# *Nottingham Law School's International Insolvency Law Conference, 15 September 2010*

By a strange quirk of fate, Nottingham Law School's Insolvency and Corporate Law Research Group's annual International conference fell on the second anniversary of the insolvency of Lehman Brothers. Professors David Burdette and Adrian Walters (who organised the conference) felt that it was, therefore, entirely fitting to invite Judge James M Peck of the US Bankruptcy Court in the Southern District of New York to deliver the keynote address. Judge Peck has presided in the Lehman Brothers bankruptcy since it started in 2008.

Judge Peck's address was fascinating, giving insights into how he and his team manage the Lehman's case and how it has changed his life, effectively becoming his career. The statistics are astonishing: in the US, there are 24 Chapter 11 proceedings; two Chapter 15 proceedings; and 39 active adversarial proceedings. Claims are estimated ultimately to be in the region of US$ 1 trillion and costs are running at approximately US$ 1 billion.

Understanding the documents and the transactions has been a key part of the litigation. Matters have been hampered where electronic data has not always been available due to the separation of affiliated units and the use of different software across the organisation. A number of the matters being addressed have no precedent.

To deal with the enormous workload, monthly omnibus hearings are conducted, in addition to the trials. Clearly, the burden on the court is enormous and, where possible, cases are encouraged to go to mediation. This approach has been used for some of the guarantee and derivatives claims.

Judge Peck considered that one of the most important things that he had achieved so far, was to agree a cross-border protocol. The purpose was to minimise costs and maximise recoveries by requiring maximum information sharing amongst the parties: hugely important as there are currently 80 sets of proceedings in 60 jurisdictions.

Overall, he considered that the US Bankruptcy system has held up well in the circumstances.

**********

Joe Bannister (Hogan Lovells) chaired a session on international judicial co-operation in which Judge Peck and Professor Dr Heinz Vallender (Chief Judge, Cologne Bankruptcy Court) shared their experiences.

Both judges considered that, generally, judicial co-operation is brought about at the request of the insolvency practitioners bringing the proceedings. Both parties will tend to realise that it is necessary and co-ordinate approval by bringing a request in each court. Judge Peck considered that, in his experience, the only exception had been in the context of the Lehman's litigation where the large number of contentious cases exposing international issues indicated that a court to court protocol was required.

Judge Vallender considered that judicial co-operation was easier to effect in common law jurisdictions than in civil ones, largely because of the language barriers involved, but also because of perceived legal limits. In Germany, for example, there was no specific authority for co-operation. Whilst Judge Vallender took the view that if co-operation was necessary he would co-operate, he recognised that this approach was not necessarily shared by his fellow judges who would not co-operate as this was not specifically allowed by law. He also considered that wider cultural differences could prove a barrier to judicial co-operation.

Judge Peck gave an example of a case where he had gone beyond the protocol agreed by the parties. This had happened where he and his fellow judge had recognised that they needed to collaborate to ensure that the proceedings ran smoothly and they had

communicated by email and telephone. These communications had not been sought by the parties to the proceedings who were unaware of them, but the judges immediately informed them after the event.

Although Judge Peck was unable to comment on cases that are currently before him, he indicated that the current discussions between him and the High Court in the *Perpetual* case are on an entirely formal basis, being conducted by "snail mail" and without personal contact.

This was a fascinating discussion from start to finish. From what was said, it seems as though judicial co-operation on a personal basis is likely to be most effective where an element of judicial collaboration is necessary to ensure that the case is managed effectively: as an outside observer, it is harder to see how it will work when there is a point of legal principle at stake, as in the *Perpetual* case. Still, they always say that judges are lonely, so if they can make friends across continents, that has to be a good thing!

**********

The morning's general session was chaired by Professor Rebecca Parry (Nottingham Trent University) and began with a discussion of the impact of labour law principles on South Africa's new corporate rescue mechanism (Professor Stefan van Eck and Tronel Joubert, University of Pretoria, Professor David Burdette) followed by a discussion of the enforceability of retention of title clauses (Francesco Dialti, Hogan Lovells, Italy).

There was then a consideration of the issues with pre-packs (Dr Peter Walton, University of Wolverhampton), particularly the apparent lack of independence of the pre-pack administrator and suspicion that unsecured creditors get a raw deal. Graham Horne (Deputy Chief Executive of the Insolvency Service) responded to Dr Walton by outlining the policy objectives of the current insolvency regime: essentially, the regime tried to achieve the best financial outcome for creditors (wealth maximisation) combined with a desire for certainty of outcome. The approach to the problem of pre-packs had, to date, consisted of seeking to ensure transparency (SIP 16 had been part of this drive) and that there was a system in place to catch wrong doers within the system, whether directors or insolvency practitioners. It is not clear whether the present coalition government will take any action to change the regime as government policy is being driven by its economic outcome: i.e. things will probably only change if the change will help the deficit.

The afternoon session was chaired by Hamish Anderson (Norton Rose) and saw a brief consideration of the merits of forum shopping in both corporate and personal insolvency. There were presentations from Professor Gerard McCormack (Leeds University), two very able PhD students Keith Crawford (Nottingham University) and Joseph Spooner (UCL) as well as Anton Smith (Geldards) and Professor Adrian Walters which gave everyone an opportunity to discuss bankruptcy brothels which was much enjoyed.

Jennifer Marshall from Allen & Overy indicated that the panellists (Richard Sheldon QC, 3-4 South Square; Samantha Bewick, KPMG) were firmly of the view that forum shopping in corporate insolvencies was a Good Thing if it got the best result for the client.

Chief Registrar in Bankruptcy Stephen Baister indicated that he thought that harmonisation was not necessarily the best way forward as he thought competition was important. Professor Adrian Walters made a nice point following on from his paper, noting that the personal insolvency regime currently favoured debtors, which was somewhat contrary to the policy espoused by Graham Horne.

The final session was chaired by Neil Cooper (Zolfo Cooper) and considered IP regulation and remuneration. Sue Aspinall summarised the Office of Fair Trading's Market Study on Corporate Insolvency and, in response, Steven Law (President of R3) said that he broadly welcomed the report. There was a lively debate as to whether the recommendation for a complaints body was a good idea. Whilst it would probably improve matters for unsecured creditors, concerns were voiced that it would be costly to administer and lead to a rash of ill

informed complaints, all of which would lead to a reduction in the amount of money that was ultimately available for creditors.

The discussion continued in the bar afterwards.

**PM**