Forward Thinking: Insolvency Response in Uncertain Times

Blog by Oluwaseun Oyekan, Moyinoluwa Adegoroye, Oreoluwa Sanmi-Lawal, Mary Martins and Opeoluwa Olowe LLM students at Nottingham Law School, NTU

We were pleased when we heard that the Forward Thinking Conference organised by the Insolvency Service in conjunction with the Nottingham Law School, was to be held at Nottingham Trent University, where we have been studying insolvency law as part of our LLM degrees. It was great that we could be present at the conference on 18 November 2022. The Conference was a hybrid Conference that brought together brilliant academics, leading insolvency practitioners, legal practitioners and government bodies to discuss the past, present and future of insolvency in the UK and many of our classmates watched it online as part of an online audience of around 400. Eight papers were presented at the Conference and laid out below is a summary of the issues discussed.

The Conference opened with a welcome address by Mark Austen, Chair of the Insolvency Service Board and Cillian Ryan, Pro-Vice Chancellor, Nottingham Trent University. Dr Katharina Möser of Birmingham University presented the first paper with an excellent discussion of personal insolvency, in '*The Dynamics of the Cost-of-Living Crisis: Desperation Borrowing, the Economic Problem of the Debt Overhang and the Charging Role of Personal Insolvency.*' The presentation examined the cost of living crisis and how this is reflected in consumer credit trends, including an increase in credit card borrowing. Dr Möser highlighted a worrying trend of desperation borrowing: the use of credit to meet basic household needs. Theories that might inform personal insolvency policies were considered. This paper was very timely given the Insolvency Service's consultation on a review of the personal insolvency framework, which closed in October.

The second paper, titled '*The Effects of Insolvency Practitioner Firms' and Secured Financial Creditors' Market Share and Their Prior Relationship on Direct Insolvency Costs*' was presented by Professor Yvonne Joyce of the University of Glasgow. The analysis focused on administration and how higher insolvency practitioner, "IP", fees invariably result in lower returns accruable to secured financial creditors and vice versa. It considered the imbalanced negotiating power between the secured financial institutions and insolvency practitioner firms. The research, jointly written by Betty Wu, used statistical information to show how prior relationships between insolvency practitioner firms and secured financial creditors would help to moderate the issue of fees. It concluded that if insolvency practitioner firms leverage on these prior relationships, they may be able to get higher IP fees from secured financial creditors.

The third session by Ben Luxford of R3 and Stewart Perry of Fieldfisher LLP was a paper titled '*Enabling Greater Use of Section 216 of the Insolvency Act 1986 (IA86), 'Restriction on Re-Use of Company Names"* and the paper entertainingly examined the relevance of Section 216. It pointed out that the section applies to companies that have gone into insolvent liquidation rather than dissolved companies. It highlighted that the reason why many creditors do not rely on the section is due to their ignorance of the existence of these

rights and the fact that many are disinterested. In addition to that, it pointed out that the proceedings under that section are not cost-effective for many creditors, hence, there is no incentive for creditors to prove that there has been a contravention. The paper ended by proposing ways that the proceedings can be made more popular among creditors. It suggested amongst other ways, the possibility of allowing liquidators to bring claims on behalf of the creditors but only after notice of such action has been given to the creditors. Thus, it called for a reform in the law to allow the liquidators bring a collective action on behalf of the creditors.

Professor Yvonne Joyce also led the fourth session where she presented her research with Eileen Maclean on '*A multi-case study database of reporting matters in insolvency practitioner reports to creditors*'. The research looked at IP reports to creditors and identified several errors in the reports to the creditors. It reemphasised how information and competence gaps undermine the relationship between the IP and the creditors. Using documentary evidence it highlighted examples of accounting errors, inconsistencies with receipts and purchases, basic arithmetical errors, the unclear split of realisation of costs between fixed and floating charge assets, missing information and unfiled documents, unclear objectives of administration, confusing and conflicting information provided in the administrator's proposal and progress report. Professor Joyce's presentation prompted quite a number of observations and inputs from the audience. It was pointed out that many creditors do not care about the reports, but Professor Joyce pointed out that the IPs have the responsibility to prepare the reports accurately, and the lackadaisical attitude of creditors does not discharge IPs from doing so.

The lunchtime session had three papers with the central theme of the public interest in insolvencies of wide public impact. The Clifford Chance team of Melissa Coakley, Giles Allison and Robert Davey opened the session by examining the Balgan Operations Limited's case wherein the High Court had to consider the health, safety and environmental impact in the compulsory liquidation of the Balgan group of companies, which included a gas turbine power station. The case impacted on the public through potential flood risks and dangers to children walking to and from school in the dark and it also would hamper supplies of energy to a large commercial user. The paper examined what the future of trading liquidations would be in light of the court's attempt to balance the interests of the company, customers and creditors in the liquidation of Balgan. The paper considered whether the court in balancing those interests stretched the purpose for which an official receiver can carry on business of the company, whether for winding up or for profit.

The sixth paper by Dr John Tribe on '*Chance Communitarianism and the public interest in large corporate insolvencies: Future directions for value and potential in commonweal undertakings*' The paper examined situations where liquidators decide to disclaim a property that is onerous for the company to keep or in cases where a property has been discovered after the company has been dissolved. Drawing upon examples from property law and charity law he argued that the Crown should take responsibility for such disclaimed property for the benefit of the public.

Professor Andrew Keay and Professor Peter Walton presented a paper titled '*Dealing with large insolvent companies where the public interest intrudes: Some forward thinking*.' The paper showed that in ordinary administration there is no *general* public interest administration as existing special administration regimes apply in different sectors, including energy supply and railways. The paper focused on a few past insolvency cases that greatly

impacted public interest. Such cases include Carillion, British Steel and Thomas Cook, all dealt with by the Official Receiver as compulsory liquidations. It suggested that while such companies are not public utility companies, the impact they have when they are financially distressed makes them relevant and as such special administration should be applied to such companies. It was pointed out that such companies may have problems raising funds from the market as many investors would not be keen on investing in such companies knowing that in the case of liquidation, their interests as creditors would be balanced with those of the public. It was suggested that a 'Public Interest Administration' be introduced.

The last paper at the conference was by Dr Stephen Baister titled '*A thing that has no value does not exist*.' The paper examined whether there are greater possibilities for assigning actions that under the legislation are to be brought by the office holder on behalf of creditors, as under transaction avoidance. It considered the possibility of assigning section 423. Dr Baister touched on *Re Totalbrand Ltd Cage Consultants Ltd v Iqbal* in discussing dynamics of insolvency failures, and he considered S. 246ZD(2) in the light of assigning the right of action to third parties to pursue transactions at an undervalue (s.423).

The conference ended with Dean Beale, Chief Executive of the Insolvency Service delivering a light and humorous closing address. The conference was engaging, educating, and intriguing. It was a privilege for us to have attended the conference physically and meet many wonderful people in the field.

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