

INSOLVENCY PRACTITIONERS: THE STANDARD OF CARE

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CHAMBERS

- The Standard of Care
- The Role of Expert Evidence
- Some applications of the standard of care:
 - Giving advice
 - Investigations
 - Pre-packs
 - Sale of Assets
 - Commencing/Conducting litigation



STANDARD OF CARE



Sources of Duty:

- Statute
- Common Law
- Contract
- Equity

THE STANDARD OF CARE

- A 2 tier system? **Strategy/commercial decisions v Implementation /action**
- **Tier 1:** Re a Debtor, ex parte the Debtor v Dodwell [1949] Ch 236. Deference to IP's views unless conduct:
 - Unreasonable: Pitman v Top Business Systems Ltd [1984] BCLC 593
 - Absurd : Leon v York-O-Matic Ltd [1966] 1 WLR 1450
 - In bad faith, perverse, fraudulent or so unreasonable or absurd no reasonable person would have acted that way: Osborn v Cole [1999] BPIR 251
- **Tier 2:** Medforth v Blake 1999] 3 WLR 922

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THE STANDARD OF CARE

*“An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company’s assets is, therefore, a complaint of professional negligence ...It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner. **In order to succeed the claimant must establish that the administrator has made an error which a reasonably skilled and careful insolvency practitioner would not have made.**”*

Re Charnley Davies Ltd (No 2): [1990] BCC 605 at 618D–E (per Millet J)

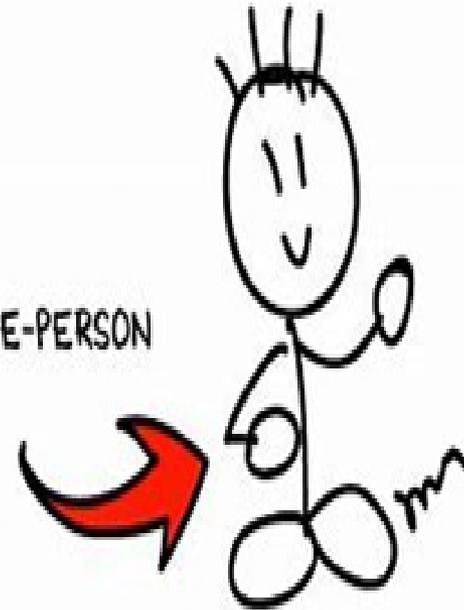
- Same for Liquidator : Re Mama Milla [2014] EWHC 2753 [28]
- Likely also for a trustee in bankruptcy

THE STANDARD OF CARE

“the reasonable IP” –

- Objective standard
- An ordinary skilled practitioner
- No allowances made for lack of seniority (cf Nettleship v Weston [1971] 2 QB 691)

A REASONABLE-PERSON



THE STANDARD OF CARE

The Test:

*“a professional person is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a **responsible body of professional people** skilled in that particular art’.*

Bolam v Friern Hospital Management Committee [1957]
1 WLR 582.

STANDARD OF CARE

Court will have regard to:

- Codes of practice / guidelines/ SIPS/ “Dear IP” eg Safier v Wardell [2017] EWHC 20 (Ch)
- Availability of advice and guidance which should have been sought: Re Home & Colonial Insurance Co Ltd [1930] 1 Ch 102
 - eg Brewer v Iqbal [2019] EWHC 182 (Ch) (specialist valuation advice)
 - & State Bank of NSW v Turner Corp Ltd (1994) 14 ACSR 480 @ 483 (legal advice)



STANDARD OF CARE

- Advice reasonably relied on can be protective eg Davey v Money [2018] EWHC 766 (Ch) [444]-[451] (even if wrong!)
- Conduct to be assessed at the time of the act/ omission: Pitt v Mond [2001] BPIR 624, 639.
- Nb the rule in ex parte James – see Lehman Brothers Australia Ltd v MacNamara [2020] EWCA Civ 321



STANDARD OF CARE

Control of cases:

- Non delegable duties: *Woodland v Essex County Council* [2013] UKSC 66
- Code of ethics:
“Although, an insolvency appointment will be personal to the insolvency practitioner rather than their firm or employing organisation, insolvency practitioners shall ensure that work for which they are responsible, which is undertaken by members of the insolvency team on their behalf, is carried out in accordance with the requirements of this Code” [R1.10].



DELEGATION

THE ROLE OF EXPERT EVIDENCE

“In my judgment, it is clear ...that a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party), without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule ... but, unless it is an obvious case, in the absence of the relevant expert evidence the claim will not be proved.”

Sansom v Metcalfe Hambleton and Co [1998] PNLR 542 (CA) @ 549 (per Butler Sloss LJ)

- See also Pantelli Associates Ltd v Corporate City Developments Number Two Ltd [2010] EWHC 3189 (TCC) at [16]–[19].

THE ROLE OF EXPERT EVIDENCE

- Exceptions
 - The plain and obvious case eg Demarco v Perkins [2006] EWCA Civ 188
 - The entirely novel situation
 - Where a recognised practice is unreasonable eg Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] AC 296.
 - where there is adequate regulations, text book learning or standard practitioner guidance eg Re ISG Group Ltd (No 2) [2003] BPIR 597
- Have you thought about strict liability? Eg Re AMF International Ltd [1995] 2 BCLC 529
- NB An IP cannot be expert in own cause: Re Colt Telecom Group plc (No 2) [2002] EWHC 2815 at [80].

GIVING ADVICE

- May be subject to a retainer (with an implied term to exercise reasonable skill and care) or a tortious assumption of responsibility: Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465
- Capacity in which advice given: Prosser v Castle Sanderson [2002] EWCA Civ 1140
- Identity of recipient : Wade v Poppleton & Appleby (a firm) [2003] EWHC 3159 (Ch), [2004] 1 BCLC 674
- Independent business reviews: Premier v PwC & Lloyds [2016] EWHC 2610 (Ch).
- Limitation clauses

INVESTIGATIONS

SIP 2 (paras 9-11):

9. Notwithstanding any shortage of funds, an office holder should consider the information acquired in the course of appraising and realising the business and assets of a company, together with any information provided by creditors or gained from other sources, and decide whether any further information is required or appropriate. The office holder should make enquiries of the directors and senior employees, by sending questionnaires and/or interviewing them, as appropriate.
10. In every case, an office holder should make an initial assessment of whether there could be any matters that might lead to recoveries for the estate and what further investigations may be appropriate.
11. An office holder should determine the extent of the investigations in the circumstances of each case, taking account of the public interest, potential recoveries, the funds likely to be available, either from within the estate and/or from other sources, to fund an investigation, and the costs involved.

INVESTIGATIONS

- Reports on conduct of directors : s7(3) of the Company Directors Disqualification Act 1986 (NB SIP 2 para 19)
- NB Administrator's Proposals
- Trustees duties to investigate asset position
 - at date of bankruptcy
 - and dispositions made 5 years (or more: s 423?) prior
 - after acquired property
 - IPOs .



PRE PACKS

- Of the 473 pre-packs which took place in 2019, 260 involved a sale to a connected party (55%)
- IP must *“recognise the high level interest the public and the business community have in pre-packaged sales in administration. The insolvency practitioner should assume, and plan for, greater interest in and possible scrutiny of such sales where the directors and/or shareholders of the purchasing entity are the same as, or are connected parties of, the insolvent entity”* (SIP 16).
- Pre pack pool (para 9, SIP 16)
- Draft Regulations
- Conflicts: Re *Vegas Investors IV LLC v Shinnars* [2018] EWHC 186 (Ch)

SALES



Reasonable Care

In relation to the sale of company property, administrators, as agents, owe a duty to the company to take reasonable care to obtain the best price which the circumstances of the case permitted, but do not owe the heightened duties of a trustee selling trust property:

Davey v Money [2018] EWHC 766 (Ch)

SALES



Warning flags:

1. Failure to investigate extent and nature of assets
2. Failure to identify the potential to add value eg where property has planning permission (Cuckmere Brick at [1971] Ch 949. Cf, the dissent of Cross LJ at 962E–H, 978H–979B, D.)
3. Failure to take expert valuation advice (& from the right expert: Brewer v Iqbal [2019] EWHC 182 (Ch))

SALES

4. Failure to properly instruct the valuer eg identifying particular market or special interest purchaser: Devon Commercial Property Ltd v Barnett & Another [2019] EWHC 700 (Ch)
5. excessive haste or undue delay in taking realisation steps, resulting in a depressive effect on value
6. Failure to expose to the market/ publicly advertise (but cf Davey v Money [2018] EWHC 766 (Ch) @ [455])
7. Failure to secure any deferred consideration eg by guarantee

SALES

- Killearn v Killearn [2011] EWHC 3775 [16]: “guiding principles” for trustees:
 - (i) It is the overriding duty of a trustee when selling a trust's property to do so under every possible advantage to his beneficiaries: see Downes v Graysbrook (1817) 3 Mer. 200 ; see also Re Cooper and Allen's Contract (1876) 4 Ch D 802)
 - (ii) The duty includes a duty to secure by every means in the trustees' power a proper competition for the trust property in order to obtain the best price; see Harper v Hayes (1862) Gif 210 .
 - (iii) The duty requires the trustee to investigate a higher offer after the stage at which an ordinary vendor might consider himself morally bound by a lower offer; see Buttle v Saunders [1952] 2 All ER 193 .
 - (iv) The trustee must not make a sale with a view to advancing the particular purposes of one party interested in the execution of the trust at the expense of another; see Ord v Noel (1820) 5 Madd 438 .
 - (v) Where a trustee exercises a power vested in him such as a power of sale, the burden of proof lies on him to show that it is a fit and proper exercise of the power; see Norris v Wright (1851) 40 Beav 291.....
- McAteer v Lismore [2012] B.P.I.R. 812



- Classic case: Missing limitation
- Use it or **lose it**: Section 283A IA 1986
- Legal advice: safe harbour? cf Top Brands v Sharma [2014] EWHC 2753 (Ch), [2015] 1 BCLC 546
- Seeing directions from the Court – no longer a panacea: Parker v Nicholson [2015] EWHC 3881 (Ch) (cf Day v Haine [2007] EWHC 269)