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What is market value and how can officeholders demonstrate it has been obtained? A look at *Re One Blackfriars Ltd: Hyde v Bannon*

KEY POINTS

When selling an asset of high worth, officeholders should consider:

- obtaining a valuation addressed to themselves, particularly in the case of a contested value and/or high asset value;
- seeking an overage/anti-embarrassment provision where there is a risk that an asset could improve greatly in value as a result of a regulatory/planning change; and
- administrators in particular should consider for themselves whether there is anything which could be done to improve the value of a property, conducting and recording the cost benefit analysis undertaken.

Re One Blackfriars Ltd: Hyde v Bannon [2018] EWHC 901 (Ch) is a judgment handed down in relation to an application under para 75(6) of Sch B1 to the Insolvency Act 1986. The application was brought by the liquidators ('Liquidators') of One Blackfriars Ltd against the Company's former administrators ('Administrators') for permission to initiate misfeasance proceedings against the Administrators in relation to the Administrators' conduct in selling the Company's London property and main asset.

The Administrators challenged the application on two main grounds. Namely, that at time of issue, the Liquidators' claim against the Administrators was:

- unsupported by expert evidence, meaning that key aspects of the claims could not be sustained; and
- issued only to avoid the claim being statute barred, meaning that it could be inferred that at the time of issue no reasonable litigant would have issued the application on the facts then in hand and therefore was an abuse of process.

The submissions put to the judge accordingly looked primarily to technical and procedural argument in relation to what should support an application under para 75(6) and when that supporting evidence should have been put in. The case is interesting from this procedural aspect alone, but perhaps only to solicitors themselves looking at a para 75(6) application or other similar application under s 212 or s 304 for permission to pursue an office holder.

Perhaps more interesting for both insolvency practitioners and solicitors advising them are the facts upon which the alleged misfeasance application is founded. It is on those facts and an analysis of what the Administrators are alleged to have done/not done that this article focuses.

FACTUAL BACKGROUND – WHAT THE ADMINISTRATORS ARE ALLEGED TO HAVE DONE WRONG

On 14 October 2010 the Administrators were appointed by the Royal Bank of Scotland PLC ('Bank') under its qualifying floating charge. The Bank was security agent for a syndicate ('Syndicate') which had funded the development of a site at 1-6 Blackfriars Road, London ('Property'). The purpose of the Administration was stated to be that under 3(1)(c), namely to realise property and make a distribution to preferential and unsecured creditors.

The Administrators sold the Property in December 2011 for £77.4m.

In October 2012 the Company's administration ended and the Company was struck off and dissolved in early 2013. From the point the Administrators ceased to be in office they were discharged from liability pursuant to para 98 of Sch B1.

The Company was restored to the register in 2016 and the Liquidators appointed. The application to restore and wind up the Company was brought by a second ranking chargeholder owed around £20m, which the sale of the Property had failed to discharge.

Following their appointment the Liquidators, via their solicitors, wrote to the Administrators setting out the Liquidators' belief that the Administrators had sold the Property at an undervalue. The scale of that undervalue was estimated at around £58m. It appears that the Liquidators founded that belief on review of papers obtained from the Administrators in relation to their period in office.

Following a period of correspondence the application was issued (just before the limitation date) with a witness statement exhibiting draft particulars of claim. It is these draft particulars (as later supplemented) which set out the alleged facts on which the Liquidators rely and which form the discussion of this article, namely that the Administrators:

- failed to obtain a valuation for the Property either before, during or after the sale;
- failed to have regard to valuations provided by the Company:
  - pre-appointment by Savilles; and
  - post-appointment by Montagu Evans;

- failed to conduct a proper marketing of the Property including:
  - negligently appointing a sole agent for the sale of the Property with an agreed a fee structure which dis-incentivised achieving value for creditors;
  - that the marketing was not properly supervised to ensure full market exposure, including to overseas investors; and
  - failure to oversee a proper bidding process was conducted with interested parties;
- failed to insert overage provisions into the sale agreement (anti-embarrassment);
- failed to seek or obtain a revised planning consent which would have improved the value of the Property; and
- failed to have regard to the other possible objectives of administration, which could (had a valuation been obtained or considered properly) have resulted in returns to unsecured creditors. The alleged result being that the Administrations were focused on returning funds to the Syndicate, but not the other creditors of the Company.

The Liquidators alleged in the draft particulars that the loss suffered by the Company was £37.5m and pointed to the Savilles valuation and the fact that following completion of the sale the purchaser had obtained an amendment to the planning consent, then marketed the Property for offers in excess of £150m.

The judge found in favour of the Liquidators on the technical grounds and granted permission for the claim to be brought against the Administrators. In summary, the finding was that:

- there was a case to answer; and
- the Liquidators, as insolvency professionals, had sufficient standing to pass the requirements that evidence as to undervalue must be supported by an expert (at least in this case sufficient standing to defeat the challenge by the Administrators in relation to the s 75(6) application).

COMMENT ON THE ALLEGATIONS

Even if the eventual misfeasance claim were to fail, the fact that the claim has been brought at all means that practitioners should give consideration to the grounds set out in the particulars of claim to mitigate the risk of challenges against themselves.

Valuation

It is not unusual for an officeholder to disregard valuations obtained by the Company, which may present a rose-tinted view of a property to argue against a loan to value covenant breach. Indeed, officeholders often highlight the fact that he/she is testing the actual market value, as opposed to the theoretical value based on Redbook assumptions. However, the formal valuation provides more than simply a test of the immediate market instead also looking forward to potential future value of a property. Indeed, it may be necessary to ask the valuer to consider specifically whether there are any easy steps which could be taken to potentially improve a property's value in the letter of instruction.

It is perhaps unusual for an office holder (not being themselves a surveyor) not to obtain a valuation, or at least a letter of reliance on valuations provided to the lender. This is particularly so where the value is high and there is a high disparity between two valuations. The allegations highlight that in a case such as this it would be best practice for an officeholder to obtain an independent valuation (or perhaps two when taking into account the value of the Property). Not only would such a valuation assist with determining what is a 'fair' offer for a property, but it would also give an officeholder some comfort as to the price obtained and recourse to a negligent valuer's professional indemnity insurance.

Marketing

Proper marketing of a property goes hand in hand with an assertion that a property has been sold for the market value. Without proper market exposure (and evidence of it) an officeholder is open to the accusation that a person willing to pay more could have been found.

It is not clear on the present allegations why or, indeed, if the marketing of the Property was deficient. However, it does highlight the need for officeholders (perhaps excluding surveyors acting as receivers) to oversee an effective marketing process and not to simply outsource the responsibility to an agent without challenge. Sometimes, particularly for high value/complex situations, joint agents are an effective means of ensuring a competitive and robust marketing process.

Overage/anti-embarrassment

The aim of an overage provision is to prevent criticism of an officeholder should a purchaser 'flip' the property on to a third party for a much increased value shortly after completion. Whether an overage provision is requested, makes it into the final contract or indeed whether such provisions are practically effective, is a matter of negotiation between the parties. Yet, in a case where there are large disparities between formal valuations and particularly if there has been a short, limited or curtailed marketing exercise, a request for an overage provision should be made and pursued with some force. Such action, even if completely resisted, at least assists an officeholder in confirming that the market/purchaser would not stand the imposition of an overage.

Duty to 'improve'

It is perhaps interesting to contrast the position of the administrators with that of receivers on this point, which could itself form the subject of its own article. Case law is well established on the fact that a receiver has no duty to improve and may sell a property as he/she finds it. The position is less clear in relation to administration, where an administrator's wider powers and duties to consider the interests of all creditors perhaps imply a duty to at least consider improvement where possible. Administrators would be well advised to record a cost benefit analysis, particularly if potential improvements/planning changes are revealed to a have a drastic impact on value by any valuation in hand.

Obviously there are circumstances which prevent an administrator from improving

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a property to enhance value, such as a lack of funding. In such a case it may be helpful to have letter from likely funders rejecting funding applications

Relations with secured creditors

There is a balance to be struck between:

- having due regard to the interests of a secured creditor which itself could seek permission to obtain possession/appoint a receiver; and
- the interests of second ranking and/or unsecured creditors.

However, because statue provides an administrator with an ability to resist an application by a mortgagee for control of a property so that the interest of creditors generally are better served, it is perhaps worth maintaining (and being seen to maintain) independence while recording the detail of decisions and reasons why they are reached to avoid criticism that an administrator is simply following the wishes of a mortgagee.

CONCLUSION

Officeholders would be well advised to look at the particulars of claim and the complaints against the Administrators in this case, and look to mitigate the risk that they themselves could be open to the same criticism. Particularly, since by their resignation/discharge they no longer have recourse to the assets of the company themselves to meet the costs of defending such actions. It is also worth remembering that administrators undertaking pre-pack sales are required by SIP 16 to follow marketing guidelines in relation to assets sold to show that value has been obtained.

Should the misfeasance application run to trial the comments of the judge on these points would be interesting. ■

Further reading

- LexisPSL Restructuring and Insolvency: Cases: *Re One Blackfriars Ltd; Hyde and another (as joint liquidators of One Blackfriars Ltd) v Bannon and another (as former administrators of One Blackfriars Ltd)*
- LexisPSL Restructuring and Insolvency: Practice notes: Statement of Insolvency Practice (SIP) 16 – pre-packaged sales in administration
- LexisPSL Restructuring and Insolvency: Practice notes: Roles, powers and duties of administrators, liquidators and receivers