

July 2003

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IR35 legislation & NEDs

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## Dear Colleague,

Welcome to the July Issue of *Interim Insight*.

As organisations continue to search for solutions to address the escalating competitive and economic pressures for business survival, (both from domestic markets and globally) they have not only had to redefine themselves in terms of entity - 'think global act local or think local act global'? – but also to embrace the increasing orientation towards a flexible workforce.

There are encouraging signs that Interim management as an effective business solution is gaining more momentum internationally, and you will find that this Issue of *Interim Insight* has an international theme to it. As Interims, there is equal demand on us to redefine, reinvent or reposition ourselves and our businesses. I hope that you will find some of this Issue's articles of interest in appraising overseas opportunities and to broaden your Interim portfolio – 'think global work local or think local work global'?!

By kind invitation of the Institute of Directors' Policy Unit, I attended two seminars recently on the subjects of "The Convention on the Future of Europe" and "Tackling the Regulatory Culture at its Roots". Both provided greater insight into the evolving political machinery and increasing bureaucracy developing within, and indeed between, UK and EU governments, with excellent content, delivered by prominent speakers and admirably officiated by Ruth Lea, Head of the Policy Unit, IoD.

However, the generous hospitality of the IoD at the ensuing reception was for most of us the highlight of the events, as by this time we had all become totally depressed with the evident lack of direction and leadership by Ministers and officials representing us. I share this with you particularly in connection with the three proposed items of employment legislations that are likely to impact Interims and on which we have been actively lobbying with the Government for exclusion. Whilst the situation is not finite yet and we continue our efforts with any influential body that can serve our interests, I would encourage you to also continue your representations with your MPs and MEPs, as it would seem that securing accountability from the MPs of both Parliaments is probably more tangible to achieve. The increasing red tape emerging within the current political climate, compounded by an A to Z of regulatory bodies, whose remit is not only difficult to identify but also whose accountability needs to be enforced, does not make our tasks any easier and we need to maintain the pressure from all channels. It would not be surprising if yet another new regulatory body were formed to 'regulate the regulators'!

Our 'eventful' events season came to a close (before the summer recess) with the hugely successful "The Changing Turnaround Landscape – What Interim Managers Need to Know", held in Manchester in July, kindly sponsored and delivered by PwC. Given the continuing interest on the subject of turnaround and change management and in response to popular demand, we are delighted to announce that PwC have kindly agreed to repeat the event, this time in London in the autumn.

The public sector is another area of particular interest and we are grateful to KPMG Interim Management for agreeing to sponsor this event in November.

We are very pleased with the market feedback on *Interim Insight*, "more of an industry magazine than a e-newsletter" being one of several comments – please keep your ideas and contributions flowing in. We are also receiving more industry speaking engagements and interest from the media, our most recent feature being in the July edition of the leading business journal Yorkshire Business Insider.

Happy reading and there's certainly plenty of it in this Issue! On behalf of the Board I wish you all a good rest of the summer and look forward to seeing you at our forthcoming events in the autumn.

**Taravat Taher-Zadeh**  
Chairman

## ● IIM NEWS & EVENTS

### NEWS

#### ■ IIM Sub-committee Formation

We are grateful to all Members who have volunteered supporting Institute activities and new initiatives in further developing the IIM, and congratulate them on their appointments to the sub-committees.

<b>Marketing &amp; Communications</b>	Paul Vousden, Graham Sibley, Bob Chambers, Ian Henderson
<b>Membership</b>	Assessors: Ray Gentle, Tony Tyler, Ian Younger-Ryan, Nick Duncan, Tom Brass Quality Assessor: Paul Vousden
<b>CPD</b>	Frank Dawson, Tony Tyler, Stephen Huard
<b>IIM Regional Developments</b>	Colin McGrath succeeds Dr. Glenn Strange as Regional Director for IIM Scotland Chris Mann joins Rod Seville, Regional Director for IIM Anglia

#### **Public Affairs Committee**

Given the increasingly active role of the IIM in lobbying at Government and EU level, the Public Affairs Committee is seeking additional members. Members with experience in lobbying, public sector, marketing and media are invited to apply. Please send your inquiries to [publicaffairs@ioim.org.uk](mailto:publicaffairs@ioim.org.uk).

#### **Ethics & Corporate Governance Committee**

The E&CG Committee has a number of significant issues that require development and implementation. Therefore, Ian Younger-Ryan the committee's Chairman would welcome participation from at least three other members to join the committee. If you have a background or experience from the legal sector, as a company secretary, or have been a director or senior manager responsible for corporate governance, Ian would like to hear from you. Please send your inquiries to [governance@ioim.org.uk](mailto:governance@ioim.org.uk).

#### **IIM Disciplinary Panel**

One of the roles of the E&CG Committee is to set up a Disciplinary Panel for the purpose of dealing with complaints and issues about Members, and to ensure that the IIM Code of Conduct is adhered to. It is anticipated that it will be extremely under-utilised!

We believe that on the back of a substantive Code of Conduct as well as a strict membership accreditation process already in place, it is important for the IIM to have a robust process for dealing with matters of professional impropriety. This move will also signify an important message to client organisations and providers of the high standards set by the Institute and the value proposition attached to the selection of IIM Members for Interim assignments.

We hope to announce further developments by the time of the next issue of *Interim Insight*. In the meantime, any comments or input to this process would be welcome.

#### ■ **Membership Benefits**

##### **Member-get-Member Campaign**

We all know that referral is the best way to get business, so with this in mind we are encouraging Members to help boost membership by introducing friends and colleagues to the Institute.

As Members we know the benefits that belonging to the IIM give us - assessed status, promoting excellence through professional standards, CPD, networking opportunities, marketing intelligence and practical help and advice. Additionally, Members can take advantage of preferential rates for Professional Indemnity Insurance with Dallas Kirkland, access accounting services through Nyman Linden and legal services through Lawspeed.

On top of these, the Board is pursuing a number of campaigning and lobbying initiatives with Government, Interim providers, other professional bodies and user-organisations to raise awareness of Interim management as a specialist and professional discipline, as well as to protect Members' interests.

To give us a stronger voice we need to grow the membership. Therefore, starting in August any Member introducing a new member will have the option to receive a bottle of Champagne or a £20 reduction off their annual Institute subscription at their next subscription renewal. The introducing Member will be contacted once an offer of membership (at any grade) is made and accepted by the applicant and the assessment fee and first subscription paid. So get cracking in order to start cracking those Champagne bottles!

NEW MEMBERS

APPOINTED TO

SUB-COMMITTEES

INVITATIONS TO

ASSIST

IIM INITIATIVES

&

LOBBYING ACTIVITIES

OF

PUBLIC AFFAIRS

&

E & C G

COMMITTEES

IIM

MEMBERSHIP

CAMPAIGN

## EVENTS

Our event on 7 July co-hosted with PwC in Manchester brings to a close our events season before the summer recess. An evaluation of our events programme during the past year has revealed some interesting and useful insight to help us respond to Members' needs and further improve our activities and services.

During the 12 months leading to our AGM this year, we held a series of events across the country to meet as many Members as possible and which covered a host of topical issues of importance to you and the Interim sector as a whole.

London continues to be the preferred location, followed by Birmingham, Manchester, Cambridge and Milton Keynes. As we continue to build on our regional development we will be holding events in other locations as well.

There is interest developing in interactive workshops, with the leading topics being 'self-marketing', 'improving business performance', 'Change Management' and 'Interim Case Studies'. The majority of delegates confirmed that their objectives for attending the events were met with a few saying that they were partially met. Over 65% of delegates had heard about our events directly through the IIM, with 26% from leading providers, and the balance through other sources such as the IIM website and the media.

We are delighted with the industry momentum that our events and activities are gathering and grateful to all our sponsors and hosts, Odgers Interim, Calibre One Executive Interims, KPMG in the UK, DLA international law firm and PricewaterhouseCoopers.

We wish equally to thank again all our keynote speakers who kindly gave up their time in supporting the Institute and for sharing their knowledge and expertise with us.

Peter Seedhouse (Inland Revenue), Nick Duncan (IIM Member), Miles Protter (The Values Partnership), Dermot Hill (Intramezzo), Gwyn Rhys (That's the Trick), Tony Crilly (Saladin Technical Services), Marianne Wheatley (Bevan Kidwell Solicitors), David Mackenzie (Baker & McKenzie Solicitors), Dr. Richard Wilson (IoD Policy Unit), Professor Colin Carnall (Henley Management College), Mike Green (IIM Member), Wendy Harrison & Colin Ashford (DLA Lawyers), David Costley-Wood, Philip Tooke & Irving Warnett (PricewaterhouseCoopers).

Outlined below is the full programme of events held during the period - we look forward to seeing as many of you as possible at our forthcoming events, and please continue to give us your feedback.

Date	Location	Topic
June 2002	Birmingham	<i>Tax Man's View of IR35 – The How &amp; Not the Why</i>
September 2002	London	<i>Self Marketing &amp; Networking Skills</i>
September 2002	Hatfield	<i>Value Creation &amp; Effective Leadership</i>
October 2002	London	<i>Interim Management Teams</i> & <i>Networking your way to Profitable Customers</i>
October 2002	London	<i>Commercial Espionage</i>
November 2002	London	<i>Knowing the Law: Contractual Relationships</i> & <i>The Data Protection Act</i>
February 2003	London	<i>The SME Market Opportunities for Interim Managers</i>
May 2003	Newbury	<i>Crafting Successful Change</i>
May 2003	Leeds	<i>Interim Management in Corporate Restructuring &amp; Venture Capital Projects</i>
May 2003	Manchester	<i>The Changing Turnaround Landscape – What Interim Managers Need To Know</i>

### ■ **“Next Step 2003 – The Career Options Show for Mid-life Professionals” Horticultural Hall, London 27 & 28 June**

The IIM was represented at this two-day exhibition - the first of its kind in the UK.

Taravat Taher-Zadeh and Ian Daniell (ex Chairman of the trade body, the Interim Management Association, and MD of Executive Support Group), delivered a seminar on Interim management, not only sharing the platform but also as a support act to one another throughout the slide presentations.

■ **“The Changing Turnaround Landscape – What Interim Managers need to know”  
PricewaterhouseCoopers, Manchester 7 July**



**Welcome by our host  
Michael Horrocks, PwC Partner**



**Taravat Taher-Zadeh introducing delegates  
to the IIM & Board members**

Around 65 delegates were treated to a mini turnaround master class at the offices of PricewaterhouseCoopers in Manchester. Michael Horrocks, Partner Business Recovery Services, kindly opened the evening followed by Taravat Taher-Zadeh IIM Chairman, thanking our hosts for their generous sponsorship of what was a most interesting evening, charged with a lively debate and followed by a lavish reception. The evening covered topics of interest to both turnaround specialists and practising Interim Managers working on projects involving major change.

First, David Costley-Wood, PwC Corporate Finance & Recovery, presented an outline of the Enterprise Act 2002 due to come into force later this year. The main message of the Act was to remove the stigma of failure (citing the US experience of Chapter 11) whilst at the same time facilitating the rescue of a company as a going concern, with the existing management remaining in situ. It is intended that the administration process would be used to rescue companies rather than 'bury' them. One of the consequences of this process would be to restrict the use of receiverships and also abolish all Crown preferential debts (e.g. PAYE/VAT). It was interesting that the ensuing panel discussion seemed undecided on whether this process might be seen as a potential route for more or less external Interim management work!

The next topic was the thorny pension problem for companies with defined benefit (final salary) schemes. Philip Tooke, Director, PwC's pensions recovery unit, admirably articulated this complex issue. He explained the background to the pension problem that has recently witnessed an FRS17 pension deficit of some £70bn for the FTSE 100 companies that have defined benefit schemes. Philip then took us through the recent Government proposals outlined on 11 June to create a Pension Protection Fund. One of the features of the Fund is that Pension Trustees would have more power to decide employer contributions, which may in turn impact on the employer's ability to compromise the debt to the Trustees. A key message from Philip's presentation was that, despite the Government's good intentions to help alleviate the pension problem, the 'cure' might have the entirely opposite effect by creating more insolvencies!

Finally, Irving Warnett, Director, PwC Business Regeneration, gave a stimulating presentation on the turnaround landscape illustrated using a series of PwC business models, "The Corporate Life Cycle", "The Corporate Demise Curve", "Rebuilding Value in the Turnaround Corridor".

Irving's main theme was that turnaround equated mainly to change that required special skills and powers of persuasion. Irving described the "Irv Curve" - his view of the downward phase of a typical company's life cycle - and introduced the concept of a 'turnaround corridor' in which the downward trend could be arrested and turnaround started. He argued that there were two distinct elements to the corridor - the 'stabilisation' process (involving strict cash & stakeholder management to re-establish the viability of the business) and the follow-on 'rebuild' process (involving business performance improvement and establishing an 'exit' strategy).

Not surprisingly, this scenario should ideally create further opportunities for Interim Managers with strong influencing skills coupled with financial and/or operational abilities! For those who were unable to make this event and want to learn more about potential assignment opportunities, you will be pleased to note that we will be repeating the event again in October in London.

Our May issue of *Interim Insight* included an article about the Company Doctor Clubs that are run by PwC's Leeds and Manchester offices for local Interim Managers working mainly in turnaround situations. PwC have had an external 'turnaround panel' for a number of years. This is managed by John Bloor who is based in London and he would be happy to talk to any appropriately experienced IIM Members who have operated at MD or FD level in companies with revenues of £50m and above. He can be contacted on 020 7804 4239.

MANCHESTER

7 JULY

IN ASSOCIATION WITH

PWC

IIM MEMBERS

ARE INVITED

TO APPLY FOR

MEMBERSHIP OF

PWC'S

TURNAROUND PANEL

&

CO. DR. CLUB

## ▪ MARK YOUR DIARIES

LONDON

**London 8 October 2003 - The Changing Turnaround Landscape – Building Corporate Value**

8 OCTOBER

Our autumn schedule will be launched with a repeat of the event held in Manchester on turnaround management, which we are grateful to PwC for agreeing to host in London.

IN ASSOCIATION WITH

Utilising their significant experience in the corporate market PwC will be looking at some of the key warnings signs that Interim Managers should be aware of. They will also discuss the critical period within which companies must seek to restructure their business or face likely failure. The current hot topic of pension deficits, its effect on under-performing companies and the implications for Interim Managers will also be covered during this evening event.

PWC

Further details and booking information will follow shortly.

## November – Interim Opportunities in the Public Sector

LONDON

Many of you have requested an event covering the developments of the UK public sector and the increasing Interim opportunities emerging within this sector. We are very pleased to announce that in association with KPMG Interim Management we will be holding this event for week commencing 3 November. Again further details and booking information will follow shortly.

NOVEMBER

IN ASSOCIATION WITH

We are currently working on other events, which we aim to announce on or before the next Issue of *Interim Insight*.

KPMG



## ● INTERIM INSIGHT'S FIVE MINUTE FOCUS ON PROVIDERS

In this issue we talk to Chris Behan, Partner at Odgers Ray & Berndtson and Head of the Group's Interim Practice.

**Interim Insight:** *Can you please give us some background to Odgers Interim, (including organisational/operational structure in managing client/industry/assignment needs) and your particular areas of specialisation within the interim sector?*

INTERIM INSIGHT

**Chris Behan:** *The company, originally formed by Graham and Ian Odgers, dates back over 30 years. In 1998 an MBI team led by Richard Boggis-Rolfe, ex Managing Director of BNB plc, acquired it. It is now the largest privately owned Search Company in the UK, the 5th largest search company in the UK and through the acquisition of the Ray & Berndtson brand name it enjoys the ranking of 7th largest search company in the world.*

INTERVIEWS

CHRIS BEHAN

OF

*The Company has three distinct businesses, Odgers Ray & Berndtson for executive search, Odgers for advertised selection recruitment and Odgers Interim. The organisation is managed through business practices, which are mainly sector based – Plc Board Appointments, Financial Services, Retail, Not for Profit, Industrial and Manufacturing, Professional Business Services and Technology - the exception being the Interim Practice which covers all business sectors but, in addition, is represented on all the other executive search practices. There are clear benefits in this policy of operating as an integrated search, selection and interim organisation within business sectors. One third of our clients use all our services.*

ODGERS INTERIM

*We have almost 150 people working for us in the UK, of which 11 are in the Interim Practice.*

*"...successful Interims have low boredom threshold.."*

**Interim Insight:** *Do you have an ideal set of qualities that you look for in an Interim candidate?*

**Chris Behan:** *Living up to their skills set, professional integrity, seeing projects through, a desire and willingness to thrive on a challenge, coping under pressure and a sense of humour. By the way, all successful Interim Executives have a low boredom threshold.*

**Interim Insight:** *What's your view of the Interim market? Do you think it will grow or that we'll see a tailing off in demand? In which industry sectors and functional roles do you anticipate possible changes, and what impact do you foresee to daily rates?*

*"....the market is still small and there are many opportunities to develop.....30% of this year's clients are first time users...."*

**Chris Behan:** *During the past two years the recruitment market has been hit badly by the downturn in the World's economy. Contrary to the general impression, the Interim Management market has not suffered as much as the recruitment market and there has continued to be growth. This is mainly due to the fact that the market is still small and there are many opportunities to develop it despite the state of the economy. However, it is still difficult to forecast what is going to happen by 2004 but the market will still continue to grow. 30% of this year's clients are first time users.*

In the present environment, Companies are more likely to continue making director level interim appointments, as opposed to those at lower management levels. A view is taken, wrongly in my opinion, that these lower level requirements can be shelved or dealt with internally.

Fees should reflect the value of the assignment in the same way as salaries do. Interim management is not a cheap option, and too many Interim Managers are being given away. The average daily fee paid to Interim executives by Odgers increased in 2002 and is now nearly £700 per day. Over 45% of Interim executives working with Odgers receive more than £750 a day, of which a third receive £1000 or more. Our policy is very open and transparent, for example, all three parties to any assignment are fully aware of the fees and the costs.

*"Interim management is not a cheap option....too many Interims are being given away....."*

**Interim Insight:** How aware do you think clients are of the benefits of Interim management in solving senior management problems?

**Chris Behan:** There is still much room for cultivating greater awareness of Interim management as a management-resourcing tool. Many organisations are still not familiar with the concept or the value Interim management creates in offering short-term solutions for achieving long-term objectives. Both practitioners and providers can collectively and severally play a more active and productive role in developing Interim management awareness and new initiatives should be considered.

**Interim Insight:** Do you think that Interim Managers are gradually taking the place of management consultants?

*"Interim management and consultancy are complementary, not competitive..... did TV kill radio?!"*

**Chris Behan:** No! However, there is a place for both consultancy and Interim management as they are, in my opinion, complementary, not competitive, management tools. An analogy. I remember when they said TV would kill off Radio!

**Interim Insight:** What do you think are likely to be the biggest growth sectors for Interim management over the next few years?

**Chris Behan:** The public sector is the one main growth area currently in the UK. However, this sector is at the mercy of Government policy and could decline as fast as it has risen. There is no reason why the use of Interim management in all business sectors should not continue to grow.

However, the state of the world and national economies will determine which sectors will grow the fastest and that is no longer an easy factor to forecast. We have to have the speed and flexibility to see the opportunities quickly and react quickly. At Odgers we are very conscious of this and react accordingly. It is one of several reasons for a growth in our Interim business - over 50% this year compared with last year – and last year's wasn't bad either!

*"....speed and flexibility are key factors in responding to opportunities..."*

**Interim Insight:** Where do you feel Odgers Interims unique differentiation lies within and how do you manage your recruitment and negotiation process.

**Chris Behan:** We are part of a very successful, well-respected executive search company. We, therefore, have to reflect the professionalism and standards set by this part of our business as well as operating at the same level. In practising this, we operate very closely with our executive search consultants and our approach and attitude to the client and the Interim executive is crucial. Ignore or neglect either the client or the interim executive at your peril! They are both of equal importance to the success of our business – without either of them we do not have a business.

We take total management control of the selection process and are involved throughout the process including meetings and interviews between the client and the potential interim candidate. All three parties are engaged in the negotiation process and throughout the assignment. Such collective involvement and openness, we believe, is where we offer our added value.

*"....collective involvement and openness are our added value....."*

The high-level interim management appointments we make demonstrate the results of these policies.

**Interim Insight:** If there were one single piece of advice you could give an interim manager looking for assignments, what would it be?

**Chris Behan:** Over the past 15 years in Interim management considerably less than 1% of all the CVs I have received have produced a successful Interim Executive. If you are thinking about becoming an Interim executive, think hard, think long and take a lot of advice from successful Interims and providers.

"....Out of sight out of mind....don't think for one moment you'll be put forward .....by the wonders of some database...."

*In this period I have noticed that all the successful Interims have several attributes in common but the one that I think is significant is the ability to communicate. Not only with their client and the people they work, with but also with the Interim management suppliers. The latter is crucial – out of sight, out of mind.*

*Do not for one moment think you will be put forward for the next assignment by the wonders of some database. The top suppliers will use their small databases with discretion and a lot of "who do we know?" The others, with large databases, will use their databases but, frankly, it's a lottery. Get yourself known and get yourself in front of the providers.*



Prior to joining Odgers Interim, Chris Behan was with NB Selection Ltd. and established their Interim practice. Chris spent the first 10 years of his career with GEC, first as a military radar design engineer before becoming production controller for the GEC FHP Motor Factory and later as Marketing Manager of GEC Electric Motors. He was then appointed Managing Director of Hoffman la Roche's Medical Electronics Company working in Europe and the U.S.A. Chris's Interim career started in 1987 when following a period as a practitioner he moved on to selling the concept as a consultant before joining Odgers Ray & Berndtson in 2000 as Managing Director of Odgers Interim practice.



## ● INTERIM MANAGERS AS SHADOW DIRECTORS

The concept of "Shadow Directorship" became part of English company law in 1980. The intention was to extend the various duties and potential liabilities of directors to anyone:

- who controlled board decisions through instructions or directions; and
- who had not been appointed as directors themselves, and who avoided holding themselves out as directors.

ROBERT PATERSON

OF

DLA LAWYERS

OFFERS SOME

INSIGHT FOR

INTERIM MANAGERS

ACTING AS

SHADOW DIRECTORS

Does this include Interim managers?

As is well known "Shadow Directors" is defined in section 741 Companies Act 1985 as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act." The definition appears in similar form in section 251 Insolvency Act 1986 and section 22(5) Company Directors Disqualification Act 1986. It extends to an individual or a corporation, and at first sight appears to be narrow. "Directions or instructions" hints that more than mere suggestion is required, and "accustomed to act" suggests a pattern of behaviour. However, in recent years the courts have sought to move away from a narrow interpretation and have analysed the actual influence exerted in each case.

The definition is followed by the following exception: "However, a person is not deemed a Shadow Director by reason only that the directors act on advice given by him in a professional capacity." This suggests that someone can direct or instruct a board of directors with impunity provided he acts in a professional capacity. Does it follow that interim managers are safe provided they are professionally qualified and regulated?

The relatively sparse case law would suggest this is **not** so if interim managers go beyond the province of a company's professional adviser - which they invariably do. Interims should have regard in the first instance to the guidelines issued by the disqualification unit of The Insolvency Service which the unit uses when assessing a case based on shadow directorships:

- a) whether the person was a signatory to the bank account;
- b) whether memoranda of interviews with bank officials point toward shadow directorship;
- c) whether there is evidence of the person ordering goods or services;
- d) whether there is any written documentation which the person has signed as a director;
- e) whether he/she has been attending board meetings;
- f) whether there is evidence from creditors or employees that he/she has acted as a director; and
- g) where the company has gone into liquidation, whether he is the only person able to give the insolvency practitioner (certain) information.

Many, if not all, interim managers are likely to fall within these guidelines and, as a consequence, choose to be upfront about their involvement and take a formal appointment as director. However those who do not should also have regard to case law on the subject.

In the 1992 case of *Re Tasbian Limited* the Court of Appeal considered the merits of whether a Mr Nixon, an experienced company doctor, and Fellow of the Institute of Chartered Accountants, was a shadow director. Mr Nixon was appointed as a consultant by the company's financier to report on Tasbian Limited's ailing financial position and assist in its recovery. The Court of Appeal considered Mr Nixon's involvement in the company's affairs. The court considered that acts such as negotiating a moratorium with the company's creditors were "of little weight". However, more significance was attached to the finding that Mr Nixon had monitored the company's trading through the bank mandate - every company cheque had to be countersigned by Mr Nixon or one of his partners. The Court found that by deciding which cheques could or could not be submitted to the bank, Mr Nixon exercised a degree of control over the finances. The Court of Appeal concluded there was at least an arguable case that Mr Nixon could be a shadow director and on that basis allowed disqualification proceedings outwith the usual two year time period following the onset of receivership.

The above begs the question at what stage the interim manager's involvement would be deemed to go beyond the normal boundaries of his profession. In *Re Unisoft Group Limited*, it was held that an individual would have to control the majority of the board of directors - influencing only two out of five directors was insufficient. However, in the *Secretary of State for Trade and Industry v John Deverell and Peter Hopkins*, the Court of Appeal gave more constructive guidance. Morritt LJ commented that the concept of shadow directors was there to protect the public (presumably creditors) and stated the following:

1. the term "**Shadow Directors**" should be interpreted in the normal way to give effect to the purpose of protecting the public. The potential of disqualification and personal liability did not justify a narrow interpretation;
2. a real influence must be exerted in the corporate affairs of the company, but such influence need not be over the whole field of its corporate activities;
3. communications between an alleged shadow director and a board should be ascertained objectively in the light of all the evidence. It is not necessary for the claimant to prove any understanding between the director and the shadow - it usually would suffice to prove the communication and its consequence;
4. non-professional advice can lead to shadow directorship; and
5. the actual directors would usually act in a subservient role or surrender their discretion, although not always.

The Court of Appeal also stated it was not necessary for a shadow director to literally "lurk in the shadows" and commented that epithets used previously such as "puppets", "dancers" and "cats paws" were inaccurate and misleading.

It can be seen that the concept of shadow director is very broad and it appears each case will be decided on its facts. This does not detract from the serious risks facing an interim manager. A shadow director's lot includes statutory duties to have regard for the companies' employees, declaring any interest in business discussed at board meetings, risking disqualification and also personal liability for such matters as misfeasance and wrongful trading. The Enterprise Act 2002 will give liquidators the power to issue proceedings in wrongful trading and misfeasance proceedings without prior sanction of the court or liquidation committee. The likelihood of shadow director proceedings remains as high as ever.

This article was kindly produced for *Interim Insight* by Robert Paterson, solicitor in the Business, Support & Restructuring Department at DLA Leeds office.

DLA is a leading law firm in the UK with a significant international presence. For further information of DLA's services please visit their website at [www.dla.com](http://www.dla.com) or contact 08700 111 111.



## ● WINDOW ON INTERIM MANAGEMENT ASSIGNMENT

### “Working Down Under”

#### Acquisition & Financial Management Interim solutions for the Australian Broadcasting Corporation

IIM MEMBER  
DAVID MITCHELL  
LEADS THE  
ACQUISITION  
&  
POST MERGER  
INTEGRATION  
OF  
NATIONAL  
TRANSMISSION  
AGENCY  
BY  
NTL

Choosing a favourite case study in Interim management has not been easy for me, simply because in over 10 years' Interim experience I have not yet had an assignment I did not like, and all have had much more challenge and satisfaction than anything in conventional employment.

However, there is one that stands out because of its uniqueness and variety of work involved. This was the acquisition and post-merger integration of the NTA from the Commonwealth by NTL's Broadcast Division.

It all started with a call from the NTL Group Finance Director when I was returning on a Friday evening from a previous assignment in the Midlands. (I had already done a variety of Interim projects for the Sister Company of NTL, CableTel, and was known to the key decision-takers at the time).

I was asked if I were willing to undertake an assignment as Interim FD in Australia for up to three months during the transitional phase of the sale of the NTA to NTL. Not having been to Australia before, this sounded extremely exciting and, after an interview with the NTL Broadcast MD, I was offered a 3-month contract as Interim Finance Director.

The objectives of the assignment were to:

- expedite the completion of the purchase of the business from the Commonwealth
- recruit all the key finance & support staff for the new business
- set up the business (subsequently renamed NTL Australia) with appropriate accounting, support systems and financial controls
- recruit a permanent FD locally.

I flew out to Sydney a week later and went immediately onto Canberra where the main business was located. Since the deal had not yet completed we were unable to have access to the company's premises and we therefore set up in temporary serviced offices in the city centre. The first fortnight involved an intensive round of interviews with all staff, which had expressed an interest in transferring across. Re-employment was not automatic since there were no equivalent TUPE transfer arrangements in place, and each member of staff therefore had to decide whether to remain with the Commonwealth (albeit in a different role) or apply to join NTL Australia.

As well as interviewing staff, start-up formalities for NTL Australia had to be undertaken. These included setting up a new bank account with the relevant mandates (we had been living on credit cards for several days and clearly the need to be self-sufficient was paramount); the work also included setting up new reporting systems for the business and preparation of a new operating plan for the year.

In addition, a series of meetings were held with Commonwealth officials in Canberra to agree what systems could be shared on a transitional service basis upon completion

These mainly related to specific accounting systems, where we negotiated the right to use for the first six months the Commonwealth system (SAP) for which we set up a separate file for NTL Australia. An external bureau was chosen to handle HR administration and payroll.

At the end of the fortnight all staff had been recruited to NTL Australia and I returned to Sydney to focus on completion of the deal. This involved lengthy negotiation with the vendors' lawyers on a variety of issues, any one of which could have prevented the deal going ahead. Completion took place at the end of April, when the last item remaining was waiting for the completion monies to arrive. This had been set up to come from the States who were almost a day behind us and the funds finally arrived on Friday evening just before the banks closed for business.

The new staff were warmly welcomed by the NTL Broadcast MD and myself on the following Monday morning and we set about applying the NTL corporate culture to the new team. I was now commuting between Sydney (where I had rented a serviced apartment overlooking Darling Harbour!) to Canberra on a regular basis and starting to get more involved in many of the detailed accounting and finance initiatives. These included the raising of start-up working capital, preparation of budgets, creation of a new chart of accounts and a host of separate projects for site services and facilities to ensure the new business could continue to be self standing without having to rely on the support of its former owners.

The next few weeks were largely devoted to 'bedding in' the new business and meeting customers and other stakeholders to inform them of the change of ownership, whilst ensuring that the high standards of service would be maintained. For some customers, new agreements had to be renegotiated to include price increases and changes to payment terms (typically within 30 days).

In the meantime, the search for a permanent FD was well underway. Having written the detailed job description and scoped the key tasks and candidate profile, we screened a number of potentially suitable candidates before this was finally reduced to a couple of excellent candidates.

The individual who was eventually selected had been closely involved with the sale of the business on behalf of the Commonwealth in his previous firm and had all the right skills and chemistry to fit in well with the new team.

I then handed over to my permanent successor and was able to enjoy a rare weekend break in the Whitsunday Islands before heading back home.

Against the objectives set early three months earlier, everything that had been promised had been accomplished, and a little more.

This was indeed an assignment on which I could look back with great pleasure. Sydney? Now that's another story .....

*Interim Insight* welcomes other Interim case studies of a broad professional and functional discipline, for publication in future issues.

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## ● INTERIM FLIGHTS BEYOND THE FRINGE

Interim Managers who are prepared to work overseas are finding greater opportunities than counterparts whose horizons are limited to the UK, where the Interim sector has experienced a testing time during the past 18 months.

Rupert Dobson Head of Practice, Hoggett Bowers Executive Interim Management, believes that whilst the main reason for the slowdown is due to the economic climate and uncertainty brought about by the War with Iraq, the process used by organisations in recruiting Interim Managers has become progressively complex, (compounding the frustration of many Interim Managers).

“Whereas in the past a ‘sponsor’ would brief, interview and sign the Interim in the space of a week, today many ‘gate keepers’ want to play a part as well. When the gate keeper and the sponsor work together they can be a very effective team, keeping costs down whilst ensuring the desired Interim skills are retained. However, as the gate keepers and sponsors rehearse their new roles on the open market, the resultant impact can become Interim assignment briefs that read more like permanent job descriptions, confusion on the target skills and knowledge, poor communication, and extended interview and selection processes.” Dobson believes that the challenge is to navigate a route that leads to a happy gate keeper (essential for future work), a happy sponsor (owner of the challenge, the catalyst for hiring and internal referee for peers) and a happy Interim Manager (briefed, supported and keen to deliver another successful assignment).

Europe is becoming the richest picking ground for Interim management. Employment laws in many countries mean using their own nationals is extremely difficult – excellent news for UK interims. Nigel Corby, IIM Companion and Managing Director of Global Executives, which has a strong tradition of selling Interim Managers into Europe and beyond, says: “UK employment law is flexible, this means that as awareness of the benefits of Interim management grows so do opportunities for the Interims. In other European countries the inflexibility of the employment regulations means there are fewer indigenous Interim Managers. This means companies have to look elsewhere to find people to fill the roles – and that elsewhere is the UK.”

50% of Global's work last year came from overseas, 90% of which was in Europe. As some of the traditional markets – such as the Benelux countries (where the concept initially started almost 20 years ago) and the UK – mature, there are growing demands for Interim Managers in, for example, Germany, Scandinavia, Spain, Portugal, Eastern Europe and even France (despite the strict labour laws). “The potential Interim management market in Europe is vast and it is a case of educating overseas businesses on the benefits of using an executive expert on a short or medium term basis both reactively and proactively,” explains Corby.

According to Alan Taylor, Partner at InterimEurope (a division of Ashton Penney), in terms of business culture “the Anglo-Saxon approach is more robust by comparison to the European approach which is much more sensitive to local laws and politics (which particularly plays an important part in business). International companies with investments in Europe prefer UK nationals.”

IIM Member and HR Interim Stephen Huard agrees. “The speed with which international business needs to move is in line with the UK work culture. Demand for UK type HR expertise that drives the workforce and takes things forward is developing across most of Europe, where peer roles are more inclined towards personnel management.”

Alan Taylor believes that for example business closures and the escalating overhead costs in West Germany, will drive more companies (particularly in the manufacturing and motor industries) to relocate to East Germany. This should create Interim opportunities, although the concept is still not fully understood or appreciated in the German markets. “There's a dearth of good managers in Europe whose removal or replacement is sometimes difficult. However, even if the companies can't easily replace the current incumbents, there will be a number of reasons for bringing in Interims to work alongside the local managers or until such time as it is possible to find a suitable replacement” says Taylor.

Stephen Huard is on assignment in Switzerland for precisely the purpose of filling in as Head of HR (for Europe, Middle East and Africa) whilst the current Director is working his notice. Stephen, who has been operating as an Interim for almost four years, also agrees that Europe is currently the best fishing ground for Interim assignments. “There are increasing constraints on headcounts in British businesses these days, over 70% of my assignments have been completed overseas, mainly in Europe and one in Afghanistan. The Swiss very much like the flexible nature of Interim management and certainly since my last assignment here two years ago, I have noticed a significant progress being made regarding the global pace of business activity”.

Fluency in the host country's mother tongue and in-depth knowledge of their cultural and business practices play an important part for Interims who want to cut the mustard overseas. Global Executives attach importance to proficiency in more than one language; in excess of a third of their Interim Managers are fluent in a second language, with 35% of those fluent in three or more languages. However, for “certain technical appointments language skills are not always the defining factor in the selection process as long as the candidate has the right skills set and experience to offer” suggests Taylor.

*“....the challenge is a happy 'gate keeper', 'sponsor' and 'Interim'....”*

*“.....as awareness of Interim management grows so do opportunities....”*

*“....Anglo-Saxon approach is more Robust .....international companies prefer UK nationals...”*

*“....language skills and cultural awareness are important for Interims who want to cut the mustard overseas.....”*

In Italy, another country where Interim management is also being adopted as a flexible resourcing solution, (largely by IT companies presently) language skills are important to the selection criteria. "The majority of the appointments being generated in Interim management are in the areas of HR, Operations, GM and Finance. Owing to the labour laws and unionised practices in Italy, opportunities are not developing as yet in other industry sectors and most appointments are currently sourced locally, as there is a lack of Italian speaking candidates", says Maurizio Quarta of leading Italian provider Temporary Management & Capital Advisers.

For Huard, not having language skills has never been a hindrance. In fact for his current client, part of the brief is to encourage and test the use of English, and send staff over to the UK for language classes where necessary.

One point that seems to be agreed upon is that an awareness of and a willingness to integrate into the local culture are as important (if not more) than language skills for successful delivery of Interim assignments. At Hoggett Bowers where the company's Interim portfolio is also taking on a strong overseas dimension, a client succinctly identified their need by saying that they were looking for "an Interim with a sense of geography in their CV."

"British based firms all too often send their own in-house staff to handle overseas operations often with disastrous, or certainly disappointing, results," explains Corby, who believes "It's essential that UK companies expanding into other countries take on someone who is not only bilingual but bicultural. It's vital to understand the culture of the people and how business practice operates in the host country." He says too many British businesses feel management experience and a background in their particular field are sufficient to enable them to handle European expansions and subsidiaries.

*"....Interims with a sense of geography...."*

In some countries such as Switzerland, with both German and French speaking regions, the cultural dimensions are even more compounded and attitudes in many respects are very different, as experienced by Huard, whose client is based in both regions. "Swiss labour laws are the same but both parts have a completely different attitude to work. Also, for example from a political standpoint one unique difference is the stance on the EU!" Huard continues, "Interim Managers on overseas assignments need to be equally aware and appreciative of the cultural differences prevailing in companies with international branches."

Edward Hope, who has recently completed an assignment for Global, working for a specialist distribution company as FD in France, says his fluency in French and German, coupled with his knowledge of both local culture and French business practice are vital skills in this situation. "The biggest value that I can bring to such a situation is the fact that I'm used to the discipline and practices of international groups and have an in depth understanding of the local business culture. This helps local colleagues understand the impact of their decisions and actions on the group and vice versa."

*".....Interims need to be equally aware of cultural differences in companies with international branches...."*

IIM Member David Mitchell, for whom the catalyst in securing his assignment was a previous one completed for a parent company in the UK, his fluency in French was beneficial to his FD Interim assignment. The challenging part of David's role was, he explains "the French structure is such that it is not user-friendly to go in, do the work, move on and that's it, because, particularly in an FD capacity one may be potentially liable for decisions made by the previous management. Therefore Interims need to be aware of a whole raft of obligations by virtue of office and consider protecting themselves through E&O insurance."

Stephen Schick, is shortly to complete an assignment as Interim FD for the French subsidiary of a US premium retail brand while the company recruits a permanent FD. Schick says: "In most instances I am selected for an assignment because language skills and international experience are required". He believes Interim Managers can provide a vital link between subsidiaries and head offices. "Interims can immediately tackle the urgent issues, and pass on expertise and experience to local teams - at the same time advising head office about local financial and trading practices which are not always understood by the parent company personnel."

Although Europe is currently the most lucrative spawning ground for Interim assignments, opportunities are also developing in other global regions. In building their international network, InterimEurope have also established associate offices in Moscow, Budapest and Warsaw, in order to serve their Interim practice. France based Global director Ross Allen explains: "The present crisis in Argentina has given rise to a shake out in the management rungs as companies reduce costs. We are providing them with the option of letting full timers go and instead taking on an Interim Manager, on a part time basis if necessary, during this fragile period. "Once the economic situation stabilises we will find companies making an increased call on Interim Managers as an add on to a small core management team as and when required."

*".....there's less pressure on rates and competition compared to UK...."*

In terms of negotiations, there appears to be less pressure on rates as well as competition compared to the UK, as the tendency - especially in Europe - is that clients do not feel the need to interview as many candidates. This may also be partly influenced by the cost of travel for interview purposes.

By its very nature Interim management is 'home-away', for international assignments it may even be 'far away'. There may therefore also be other issues to bear in mind when considering assignments, such as the scope of professional indemnity insurance, medical care and whether there is a need or indeed availability of adequate medical insurance cover in event of emergencies. For Stephen Huard his assignment in Kabul last year was the most difficult, not only owing to the hostile environment at the time but also on a personal level with only monthly return visits to the UK and the limited local medical facilities which he is pleased not to have had cause to call upon. He also adds that Interims wishing to work overseas need to be aware of issues concerning work permits and ensure that there is clarification as to whose responsibility this task falls upon.



## ● **INDUSTRY NEWS & DEVELOPMENTS**

### ■ **Public Sector Opportunities**

The Office of Government Commerce ([www.ogc.gov.uk/](http://www.ogc.gov.uk/)) works with government to improve procurement and programme/project management in the public sector. Its services include S-Cat, which is a catalogue based procurement scheme to provide public sector organisations with a simplified means of procuring, and contracting for, a wide range of consultancy and specialist services from a variety of service providers.

S-Cat has recently been extended to include Interim Management as a discrete service line. A list of the 25 companies that are approved providers of Interim Managers to the public sector can be found on the S-Cat website - [www.s-cat.gov.uk/](http://www.s-cat.gov.uk/). Once on the site, click on Human Resources and then Interim Management.

Whilst this initiative may not affect Interims with an existing network in the public sector, Interims wishing to enter this sector of the market are likely to find increasingly that the only route is via the approved providers on the S-Cat list.

### ■ **IR35 legislation widens to include Non-executive Directors**

Recently introduced legislation has widened the scope of IR35 to include remuneration received as an office-holder. This will be relevant to Interim Managers that also hold positions as non-executive directors, as the definition of an office holder includes non-executive directors.

The new rules were included in the Income Tax (Employment and Pensions) Act 2003 which came into effect on 6 April 2003. This legislation amends and in some cases replaces various pieces of tax legislation relating to taxation under schedule E. When IR35 was first drafted, the relevant section of the Finance Act 2000 did not clearly include office holders with the scope of IR35 for PAYE purposes. The relevant NI aspects of IR35, as compared to the PAYE aspects, have always applied to office holders and this latest piece of legislation brings the two branches closer into line. The chief remaining difference between the application of IR35 to PAYE, as compared with NI, relates to workers providing services abroad.

#### **Are non-executive directors caught by IR35?**

Whilst the new rules bring non-executive directorships fully within the scope of IR35, such arrangements are not necessarily caught by legislation. The same question needs to be asked, namely but for the existence of the intermediary, would the relationship be akin to employment (including office holders).

The core tests remain:

1. Is the worker required personally to undertake work?
2. Is there a mutual obligation to provide work and to do work provided?
3. Does the client exercise control over how the work is performed?
4. Are the other factors consistent with an employment relationship?

The answer to the first question would usually be "yes", however this is not conclusive and arrangements for delegation can be included within the contracts. As the contract will in most cases be direct between the client and the non-executive director's service company, the scope for agreeing terms may be easier. It may also be simpler to establish the hypothetical circumstances that exist between client and worker as there are no other contracts in the chain.

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With regard to the second question, under a non-executive arrangement there would not usually be a requirement for a set number of hours or a guaranteed amount of work. As a result the ongoing obligation to provide a set amount of work and do a set amount of work provided could also be absent.

The answer to the third question is likely to be 'no', as the non-executive is retained for his skills and experience the company would unlikely be controlling him. In fact the non-executive director could be controlling the direction of the entire company!

In relation to the other factors, depending on the nature of the relationship these could point towards or away from an employment relationship and all the relevant factors need to be considered.

Those Interims that hold non-executive directorships would be wise to review the terms in existence between their service company and the client if IR35 is a concern. The Inland Revenue appears determined to use all means to collect tax from personal service companies. Recently it has dusted off old tax laws such as s.660 ICTA 1988 (the 'settlements' legislation) and started issuing more demands. The message is clear that the key to maximising income is to take professional advice in relation to these essentially legal areas.

This article was kindly produced for *Interim Insight* by Michael Brophy, BBA, Senior Consultant, Lawspeed Limited, [www.lawspeed.com](http://www.lawspeed.com). IIM service providers Lawspeed, are a niche legal consultancy specialising in IR35, contract and employment law for those operating in the Interim Management and contracting industries.

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