allow a company to wait until it received threats of legal action, had a county court judgement against it or even later.

It is clear that there is no culture of seeking external advice every time there is a worry, but on the other hand IoD members recognise the seriousness of not paying debts on time. One member commented that with proper monitoring of a businesses' state, it should become clear early when a company might have difficulty paying its debts on time. Of course if every business monitored itself that carefully, the insolvency profession would have a lot less work to do.

The decision of SPI to change itself into R3 has a very positive flavour to it: saving businesses is just as vital a service as executing statutory processes. But we will only see results if businesses recognise when they need advice, or their banks tell them firmly when to get advice.

Advisers

IoD members were asked what qualities someone advising a company in a financial crisis should have. 43% of respondents thought it important that an adviser should be a member of a professional body, and 41% thought that an adviser should be licensed by a regulatory body, an interesting point for the IPA to consider.

Members were then asked what should happen to the management of a company in serious financial difficulties which might still avoid liquidation. Only 28% would have the directors hand control to an insolvency practitioner. Some respondents commented that insolvency practitioners are far better at winding up companies than at running them. The profession has some self-promotion work to do, trumpeting the number of jobs it saves and the number of machines it keeps at work instead of their being scrapped.

The Moratorium

The idea of a moratorium was very popular. 90% of respondents wanted this new procedure, proposed in the Insolvency Bill currently passing through Parliament. However, a moratorium will fail if a company's suppliers refuse to make further supplies on credit. Only 33% of respondents would sell on credit to a company in a moratorium. If a company lost two thirds of its regular suppliers, it would have to cease trading even if it was safe from legal action by existing creditors. One respondent pointed out that the prospect of a delay in recovering money, caused by a moratorium, might even lead creditors to take precipitate action to recover money before a moratorium could start.

The moratorium procedure will only gain the confidence of creditors if there are effective safeguards against assets leaking away. The Insolvency Bill would require certain transactions to be authorised by the nominee, but it remains to be seen whether that control will be adequate. One respondent argued that a company should have to use independent advisers during a moratorium. That would go beyond the role which the Insolvency Bill proposes for a nominee.

Floating Charges

95% of respondents thought that holders of floating charges should be forced to give warning before putting a company into receivership. The government's decision to drop this proposal from the Insolvency Bill is therefore unlikely to go down well with business people.

One respondent suggested that a bank should not be allowed to appoint a receiver without the involvement of an industry expert who would assess the situation and advise or arbitrate: he clearly had in mind someone more independent than the bank's investigating accountant. Another respondent said that the bank should be required to consult with major suppliers before appointing a receiver. However, like the compulsory warning period, such suggestions represent an interference with the rights of a charge-holder. Maybe those rights should be restricted, but we would then see a change in the lending market with higher interest rates for riskier borrowers.

The Pursuit of Directors

IoD members were asked whether creditors should contribute to a fighting fund for an insolvency practitioner to chase delinquent directors who had incurred personal liability, in an attempt to increase the return to creditors. 45% thought that creditors should contribute but 33% thought that they should not, while 22% did not know.

It is not surprising that there should be no clear majority view on this question. Creditors would be asked to risk money on a very uncertain outcome, and business judgements of risk and reward naturally differ from one person to another. If the profession does want to develop the director-chasing business, it will need to establish a record of significant additional returns to creditors.

Insolvency Practitioners' Fees

A number of respondents expressed concerns about insolvency practitioners' fees. It was felt that fees were often high and absorbed all of the assets that would have been available to unsecured creditors. There is a challenge for the profession in explaining what practitioners do for their money, and in particular why the unsecured creditors can be better off hiring a practitioner than not doing so. Some respondents wanted to see a system of payment by results, with fees being related to the money realised for creditors. Now that really would be a challenge!

After the event insurance – an insolvency perspective

By Robert Welby,
in association with Litigation Protection Limited.

The Conditional Fee Agreements Order 1995, subsequently amended by the 1998 Order and now the Conditional Fee Agreements Order 2000, created opportunities for insolvency practitioners to maximise recoveries for creditors as well as increasing levels of remuneration. Commonly known as 'no win – no fee' agreements, they have heralded a new dawn for insolvency practitioners.

Previously, cases with little or no assets were poorly investigated and any claims against directors or third parties were unlikely to be pursued, due to the reluctance of creditors to contribute to a fighting fund. The advent of CFAs changed the whole insolvency climate and added an extra weapon to the insolvency practitioners' armoury. Not only were CFAs a means of instigating litigation without funds but they also had a salutary effect on respondents, thus encouraging early settlements. The Access to Justice Act 1999, which came into force on 1 April 2000, has now brought in the recoverability of the insurance premium and the success fee.

Whilst CFAs brought many benefits, they also suffered from certain drawbacks. The first major drawback was the reluctance of counsel to act on a similar basis to solicitors. Even now, certain sets of chambers will not undertake CFA work.

A second drawback was the traditional tactic for respondents to apply for security for costs, on the basis of the plaintiff's (now known as claimant's) insolvency. Whilst courts did not always grant such orders, nevertheless, it put additional pressure on the insolvency practitioner and created extra work for the lawyers who were not being funded.

The third, and perhaps most significant drawback, was the prospect of losing and being held liable for adverse costs. However strong a case may appear, litigation is never certain as litigants have found to their cost. Whereas there is a measure of control on your own costs, you have no control on your opponent's. They may employ a large city firm of solicitors, a senior QC and junior counsel, which you will pay for if you lose.

The solution to these problems is litigation insurance, which has been around for some time, but is not widely known, even amongst the legal profession. The premium for this kind of policy is also recoverable from the losing opponent under the Access to Justice Act 1999. A small but growing number of companies offer this insurance, although sometimes the premium rates may be a little off-putting.

Available schemes allow the litigant to tailor the product to their individual requirements, including the degree of risk they are prepared to accept. Cover can indemnify one against some or all of the following risks, if the case is lost:

- Having to pay all or some of your opponent's costs
- Having to pay your own costs, including solicitor's fees and disbursements (all those expenses incurred on your behalf, such as counsel's fees)
- Having to pay expert witnesses' fees
- Some schemes also allow you to insure the premium for the policy.

A pre-requisite to effecting insurance is a positive counsel's opinion giving a better than 50% chance of success. The

greater the percentage, the lower the premium.

The cheapest option is where a CFA is in place. Understandably, underwriters are more comfortable in the knowledge that solicitors are prepared to 'put their money where their mouth is.' A typical premium for a CFA policy would be approximately 13.5% of the sum insured plus 5% Insurance Premium Tax (IPT). Therefore, for £50,000 of cover the premium would be £6,750 plus IPT.

For fully funded cases, i.e. where a CFA is not in place, the premium would typically be within the range of 20% to 40% of the sum insured, the premium depending upon the perceived strength of the case.

Another feature which litigation insurers may offer is the ability to access funds: to pay the premium and the litigants' own solicitor's and counsel's fees throughout the case. If unsuccessful, then the policy will then repay the borrowings and third party costs.

Anyone contemplating litigation insurance should remember that such policies only pay out on losing the case. They will not pay out if you win but do not recover costs from the third party. It is therefore essential to ensure that the agreement with solicitors particularly specifies 'success' as a recovery of funds rather than merely winning in court. Otherwise a successful litigant who fails to recover costs could still find himself liable for his solicitor's costs.

It is never too late to effect this insurance, even up to just a few weeks before a court hearing. Also, the cover for third party costs is retrospective, i.e. you will be covered from the beginning of proceedings, up to the limit of the indemnity.

Cover is relatively simple to initiate. A proposal form is completed providing an outline of the dispute, together with details of parties involved. Underwriters will require details of the legal team and a copy of counsel's opinion and supporting documentation. In more complex cases they may also require an opinion from an independent barrister which you will be required to pay for.

Although underwriters require details of the third parties, they are not concerned with their solvency and ability to meet costs. That is a matter for the litigant to investigate because, as stated, the policy only pays out if unsuccessful at court.

The prospects for insolvency practitioners to make recoveries for creditors have never been better. Any cause of action with a reasonable chance of success can, and should be persued with the benefit of litigation insurance.

Even if an insolvency practitioner has adequate funds at his disposal, insurance should still be considered, as it effectively caps his liability and can avoid erosion of funds available for creditors.

New members

Since 18 February 2000, the following have been added to IPA's membership:

Members

Surname	*Forename(s)*	*Firm*	*Town/City*	*Member type*
Adshead	Suzanne	Grant Thornton	Edinburgh	Affiliate
Ailyan	Nedim Patrick	Moore Stephens Booth White	Sidcup	Member
Barrington	Simon James	Pannell Kerr Forster	London	Affiliate
Bird	Pauline Mary	Joint Insolvency Monitoring Unit Ltd	London	Member
Bramston	Timothy James	Kingston Smith & Partners	St Albans	Member
Brewer	Richard Patrick	Baker Tilly	London	Member
Coakley	Dermot Brendan	BDO Stoy Hayward	Guildford	Member
Connor	Filippa Bjorg	David Rubin & Company	London	Member
Cooksey	Robert Lochmohr	Casson Beckman & Partners	Manchester	Member
Cottam	Keith Robin	Moore Stephens Booth White	Sidcup	Member
Dando	Bridget Marie	PricewaterhouseCoopers	Bristol	Member
Davis	Jonathan Miles	Deloitte & Touche	Bristol	Member
Deyes	Philip Jeffrey Ritson	Wilson Pitts	Leeds	Member
Duell	Nicola	Radfords	Southampton	Affiliate
Dyer	Gareth Alun	Deloitte & Touche	Cardiff	Affiliate
Farish	Linda Ann	R Taite Walker & Co	Newcastle upon Tyne	Member
Field-Richards	John Charles	Deloitte & Touche	Nottingham	Member
Fraser	Alexander Iain	Scott Oswald	Aberdeen	Member
Fricker	Jeremy David Shapland	Horwath Clark Whitehill & Co	London	Member
Godefroy	Jason James	Grant Thornton	London	Member
Goldring	Jeremy Mark	Baker & McKenzie	London	Member
Grange	Robert Stephen	Moore Stephens Booth White	Watford	Member
Gray	Peter William	Thomas Paxton	Newcastle upon Tyne	Member
Green	Vincent John	Hacker Young & Partners	London	Member
Jeffreys	Stephanie Beth	Kroll Buchler Phillips	London	Member
Joyce	Helen Louise	Wilson Pitts	Leeds	Affiliate
Leach	Joann Louise	Nunn Hayward	Aylesbury	Affiliate
Lord	Jonathan Guy	Casson Beckman & Partners	Manchester	Member
Macey	Kerry Louise	RSM Robson Rhodes	Birmingham	Member
Northfield	Mark Alan		Ely	Member
Oakley	Anthony Michael	KPMG	London	Member
Philmore	Jonathan Paul	O'Hara & Co	Batley	Member
Sadler	Joseph Gordon Maurice	F A Simms & Partners Plc	Lutterworth	Member
Sharma	Gagen Dulari	HKM Harlow Khandhia Mistry	Birmingham	Affiliate
Vahey	Julie Patricia	Benedict Mackenzie	Crawley	Member
Vickery	Lee	KPMG	Reading	Affiliate
Weir	Simon Nicholas Hay	O'Hara & Co	Batley	Member
Wentzell	Mark Everett Robertson	PricewaterhouseCoopers	Grand Cayman BWI	Affiliate
Whitehead	David Nigel	Larking Gowen	Norwich	Member
Whitwam	Paul Andrew	Begbies Traynor	Leeds	Member

Firm Membership

Firm	*Town/City*
A H Tomlinson & Co	Manchester
Budsworth Rawal & Co	Old Trafford
Mark Jones & Co	London
Marlor Walls & Company	Newcastle upon Tyne
Peters Elworthy & Moore	Cambridge

Insolvency Practitioners Association

Mission statement

IPA aims to promote and maintain the highest standard of performance and professional conduct amongst those engaged in insolvency practice by:

- exercising our authority as a regulator;
- encouraging students to sit the Joint Insolvency Examination;
- advancing the proficiency of junior members of the profession through the Certificate of Proficiency in Insolvency;
- ensuring that members' conduct results in favourable reports with minimal complaint;
- reviewing the guidelines and criteria for the issue of licences;
- working with the Joint Insolvency Monitoring Unit to monitor performance;
- investigating complaints and disciplining members and licence-holders;
- furthering a self-regulated, licensed profession.

IPANEWS

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