

**Welcome to Landmark Chambers'**

**Property In Quarantine:**

**Liquidation Foundation: The Basics of Property Insolvency**

**Part 1: Introductory concepts**

**The recording may be accessed [here](#).**

Your speakers today are...



**David Nicholls**



**David Holland QC**

# *Property in Quarantine*

**David Nicholls**



**Liquidation Foundation: The Basics of Property Insolvency Part 1**

## Introductory Concepts

- What is insolvency?
- Why is it important?
- Main types of insolvency
- Liquidation
- Administration

# What is insolvency?



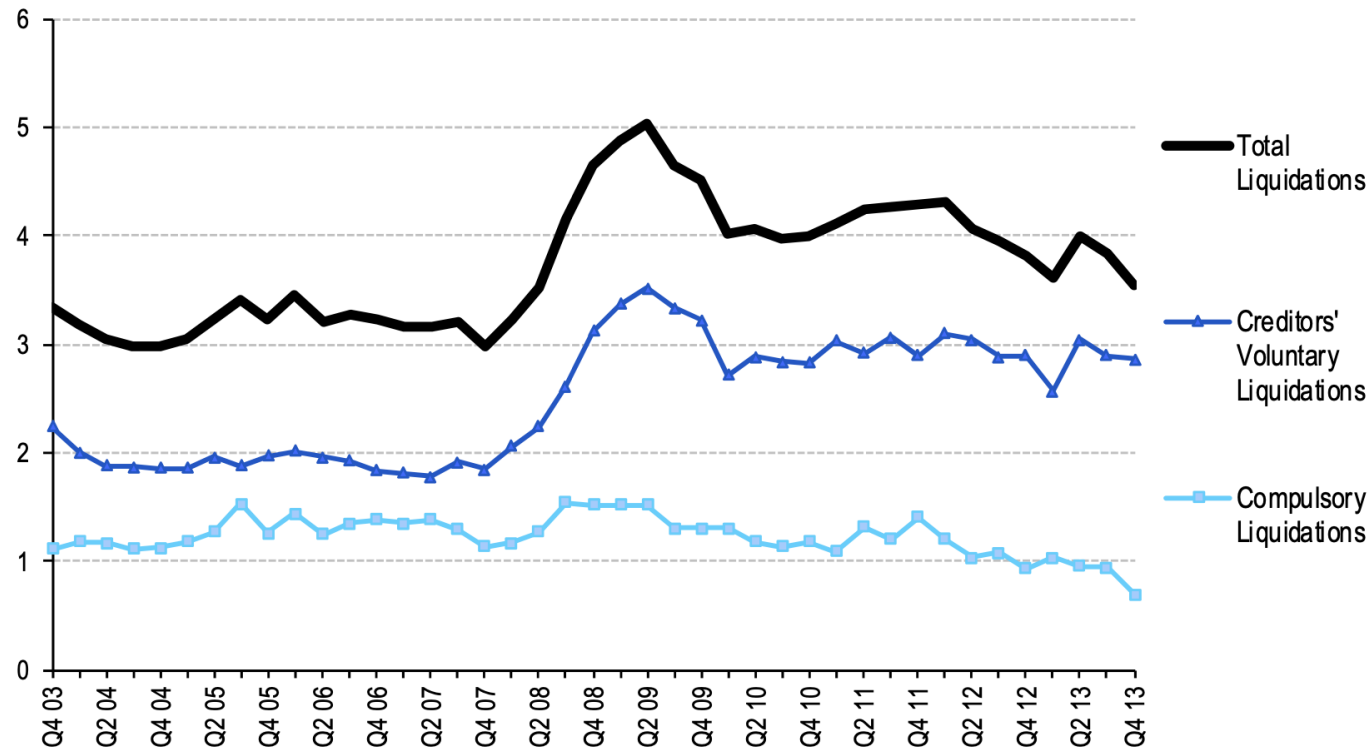
## Essential principles

- Cash flow test – *unable to pay debts as fall due*
- Balance sheet test – *shortfall of assets in relation to liabilities*
- *Pari passu* principle / collectivity
- "Rescue Culture"
- Sources: Insolvency Act 1986; Insolvency Rules 2016

# Trends in insolvency (1)

Figure 1. Company Liquidations in England & Wales

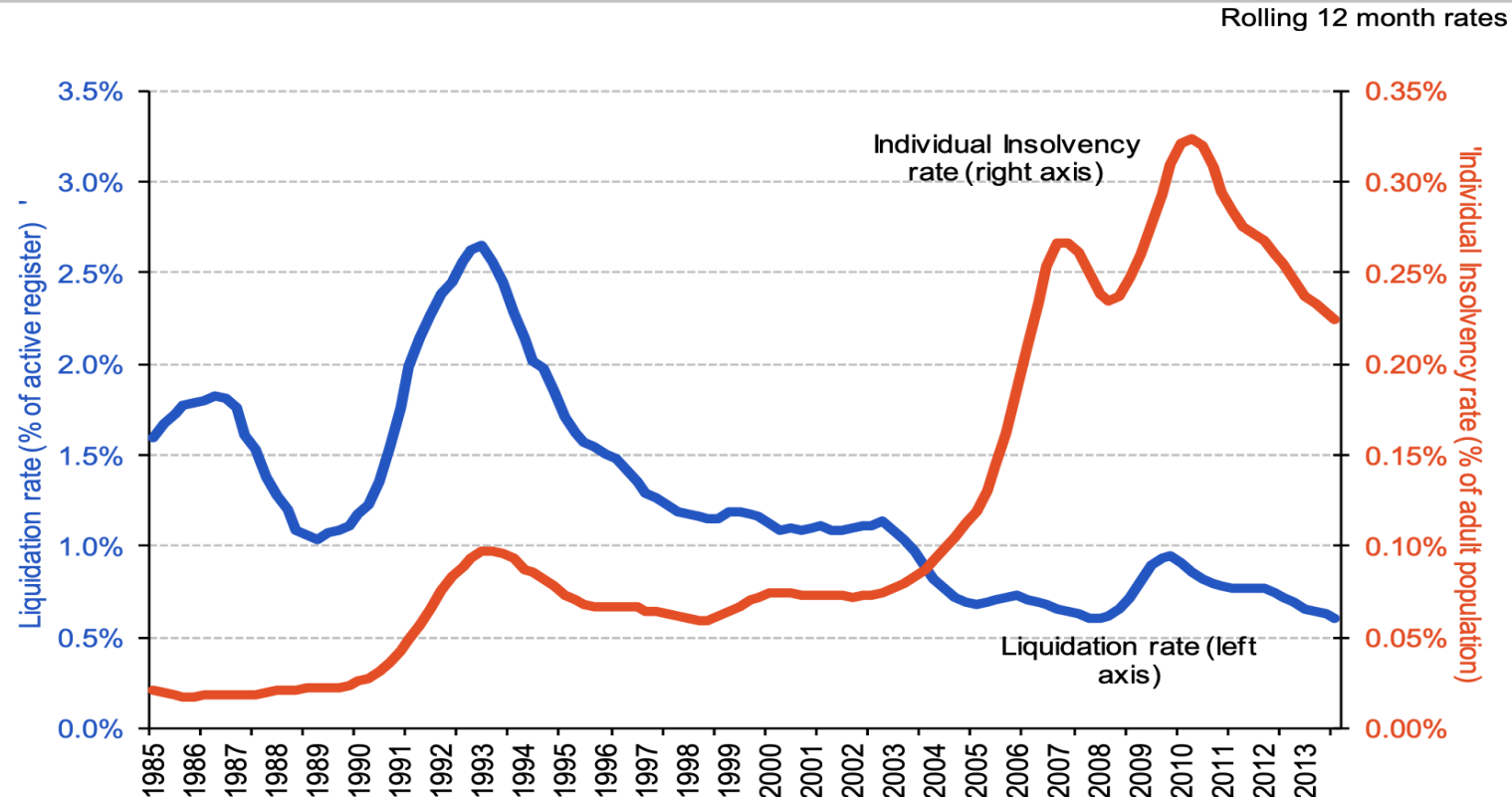
Thousands, seasonally adjusted



Source: Insolvency Service and Companies House

## Trends in insolvency (2)

**Figure 4. Company Liquidation and Individual Insolvency Rates in England & Wales**



Source: Insolvency Service, Companies House and the Office for National Statistics

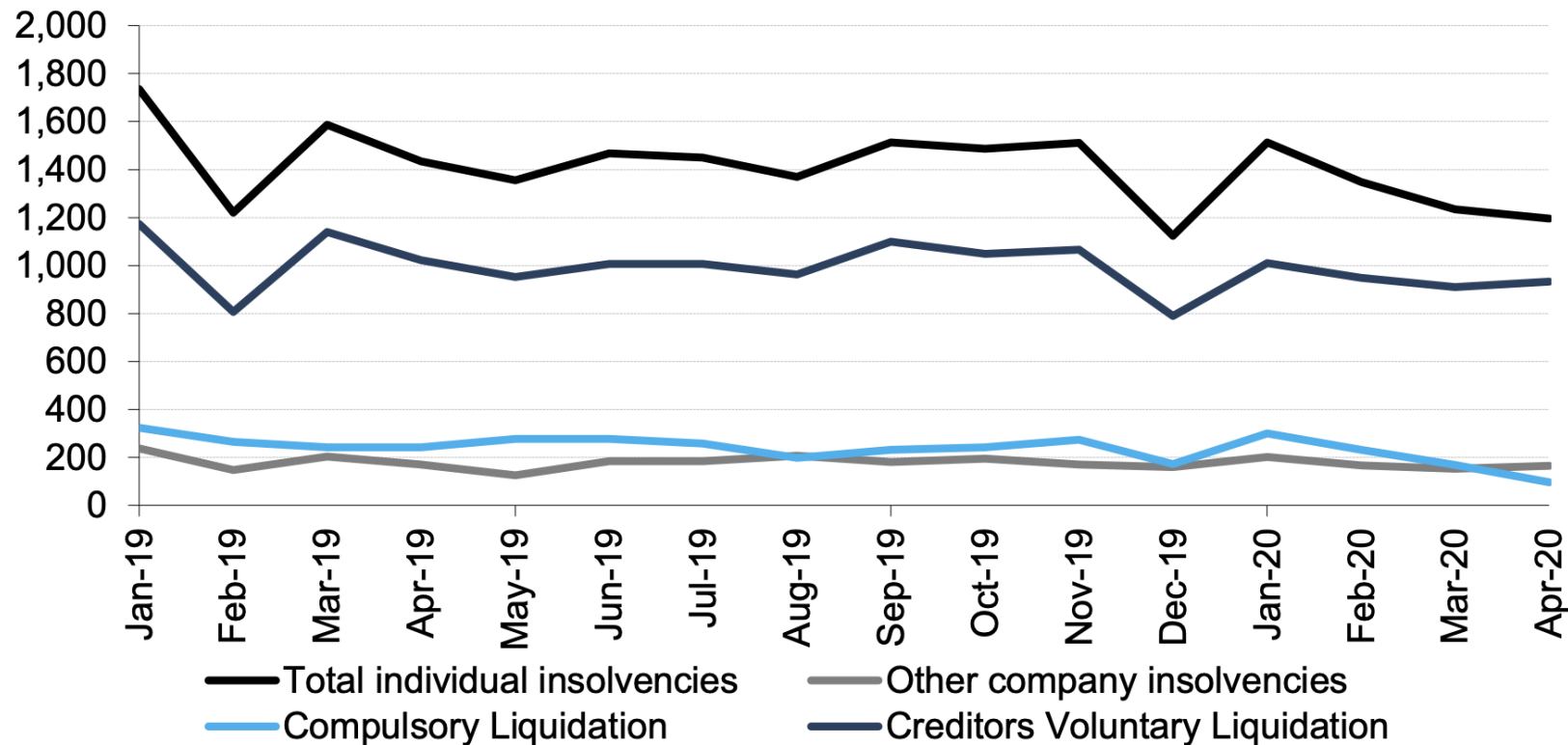
The company liquidation rate is calculated from the number of company liquidations in the latest twelve month period divided by the average number of companies in that period.<sup>1</sup>

The individual insolvency rate is calculated from the total number of new bankruptcies, IVAs and DROs in the latest twelve month period divided by the average estimated adult (18+) population of England & Wales.



## Trends in insolvency (3)

**Figure 1: Company insolvencies in England and Wales, by insolvency type and month<sup>P</sup>**  
1 January 2019 to 30 April 2020, not seasonally adjusted



**Sources: Insolvency Service (compulsory liquidations only); Companies House (all other insolvency types)**

<sup>P</sup> Figures are provisional

## Insolvency in time of Coronavirus

- Temporary suspension of wrongful trading
- 28 day moratorium before liquidation / administration
- Prohibition on suppliers enforcing termination clauses
- New restructuring vehicle
- Moratorium on lease termination for non-payment of rent
- Temporary ban on use of statutory demands / winding-up petitions
- 90 day moratorium on use of CRAR



## Insolvency processes

- Bankruptcy
- Individual Voluntary Arrangement
- Company Voluntary Arrangement
- Administration
- Liquidation:
  - Compulsory
  - Voluntary
    - Members
    - Creditors

## Objectives

- Restoring company to profitable trading
- Maximising returns to creditors
- Providing a fair and equitable system ranking claims
- Identifying causes of failure
- Addressing mismanagement

## Administration – Sch. B1

- Objective
  - Focus on rescue as a going concern
  - Or achieving a better result for creditors than liquidation
- Appointment
  - By the court
  - Or out of court by holder of floating charge
  - Or out of court by directors

## Administration (2)

Moratorium:

- No winding up
- No enforcement of security
- No repossession of goods
- No forfeiture
- No legal process

*Except* with consent of administrator / permission of the court

## Liquidation

- Members Voluntary – solvent
- Creditors Voluntary
- Compulsory
  
- Liquidator:
  - Duty to collect in assets, realise them
  - Distribute according to order of priority

## Liquidation (2)

Effect:

- Deemed to commence on presentation of petition – retrospective
- No action against the company except with leave
- Official Receiver controls the assets
- Directors' appointment and powers are terminated
- Employees discharged



## Administration vs Liquidation

Focus on rescue

Administrator may run the business

Tends to be cheaper

Potential for better return

Focus on winding-up

No power to carry on business

Tends to be more expensive

Rare for unsecureds to recover

## David Holland QC



**BANKRUPTCY AND VOLUNTARY ARRANGEMENTS**

## Bankruptcy

- Statutory rehabilitation of an insolvent individual
- Automatic discharge from debts
- IP collects and distributes assets
- Parts VII to XI of the Insolvency Act 1986

## Consequences?

- Automatic vesting – s.306
- Dispositions void - s.284(1)
- Court may stay action, execution or legal process – s.285(1)
- No creditor can pursue own remedy – s.285(3)
- Prove for debt and receive dividend

## Length

- Starts* - when order made
- Ends* - automatically after one year ('discharge')
- May be* - extended if the bankrupt is unco-operative (s.279(3))
- Effect* - release from all debts as at date of bankruptcy order (s.281(11))
- Trustee* - may still continue to act after discharge

## How to make someone bankrupt

- Creditor serves statutory demand
- SD not set aside and debt not paid
- Creditor presents a petition – s.264
- Debt must be £5,000 or more –current or future, unsecured – s.267
- Debt must be liquidated – i.e. ascertained or ascertainable
- Unable to pay / no reasonable prospect of paying – s.267(2)

## Challenge?

- Annulment – s.282
  - Discretionary
  - If order ‘ought not to have been made’ – s.282(1)(a)
  - If debts and expenses have been paid or secured – s.282(1)(b)
  - Effect: estate reverts to bankrupt – s.282(4)
- Rescission – s.375
  - Discretionary
  - Exceptional circumstances
  - E.g. events / facts of which court was unaware

## Bankruptcy in L&T context

- No claim for rent without leave – s.285(3)
- Proceedings for forfeiture possible (incl. on ground of rent arrears)
- Peaceable re-entry permitted
- CRAR exercisable but only for up to 6 months' rent before start of bankruptcy – s.347
- If CRAR exercisable, landlord can collect rent from sub-tenant (s.81 TCEA 2007)



## Voluntary Arrangements

- CVA – Part I Insolvency Act 1986
- IVA – Part VIII
- Agreement between company / individual and creditors compromising debts
- Aim is to rescue – price is creditors accept less than 100%
- 75% of creditors by value can bind minority creditors without consent

## Process

- Directors / individual make a proposal (s.1(1) / s.256A)
- Creditors vote on proposal
- If accepted, binds debtor and all creditors, including dissenters
- Administered by supervisor (s.7(2) / s.263(2))
- Creditors and supervisor can apply for directions

## Consequences

- Every creditor is entitled to vote, according to the value of their claim
- Unliquidated creditors may be given an estimated minimum value
- VA is a statutory contract – consequences depend on its terms
- Can compromise future debts
- Cannot affect the rights of a secured creditor to enforce security (s.4 / s.258)

## Set up?

- Directors or individual make a proposal to creditors
- Qualified IP acts as nominee to supervise
- Nominee reports to court
- Creditors decide – with or without modifications
- Nominee then reports the decision to the court and gives notice
- Moratorium when directors intend to propose a VA
- Similarly, individuals can apply for an interim order (s.252)

## Challenge?

- Unfair prejudice / material irregularity
- By creditors / nominee
- Time limit for application – 28 days
- Court has powers:
  - To revoke / suspend
  - Give directions
  - Revised proposal
  - Supplemental directions

## Consequences for L&T?

- CRAR not available
- But landlords cannot resort to sub-tenants
- VA binds past and future rent
- Right of re-entry is unaffected

## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.**

# Thank you for listening

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