The road to transparency – how & why we got SIP 16
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“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. Chamley Davies Ltd (unreported) 21 Jan 1987 Vinelott J
2. Re Consumer & Industrial Press Ltd (No.2) (1988) 4 BCC 72
4. N.S. Distribution Ltd [1990] BCLC 169
5. Chamley Davies Ltd (No.2) [1990] BCC 605
6. Re Montin [1999] 1 BCLC 663
7. Re Osmosis Group [2000] BCLC 428
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)

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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*

7. Need to consider disenfranchisement

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**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

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

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
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%

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%

SIP 16 - transparency

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

Conflicts

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