Because Recruitment Matters

Legal bulletin

The REC is delighted to include an article from Sally Bradshaw, Senior Associate at Francis Wilks and Jones LLP, a new REC Legal Business Partner.

Sally Bradshaw, Senior Associate, Francis Wilks and Jones LLP

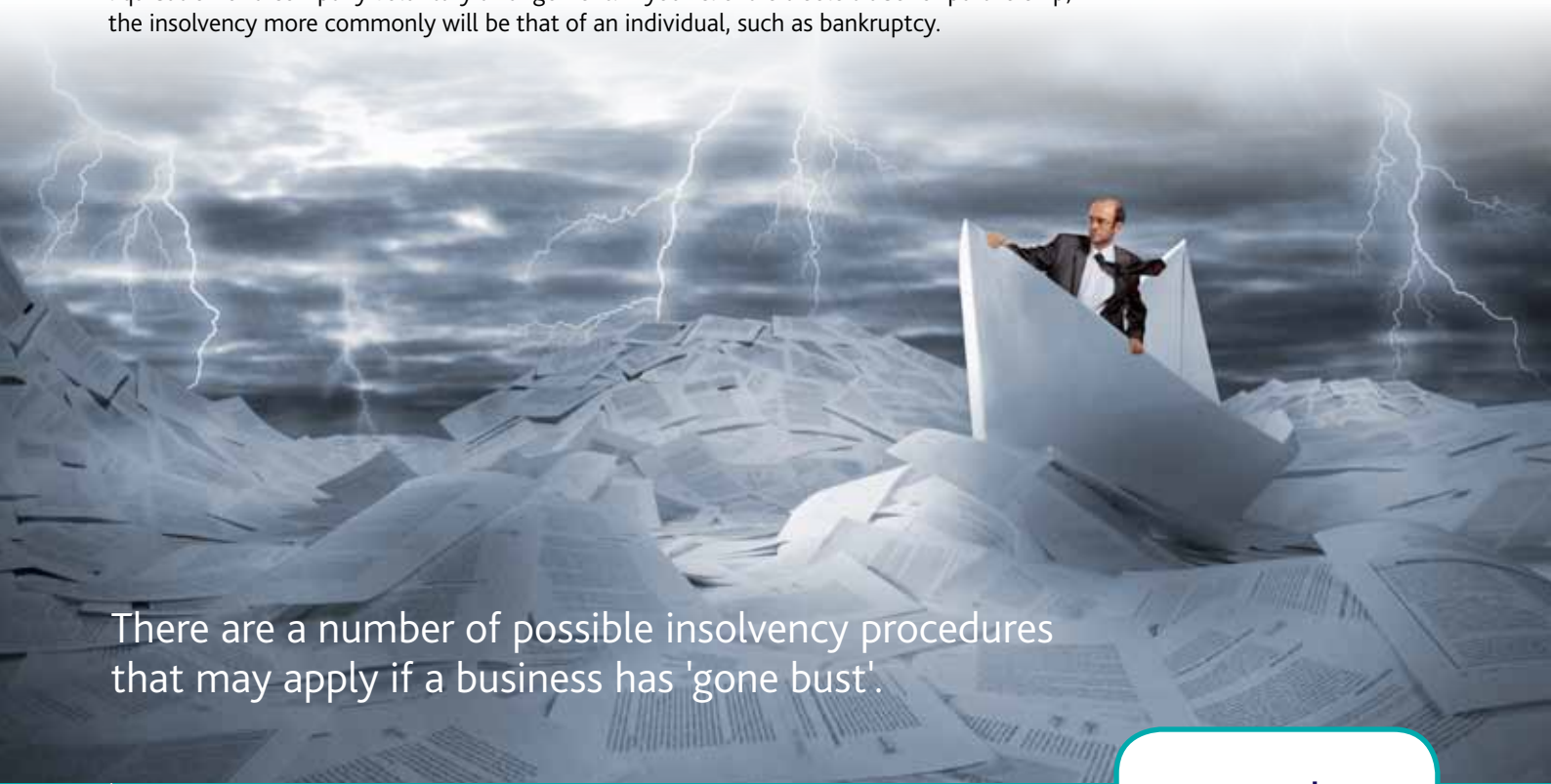
"Help: my client's gone bust!"

We all have a pretty good idea of what this phrase means, but what are the most common types of insolvency that you might meet among your clients?

As someone who is owed money by a client who has 'gone bust', what does this mean for your business and what can you do?

Types of insolvency

There are a number of possible insolvency procedures that may apply if a business has 'gone bust'. If your client is a company or a limited liability partnership (it has "Limited", "Ltd", "PLC" or "LLP" at the end of its name) the most likely occurrence is that it has entered administration, liquidation or a company voluntary arrangement. If your client is a sole trader or partnership, the insolvency more commonly will be that of an individual, such as bankruptcy.



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What's in your Legal bulletin?

So many different terms for what can seem to be the same thing; but each procedure means something different for the business and its creditors. Depending on the first procedure entered into, it is possible that a business may move between insolvency procedures over time.

Some common types of insolvency are:

Administration is a 'rescue based' procedure: the primary statutory purpose is to rescue the business as a going concern. This may be done by the administrator taking over the trading of the business and/ or by selling the valuable part of the business and its assets to a new owner to raise money for creditors. The *administrator* is under a duty to consider the interests of all the creditors when making any decisions about the company or its assets.

Liquidation is a 'terminal' procedure: the business is being wound up, the assets realised for the best possible price and the proceeds distributed to creditors. A company may enter liquidation voluntarily upon the resolutions of its shareholders and creditors (company voluntary liquidation, "CVL") or compulsorily by the order of the court upon a creditor's petition (compulsory liquidation, "CL"). In CVL, these resolutions will include the appointment of a *liquidator*. The Official Reciever is often first appointed liquidator in CL but may later be replaced by an Insolvency Practitioner ("IP") from a specialist firm. You may also come across a members' voluntary liquidation ("MVL"), which whilst terminal is a solvent procedure.

A company voluntary arrangement ("CVA") is a contractual arrangement between the company and its creditors for the payment of the company's debts (or an agreed part) over an agreed period of time. A *supervisor* is appointed to monitor the company's performance of the terms of the CVA.

Bankruptcy is the terminal procedure for individuals and, as for corporate entities, can be commenced voluntarily by the debtor or by order of the court on the application of the creditor. A *trustee in bankruptcy*, possibly or initially the Official Receiver, is appointed in respect of the bankrupt's assets and affairs. Individuals may also agree *individual voluntary arrangements* with their creditors, as with companies this is a contractual commitment to pay debts over time.

Notification and next steps

You may first become aware that a client is in difficulty from the client itself. If this is the case, ask who the IP appointed is, in order that you can inform them of your interest as creditor. However, the administrator, liquidator or trustee will be examining the records of the business to identify creditors and will contact you on his appointment. This notification will tell you what type of insolvency procedure applies or is being proposed (for example a CVL or CVA) and what is your entitlement to vote.

If there is an intended insolvency and you have an entitlement to vote for or against it, the notification will include a proxy form for voting purposes and a proof of debt form. The value of your vote will reflect the amount of the debt you say you are owed. Be aware that there are strict deadlines for responding to these notices. You may also have the ability to vote at different stages during an insolvency process.

After any insolvency appointment, you will only be entitled to share in any money realised by the IP (a "dividend") if you have submited a proof of debt form which then will be used to establish the amount of your claim. When you receive a notice of intended dividend, note again the specific deadlines for returning the requested information in order to have a share in the dividend.

Be aware that the interval between being notified of an insolvency procedure commencing and being notified of an intended dvidend can be extensive. As a creditor you are entitled to regular periodic reports on the progress of the conduct of the procedure and the likelihood of any dividend.

Creditor claims

The primary concern when a client 'goes bust' is how are you going to get paid.

There are well established rules for the ordering of different types of creditor claims in an insolvency. Unsecured creditors, typically including suppliers such as you, rank lowest in the order of payment and will only share in a dividend after all other categories of creditor have been paid in full. Amongst all unsecured creditors, everyone will have the same proportion of debt paid; for example if the dividend is '5 pence in the pound', you will receive 5 pence for every pound you are owed.

This dividend can be disappointing. Your recoveries may be enhanced if you have a guarantee in resepct of the client's payments that you can enforce; if you can set off any amounts you owe the client against the amount you are claiming, but note there are special rules relating to set off in insolvency or if you hold deposits that you can apply against outstanding payments.

If a company is in administration, one thing you cannot do is start or continue legal proceedings for the payment of any debts.

Some further thoughts

Does your contract with the client continue in insolvency?
Liquidation automatically terminates a contract, but look at what your contract provides in respect of other insolvency events.

If you are supplying staff who are crucial to the continuation of a business in administration you may find that the administrators are willing to continue paying for them during the administration, but not for the period before. If the administrators sell the business, you may be able to negotiate with the purchaser that they take over your contract with the client and whether they would be willing to pay for any arrears.

Do you have insurance for bad debts that you can claim under?
What happens to your contract with the worker? Are you still required to pay the worker or the worker's tax or national insurance contributions even if you are not paid by the client? (Note that the Conduct of Employment Agencies and Employment Businesses Regulations 2003 the Regulations) prohibit you from withholding payment from temporary workers that you supply to clients on the basis that your client has not paid you, so this option will only be available if the workers are entitled to and have 'opted out' of the Regulations). Does the worker receive benefits such as on-site accommodation, if this is withdrawn, do you have any further responsibilities?

All IP's conduct is governed by the laws of the relevant insolvency procedure and the rules of their regulatory body. If, however, you have any concerns about any IP's conduct of a matter, as a creditor you may be able to require the conduct to be investigated.

Any questions?

If you have received notification that a client has 'gone bust' and are unsure what to do next or need any assistance with any claim against an insolvent business, please feel free to contact someone in Francis Wilks and Jones LLP's insolvency team.

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FAQs

Caroline North, Legal Advisor at the REC, brings you a sample of questions posed to the Legal Helpline

Q: I am supplying an agency worker under contract for services as a receptionist with Company A and as an administrator with Company B and she has only qualified for equal treatment under the Agency Workers Regulations 2010 (AWR) in the receptionist role. I've been told something about the parent company of Company A 'taking over' Company B but the agency worker will continue to perform both roles. What will happen to her 'qualifying clocks'?

A: The first point to determine is whether there will actually be a new hirer for either of the roles. A 'hirer' is defined under the AWR as *'a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person.'* Therefore, you should obtain more information from the client about the situation of the companies going forward.

The nature of the 'take-over' is important because if, for example, the parent company of Company A has just bought the shares in Company B and the two companies continue to exist and run as separate legal entities under different company numbers (albeit they are both owned by the same parent company), then this may not be a new hirer for the purposes of the AWR and the agency worker will continue to have two separate qualifying clocks with two hirers.

Therefore, she will remain entitled to equal treatment in the receptionist role and will have to complete the remainder of her 12 week qualifying period in the administrator role.

If this is not what is happening you will need to make further enquiries to ascertain the details of the take over and seek information as to whether you will be dealing with a new hirer in respect of either role in the first instance.

You should also be aware of the anti-avoidance provisions in Regulation 9 of the AWR and make sure that any arrangement of assignments, such as the agency worker being regularly rotated between companies that are legally connected in the same group into similar roles, is not planned to prevent the worker from reaching her qualifying period or continuing to have equal treatment rights in the role for which she has already qualified avoid compliance with the AWR.

Q: A temporary worker has asked me about opting out of the Conduct Regulations? Is this possible and what do I need to do?

A: The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the 'Conduct Regulations') apply to all employment agencies and employment businesses. However, in certain circumstances, a work-seeker which is a body corporate such as limited company or a limited liability partnership (LLP) can choose to opt out of the Conduct Regulations. If the work-seeker is an individual, he or she cannot opt out and, therefore, the Conduct Regulations will always apply.

Employment agencies and businesses most commonly deal with limited company contractors (LCCs) so we use this reference here although the issues also apply to LLPs.

LCCs cannot opt out of the Conduct Regulations if the individual to be supplied will be carrying out work with vulnerable persons, namely anyone under 18 or in need of care or attention by reason of age, infirmity or some other reason.

In order for the opt-out of the Conduct Regulations to be effective, the opt-out notice must be given before the introduction or supply of the LCC. **This notification must be given in writing** by both the company and the individual who will be carrying out the work, to the employment agency or employment business. This could in fact be the same person if he or she has authority to give the notification on behalf of the company.

Please see the REC model opt-out forms:

a) Inside IR35: ADDITIONAL DOCUMENT C1 – CONDUCT REGULATIONS OPT OUT NOTICE

b) Outside IR35: ADDITIONAL DOCUMENT C2 – CONDUCT REGULATIONS OPT OUT NOTICE

The LCC may subsequently withdraw the opt-out notice by giving further notice but this will not take effect until the individual stops work in his/her current assignment and will only apply to subsequent assignments.

Additionally, the employment agency or business **must** inform the client in writing if the LCC has opted out of the Conduct Regulations. This can be achieved by agreeing terms of business with the client for the supply of a LCC who has opted out of the Conduct Regulations. The REC has drafted model terms for you to use depending on (a) whether a contractor opts out or not, and (b) whether they are operating inside or outside IR35, these are available via the following link.

If there is a valid opt out of the Conduct Regulations, the employment business will be relieved of complying with certain obligations to both the LCC and the client, such as the restriction on withholding pay from work-seekers on the ground that the client has not paid and the restrictions that relate to transfer fees.

Q: My staging date for pension auto-enrolment is early next year; can I include a section in my registration form asking candidates whether they want to opt out of pensions auto-enrolment?

A: No, it is compulsory for an employer to automatically enrol an eligible jobholder into a qualifying pension scheme before the opt-out can be effected. Asking a candidate whether they want to opt-out on an application from could be seen as an inducement by the employment business to encourage a jobholder to opt-out without becoming an active member of the qualifying pension scheme, which is against the law and can carry penalties. However, it is not compulsory for the jobholder to remain in the pension scheme if they don't want to. They may choose to opt out after they have been automatically enrolled. The opt-out period is one month.

Before a jobholder can choose to opt out of pension scheme membership, they must:

- Have become an active member of the pension scheme under the automatic enrolment or opt in provisions, and
- Have received the enrolment information from the employer

It is important that the jobholders have been provided with sufficient information about the effect of auto-enrolment, so that they can make an informed choice about whether to remain within the pension scheme or not.

'Opting out' of a qualifying pension scheme has a specific meaning in relation to auto-enrolment, rather than just generally leaving a pension scheme. This opt-out has the effect of undoing active membership of the qualifying pension scheme, as if they had never been auto-enrolled. The employment business should not provide the worker with the opt-out notification, as this can be seen as encouraging them to opt out of the pension scheme. The opt-out notification should normally be obtained from the pension provider and presented to the employment business.

When an employer receives an opt-out notice from the jobholder, the employer must take action to remove the jobholder from the pension scheme, so that they are treated as though they have never been within the qualifying pension scheme. Therefore, the pension provider will need to be informed and the employer must stop deducting contributions and ensure they refund any contributions already deducted. An employer must keep records of any opt-outs because they may be required to re-enrol on the three yearly re-enrolment date in the future.

There are specific timescales during which jobholders can opt out of active membership, known as the 'opt-out period'. These depend on the type of pension scheme. For occupational pension schemes, the opt-out period starts from the later of the date the jobholder:

- Becomes an active member from the automatic enrolment date; or
- Is provided with the written enrolment information

If the scheme is a personal pension, the opt-out period starts from the later of when the jobholder is:

- Sent the terms and conditions of the agreement to become an active member; or
- Provided with the written enrolment information

The REC Pensions Toolkit is available here

The Pensions Regulator website is available here

It is compulsory for an employer to automatically enrol an eligible jobholder into a qualifying pension scheme.

Lorraine Laryea, Solicitor and Commercial Advisor

Legal round up

Spotlight on safeguarding and the criminal record disclosure process

Two key changes have recently come into force:

- 29 May – new filtering rules introduced for criminal convictions and cautions
- 17 June – the Disclosure and Barring Service launched the new Update Service

New filtering rules

The Court of Appeal ruled in January 2013 that the criminal record disclosure process breached the European Convention on Human Rights in that the disclosure of all historical convictions and cautions without exception engaged Article 8 (respect for privacy and family life). While the Court agreed that the need to, for example, protect children and vulnerable adults is a legitimate aim, it nevertheless found that the process was disproportionate and therefore unlawful.

The Government is seeking to appeal this decision but in the meantime changes have been made to the criminal records disclosure process which will now result in the 'filtering out' of certain offences, so that they are not disclosed on a Criminal Records Disclosure Certificate and individuals will not be required to disclose them.

What is filtering?

For individuals 18 or over at the time of the offence and who only have one offence on their file:

A **conviction** will be removed (filtered),if:

11 years have elapsed since the date of conviction and the offence did not result in a custodial sentence.

Even then, it will only be removed if it does not appear on a list of specific offences (Listed offences) that will never be filtered. If a person has more than one offence, then details of all their convictions will always be included.

A **caution** will be removed (filtered) after 6 years have elapsed since the date of the caution and if the offence does not appear on the list of a list of specific offences (Listed offences) that will never be filtered.

For individuals under 18 at the time of the offence:

The same as above applies but with a 5.5 year time limit for convictions and a two year time limit for 2 years for a caution.

Despite these changes it is important to note that:

- The filtering rules do not apply to anyone who has more than one offence.
- The filtering rules do not apply to 'Listed offences'.
- The filtering rules do not apply to offences which resulted in a custodial sentence or period of detention.

On 3 July the DBS issued a document which sets out the 'Listed offences' – (offences that will always have to be disclosed regardless of the filtering rules. This can be downloaded from the DBS website

One of the consequences of the filtering rules is that individuals will no longer be required to disclose filtered offences in the recruitment process and it will be unlawful to decline work to someone because of a filtered offence or to terminate their employment because of a filtered offence. This is the case even where the worker would be required to disclose spent convictions because of the work they will be doing and even where the work relates to regulated activity with children or (vulnerable) adults.

As a result of these changes the REC has replaced the old model document criminal convictions form with a 'Model form for requesting information about (filtered) criminal convictions' form. Corporate REC members can download the new form from the Model Document Library on the REC website.

Unfortunately the nature of the filtering rules will now make the process of obtaining information about a work seeker's criminal record more onerous: Work-seekers who are unfamiliar with the filtering rules will need to take time to understand what information they no longer are required to disclose.

Members should take care to ensure that work seekers are not inadvertently asked to disclose information about convictions that are filtered and which no longer need to be disclosed by being asked to answer an initial 'yes/no' question without being advised that they are not required to disclose filtered offences.

Members will need to amend their processes and forms to ensure that they no longer ask work seekers to disclose filtered offences.

Further information is available from the DBS website

Launch of the new Disclosure & Barring Scheme Update Service

On 17 June 2013 the DBS launched its new Update Service for applicants.

The Update Service will remove the need for individuals to apply for as many new criminal records certificate each time they move roles. Instead individuals that choose to subscribe to the Update Service will be provided with a DBS certificate which is kept up to date meaning that they will be able to take it from role to role as long as they are working within the same workforce. I.e. if an individual has a certificate to work with children they will be able to move within roles working with children.

Individuals will need to pay an annual fee of £13 to use the service. The benefit to employers (including employment businesses) is that they will be able to use the online services provided by the DBS to check if the information on the certificate presented to them by the individual is up to date. Employers can carry out this check for free but must have the applicant's consent to do so.

In conjunction with the Update Service launch the DBS implemented two key other changes:

- It has ceased to issue copies of DBS certificates to counter signatories and registered bodies. Certificates will now be issued solely to the applican (with one limited exception).
- It has amended the disclosure application form. Specifically the 'Position Applied For Field' will require the following information to be provided:

  You should now include one of the following phrases in x61 line 1

  'Child Workforce'. Use this for any position that involves working/volunteering with children.

  'Adult Workforce'. Use this for any position that involves working/volunteering with adults.

  'Child and Adult Workforce'. Use this for any position that involves working/volunteering with children and adults.

  'Other Workforce'. Use this for any position that does not involve working/volunteering with Children or Adults e.g. security guard.

  X61 Line 2: Enter a description of the 'Position Applied For' up to 30 characters

See the DBS website for further information.

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New provisions for whistleblowers

Following some high profile media activity about whistleblowers in the public sector, the Enterprise and Regulatory Reform Act 2013 (ERRA) has brought in new provisions for whistleblowers.

Background: Workers have for a number of years been provided with protection when making 'public interest disclosures', better known as 'whistleblowing', which broadly means revealing information about some sort of wrongdoing about the worker's employer.

Examples of this include the fact that a criminal offence has been committed or is likely to be committed or the fact that the health and safety of an individual has been or is likely to be put at risk. Workers who blow the whistle on their employers are protected from being subjected to a detriment by their employers when making such disclosures in certain circumstances.

The following ERRA provisions came into force on 25 June 2013:

- Introduction of a requirement that the worker believes that the disclosure is made in the public interest.
- Removal of the requirement that a worker acted in good faith in order to benefit from the whistleblower protection.
- New powers for Employment Tribunals to reduce the compensation awarded to a claimant by up to 25% if the disclosure was not made in good faith.
- The whistleblowing protection has been extended to also cover workers in certain healthcare roles.
- A whistleblower's co-workers can now be held personally liable for subjecting the whistleblower to a detriment for making a protected disclosure.

Fees in Employment Tribunals.

We reported in the November/December 2012 Legal bulletin that fees were due to be introduced in Employment Tribunals for the first time. Subject to Parliamentary approval of the relevant Order, from 29 July 2013 claimants will have to pay a fee to issue and Employment Tribunal claims and a further hearing fee if the claim proceeds to that stage.

To recap, claims will be divided into two types:

1. Type A claims are generally of a more straightforward nature such as breach of contract, unlawful deduction from wages.

2. Type B claims are more complicated claims/claims where the sums the claimant could be awarded are less straightforward to define.

	Issue Fee	Hearing Fee
Type A claim	£160	£250
Type B claim	£230	£950

The fees will not apply to claims issued before this provision comes into force.

Are you passionate about raising standards in the Recruitment Industry?

The REC Professional Standards Committee (PSC) is the body which considers serious breaches of the REC's Codes of practice. This voluntary committee has the authority to issue reprimands, compliance orders and reviews and expel companies from REC membership.

The REC is looking for two new members to join the PSC. For further information, please click here

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