

The road to transparency – how & why we got SIP 16

Jeremy Bamford



“pre-pack”

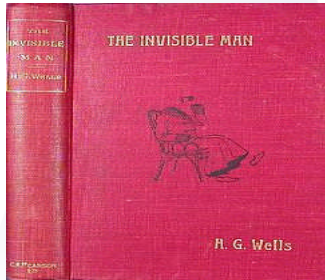
n. “an arrangement under which the sale of all or part of a company’s business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment.” : SIP16, para.1



The relevant IA 86 & EA 02 references ...



and the references in the textbooks ...



IA 1986 administration framework

- s.14(1) – powers
- Para. 2, Sch.1 – sale
- s.17

“shall manage ... (a) at any time before proposals have been approved ... in accordance with any directions given by the court, and (b) at any time after proposals have been so approved, in accordance with those proposals.



- s.23 proposals; s.24 meeting to approve



The case law

1. Charnley Davies Ltd (unreported) 21 Jan 1987 Vinelott J
2. Re Consumer & Industrial Press Ltd (No.2) (1988) 4 BCC 72
3. Re Smallman Construction (1988) 4 BCC 784
4. N.S. Distribution Ltd [1990] BCLC 169
5. Charnley Davies Ltd (No.2) [1990] BCC 605
6. Re Montin [1999] 1 BCLC 663
7. Re Osmosis Group [2000] BCLC 428
8. T & D Industries plc [2000] BCC 956



T & D Industries plc

1. Statutory language – s.17(2)(a)

- Option 1 "in accordance with ... such directions, **if any**, as are given by the court"
- Option 2 "only to the extent specifically permitted by any directions given by the court"
- "directions" rather "permission"/ "sanction" – option 1



2. Policy – (a) sanction needed exercise all s.14 powers;(b) plethora applications; (c) no adversarial; (d) commercial decision

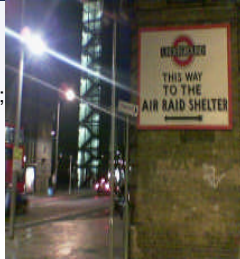
3. Authority - Charnley Davies (unreported)



T & D Industries plc cont.

But:

- Creditors' meeting asap
- Sale – commercial decision OH; court not bomb shelter
- Such consultation as can
- Directions if dispute
- Should be inter partes
- Short notice meeting
Harris Bus Co Ltd [2000] BCC 1,151
- Need to consider disenfranchisement



Enterprise Act 2002

- para. 60 Sch. B1 – powers
- para. 2, Sch. 1 – sale
- para. 68(1)
"shall manage ... in accordance ... any proposals approved ... para. 53"
- para. 68(2)
"**if** the court gives directions ... the administrator shall comply with the directions"
- Transbus International [2004] 2 BCLC 550
- DKLL Solicitors [2008] 1 BCLC 112



What's all the fuss about?

- Finch "PPA: Bargains in the Shadow of Insolvency or Shadowy Bargains" [2006] JBL
- Walton "PPA: Trick or Treat?" (2006) 19 Ins Int 113
- Bloom & Harris "PPA – what should be done given the current disquiet?" (2006) 19 Ins Int 122
- Moulton "The uncomfortable edge of propriety – pre-packs or just stitch-ups?" Recovery Aut 05, p 2
- Flynn "PPA – a regulatory perspective" Recovery Sum 06, p.3
- Davies "PP – he who pays the piper calls the tune" p.16
- Lockerbie & Godfrey "PPA – the legal framework" p.21
- Goldring "A perfect murder?" Recovery Sum 08, p.34



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The Phoenix syndrome

- Reincarnation NewCo
- Dirs, re-use name, undervalue & concealment
- Steering Group DTI CLR – good & bad phoenix
- ESS Production v Sully [2005] 2 BCLC 547
- s. 216/217 IA 86; r. 4.228-230
- Churchill v First Independent Factors [2007] BCC 45
- I(A)R 2007



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Pre-appointment problems

- Form 2.2B – PPR
- Ulva Ltd (unreported) HHJ Purle QC 25 Sept 2007
- Coyne v DRC Distribution [2008] BPIR 1247 CA
- Pre-administration costs – r.2.67(1)(c)
- Dear IP Sep 2005
- Rules review – draft r. 2.33(2)(ka) and r.2.67A; R14 and R15



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Empirical research – Dr. Sandra Frisby

- Preliminary Report to R3 – Aug 07
- (2008) 22 Ins Int 154
- Database Sep 01 – May 05
- PP sales – Sep 2003 – sharp rise
Jan 05 outstrips business sales
66% para. 22 appointment
Connected party 59% overall
71% Sep 04 – May 05
- Survival – BS 63% PP 62% overall
Connected – BS 56% PP 55%; cf. 64% and 72%



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Those in the money

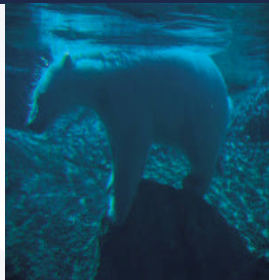
- Returns – average
BS and PP secured 67%
prefs 70%
- BS unsecured 6.5%
- PP unsecured 2.4%
- Employees full transfer PP 91%
BS 60%
- Total redundancy PP 4%; BS 22%



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SIP 16 - transparency

- Bank protocol
- OH changing practice
- Perception
- Information
- Ammunition



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New Code of Ethics

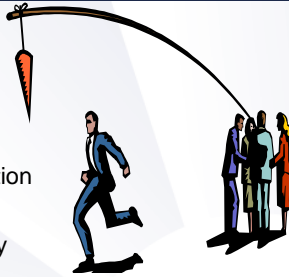
- 1 Jan 2009
- Insolvency appointment 400.22
- Conflicts of interest 400.31
- Significant prof relationship 400.47
- Pre-packs 400.51 actual or perceived threat to objectivity
- 400.52 decision making – transparent, understandable and readily identifiable
- Records 400.74; 400.75



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Conflicts

- Sisu Capital v Tucker [2006] BCC 463
- Distinction between
 - (1) Court - interests of insolvency administration
 - (2) RPB – standards – integrity and objectivity



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