

SIP 16 PARAGRAPHS 10 AND 11 EXCEPTIONS & CHALLENGES

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“Exceptional Circumstances”

Onus on A establish “exceptional circs”

Definition:

- No need to show unique or unprecedented
- Out of the ordinary, special or uncommon



In what context should “exceptional” be assessed?

Exceptional compared to what?

Should test relate to consequences of disclosure?

Desirability of obtaining legal advice?



Exceptional circumstances – Where No Commercial Confidentiality

Examples:

- Sale of only part of business
- Very nature of assets, e.g. defence contract or public interest issues
- All stakeholders already aware
- Issues of legal professional privilege - (including ongoing litigation)
- Small estate / plethora creditors – disproportionate cost?



Commercial Confidentiality Non-connected party

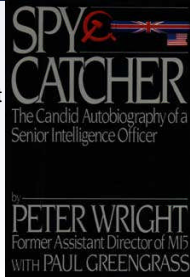
- Whose confidence – A / purchaser / 3rd party?
- Categories of confidentiality
- Can confidentiality trump SIP 16?
- What is genuinely confidential?
- Substantial disclosure with limited exception?
- Examples – identity of purchaser, amount of consideration, identity of funder, unpublished price-sensitive information



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Commercial Confidentiality Connected party

- Strong presumption in favour of full disclosure
- Guard against insiders contracting out
- Good and bad phoenix
- Independent purchaser with connected party
- Privilege issues



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Statutory exceptions

SIP 16 does not override statutory exceptions permitting non-disclosure e.g.

- r. 2.30 IR 86 – statement of affairs
- r. 2.33.3 IR 86 – prescribed part estimate
- r. 7.31 – access to court file



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Paragraph 11 – Timing of Disclosure

Disclosure to be with 1st notification

- Front-loading
- Unless “impracticable”
- Not necessary to show “impossible”
- More than “inconvenient” or “difficult”
- Likely to impose unacceptable problems or embarrassments



Paragraph 11 – bring forward initial meeting

“as soon as possible after his appointment”
cf. para. 51(2) Sch B1 “as soon as is reasonably practicable”

- No reasonableness?
- No exceptions?
- “should” not “must”
- Practical implications



Exception where no initial meeting
Para. 52 Sch B1



Impact of SIP 16 disclosure on challenges

Inform and
alleviate suspicion

or



Challenges

- Invalid appointment
- Administration application
- Choice of administrator
- Directions application
- Injunction
- Unfair harm
- Misfeasance application
- Remuneration
- Professional complaint



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Direct assault on power of sale

- Challenge to T&D Industries
- Neuberger
 - Correct
 - Change wording EA 2002
 - Policy
- Although
- 1st instance
 - no adversarial argument



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Pre sale

- Invalid appointment
Blights Builders [2008] 1 BCLC 245
- Administration Application
DKLL Solicitors [2008] 1 BCLC 112
- Directions Application (per T&D if consultation and opposition)
Structure of application – sanction or business judgment test –
Edenote No.1 or No.2?
- Choice of administrator
Cat's paw; conflicts

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Post sale

- Para. 74 – unfairly harm interests
Charnley Davies [1990] BCLC 760
- Para. 75 – misfeasance
Undervalue, negligence (Charnley Davies)
Evidential difficulty
Loss to applicants
- Remuneration
Whether recoverable under r. 2.67(1)(c)
- Complaint RPB
Breach of Code



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Challenges - Conclusion



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