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TOMLINSON – WHAT DOES IT MEAN FOR INSOLVENCY PRACTITIONERS?

By Jim Oulton and Devi Shah

In his report last year Lawrence Tomlinson roundly criticised the alleged practices of RBS turnaround division, GRG, in relation to its handling of and conduct in respect of some SMEs which experienced financial distress. He made serious allegations that, artificially and/or inappropriately, some SMEs were distressed for the bank's own benefit. In a report compiled at about the same time, Sir Andrew Large did not identify these practices and in evidence given to Parliament said so. He did not though dismiss the possibility they may have occurred. The allegations contained in the Tomlinson report are very serious and as a consequence RBS instigated its own review, with the Treasury Select Committee and the FCA now investigating the issues. These reports should become available later this year.

In his report, Tomlinson alleges that the behaviour of some IPs was, during insolvency processes, unfair and opaque. He criticises what he paints as a symbiotic relationship between IPs and banks (and valuers) while suggesting that IPs would not take action against a bank given their reliance on the banks for business – either by way of IBR work or formal appointments.

Time will tell whether the ongoing enquiries will find evidence that supports the assertions made by Tomlinson and if there is evidence of serious wrongdoing. If such evidence is found in relation to IPs, then no doubt appropriate steps will be taken. However, leaving that issue to one side, what else does Tomlinson point to and what can be said about the issues he raises as to the insolvency process at this point?

Our experience of dealing with disputes arising subsequent to an insolvency is that those who had been running the insolvent business in the period leading up to insolvency were invariably under enormous pressure. Sometimes they are in denial as to the causes of the position in which they found themselves and very often they have not absorbed information. This is particularly so where directors or officers might be considered to be relatively unsophisticated or naive.

Often the position of an IP conducting an IBR has not been properly understood. In the current environment, IPs instructed to undertake an IBR should bear in mind that those who regard themselves as having been dealt an injustice will often pursue grievances and claims well beyond the point of reason. A precisely worded engagement letter, explaining the work to be conducted and setting out to whom duties are owed, and (if needs be) differentiating the levels of duties between multiple clients is an enormously valuable shield.

IPs who have conducted an IBR are under a professional obligation to consider whether they have the necessary impartiality to accept an appointment and there is nothing out of the ordinary in doing so. Experience relates that all too often, in particular where there has been an appointment by directors, the directors have misunderstood the role of the administrator.

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Our experience causes us to strongly suspect that many complaints about insolvency practitioners are made by , or on behalf of, those who do not understand the insolvency process or that there are procedures and options for recourse by IPs but that they require funds to be able to pursue them. Such matters may well be the genesis of the complaint that the process is opaque. Countless hours and millions of pounds are spent each year in trying to resolve disputes which have become acrimonious as the former management and ownership of a business believes its point of view has been ignored. Of course, an IP must act in an appropriate and even-handed manner balancing the relative interests of the creditors. All too often the former management of a business does not understand that the (sometimes extravagant) steps that they would like an insolvent business to take have, somehow, got to be funded and be in the interests of the creditors as a whole. However, time spent communicating and explaining in these situations, at an early stage, before parties become polarised, without compromising an IP's independence, will almost always be well spent. Whilst hoping for the best, planning for the worst will save time in the long run – a well-documented file with for example, clear advice from agents in relation to the value and sale of assets will go a long way to protecting an IP if he is subsequently sued .

It remains to be seen whether Tomlinson reignites debates about IPs taking appointments in respect of a business for which they have conducted an IBR and the use of panels. No doubt there will be further scrutiny of the roles of IPs in insolvency processes. In the meantime communication remains a key weapon in keeping an IP away from time-consuming and expensive litigation. Whilst it is not a universal cure, making sure that there is effective communication around what is being done at any stage will stand a good chance of saving a fortune in time and money down the track.

Jim Oulton is a partner at Mayer Brown specialising in professional negligence disputes and has expertise in defending claims against Insolvency Practitioners. Devi Shah is head of Mayer Brown's London Restructuring, Bankruptcy and Insolvency Group. Jim and Devi frequently work together defending claims or diffusing potential claims against IP's.