Compensation for creditors?

There is a fine balance to be struck between the right of redress and compensation claims.

AUTHOR – David Kerr MCICM is the Chief Executive of the Insolvency Practitioners Association (IPA).

David Kerr

IN its role as the oversight regulator, the Insolvency Service (IS) (an executive agency of BEIS) undertook a review of how the regulators handle complaints against Insolvency Practitioners (IPs). One of its recommendations was for the regulators to enter discussions with IS to consider the feasibility of a regulatory mechanism whereby compensation can be paid by IPs to complainants where they have suffered inconvenience, loss or distress as a result of IPs' actions.

This is based on a trend towards increasing the number of complaints from consumers, and a Government desire to see some form of redress for complainants generally, applied mostly in cases of minor error, mistake or alleged poor practice on the part of IPs. It is also related to the relatively new 'fair treatment' statutory objective for the insolvency regime.

However, some careful consideration of the need for 'compensation' as such is required. There is a concern among some that payment of compensation by IPs for matters that would otherwise be brought to the attention of the regulators may adversely impact on effective regulation.

There is a current Insolvency Guidance Paper on Dealing with Complaints, and this already makes provision for IPs and/or their firms to have in place proper procedures for dealing with complaints, and covers the need for explanation, rectification where appropriate, and apology. It doesn't expressly provide for compensation, but before this or any other mechanism is used to explicitly introduce compensation as part of the IPs' procedures, the circumstances in which that might (or might not) be appropriate should be explored.

IPs are generally acting for the collective benefit of creditors, and their acts and dealings will usually affect creditors generally. Financial redress to one creditor in a class would ordinarily not be appropriate, unless that creditor/complainant has suffered some particular financial loss as a direct consequence of an IP's acts or defaults. That could apply in some personal insolvency cases where the debtor is the complainant, but even their IPs' decisions are likely to impact on creditors generally rather than the debtor; where debtors complain about perceived delay, for example, they are not likely to have suffered any loss.

Unfortunately, some degree of distress or inconvenience is not uncommon among those affected by insolvency proceedings, as a result of the financial circumstances of the insolvent entity and the consequent loss creditors and others suffer, or just as a result of a lack of understanding of insolvency processes; can IPs be expected to compensate for that?

Regulators are required to address the conduct of IPs. There is scope with the published Common Sanctions Guidance for the regulators' committees and tribunals to take into account mitigating factors such as efforts by IPs to resolve and remedy complaints, and by that IPs are not discouraged from rectifying a matter where that can be done.

As part of the complaint form for the Government's online Complaints Gateway, complainants are required to say whether the matter had been brought to the attention of the IP. If IPs and complainants have resolved matters through an apology or payment of compensation, it would not seem appropriate for the regulators to then reconsider those matters (other than to consider that redress in the context of mitigation), but matters amounting to misconduct should arguably not be dealt with between IPs and complainants; instead they should be brought to the attention of the regulators and dealt with appropriately by them. There is a separate question about the processes that may then ensue, and a consistent redress or dispute resolution system operated by regulators is a worthy discussion topic.

The present recommendations from IS is focused on IPs' paying compensation. Where less serious matters are resolved by some rectification/redress/apology, the complainant should not ordinarily be permitted to progress the matter further. Some complainants would see that as a restriction.

Policing a compensation scheme operated by IPs outside of the regulators' complaints regime can only be reviewed after the event, realistically through routine monitoring. That is done already to some extent. But while a review of IPs' procedures and their application might be expected, neither complainants nor the IS could reasonably expect regulators to second-guess whether what was agreed between the parties was fair or reasonable.

So, the balance here is to consider redress mechanisms with regard to the seriousness of the matters in a complaint, to assess the complainant's wishes, and to ensure as far as possible that serious conduct matters are not 'paid away'. It is also important to appreciate that complaints processes are not primarily geared towards compensation, but instead designed to address conduct issues in the context of the regulators' overall responsibilities. Perhaps the public interest and confidence in the insolvency regime should be primarily focused on the broader regulatory framework and the assurance it can provide rather than on compensation (though it may have a place) but instead on the broader regulatory framework and the assurance it can provide.