

Q&A

Legal

Albert McClelland and Rebecca Stratton answer your insolvency queries

Q What is the best way of maximising the realisation of intellectual property for creditors?

A The nature of the intellectual property (IP) will dictate how best to extract best value. IP refers to something created by the mind, such as an invention, an artistic work or symbol, and which may comprise patents, copyrights, designs, trademarks and trade secrets. Whether the IP is of value is highly dependent on the company's areas of business. For example, is it an innovation, a unique process or a brand?

Investigation of the company's IP may involve searching the UK and international IPO registers to identify any existing registered patents and trademarks, establishing ownership of domain names and other identifiable IP, and a careful review of books and records; how did the company account for IP? Due to the 'intangible' nature of IP, and that much IP is not capable of being registered, practitioners are often reliant on information provided by directors and employees. Care should thus be taken and often specialist agents and valuers should be appointed at the earliest opportunity.

Asserting the company's rights to IP early and protecting those rights (by way of infringement proceedings if necessary) will help protect the value of the IP, pending any sale.

It is also worthwhile identifying any IP licences held by the company. Licences that

permit the company to use IP rights owned by others can often hold value and can have significant impact on the realisable value of the company's other assets. What form of licence was granted? By whom? Was it terminable or in perpetuity?

Complications can often arise because much know-how and many trade secrets are essentially held in the minds of former employees or directors. The value of IP of this nature would be better preserved by the sale of the business as a going concern, as a sale of the IP on break-up basis will be worth considerably less without the employees' know how. The nature of the IP may thus dictate the choice of insolvency process. However, it is often the case that an owner/inventor has no intention of working for someone else, and this may limit opportunities to realise full value. As a corollary of this it would be prudent for the office-holder to continue to monitor whether the company's IP is subsequently being used by any competitor business, especially in circumstances where they have hired former employees.

Our advice is to act swiftly to identify IP and take steps to protect the asset. Healthy scepticism of any owner/director's valuation of IP should be adopted, as they are likely to have talked up IP value pre-insolvency and then seek to persuade all and sundry that it is valueless post-insolvency.

Q What level of investigation is necessary in respect of a proof of debt lodged by a connected company?

A Generally, such a proof of debt will accord with the inter-company debt position evidenced in the company's books, and limited investigation should establish the nature and *bona fides* of the debt. However, there are circumstances that will

require an insolvency practitioner to conduct a more in-depth analysis.

An example of this was recently seen in the case of *Re C.C.T. Logistics (in liquidation)* (CCT). The case arose from an application challenging the decision to allow a connected company (CCI) to vote in respect of debt purportedly arising from CCT's discharge of a debt owed by CCT to a third party made after the commencement of the liquidation but before the decision date to appoint the liquidator. This was important as the vote was determinative of the liquidator's appointment.

While the payment of a third-party debt may give rise to right of subrogation and ability to claim, care must be taken to ensure that the payment made by a connected company is not simply a 'voluntary' payment creating no obligation on the insolvent company to repay. The insolvency practitioner should thus investigate the circumstances giving rise to the payment, including whether:

- There was a request by the insolvent company for payment to be made;
- The insolvent company authorised the payment;
- The insolvent company was given the opportunity to refuse the benefit of the payment; or
- The insolvent company incurred an obligation to the payor as a result of the payment.

In the case of CCT, the court considered that in the circumstances the payment was voluntary, and thus the connected company had no entitlement to vote; with the liquidator being removed from office. A failure to investigate what appears to be an accepted debt can lead to challenge and significant consequences for the insolvency practitioner.

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