3 HARE COURT

SELLING ASSETS AT THE RIGHT VALUE

Simon Davenport QC and James Gale

Introduction

1. This talk concerns the principles of law and good practice on the topic "*Selling assets at the right value*". Three cases in particular will be discussed:

    (a) *Devon Commercial Property Ltd v Barnett* [2019] EWHC 700 (Ch);

    (b) *Davey v Money & Anor* [2019] EWHC 997 (Ch); and

    (c) *Re One Blackfriars Ltd* (judgment pending).

2. We will be focussing on the sale of assets by professionals charged with their disposal and in particular the sale of assets by receivers and administrators. The rules and context applying to liquidators and trustees-in-bankruptcy differ slightly, but much of what we say tonight will be of equal application to those officeholders.

3. The title of tonight's talk is deliberately provocative as it suggests there exist out there such a thing as the "*right value*". However, as anyone who is familiar with the sale of assets in an insolvency context is aware, it is all but impossible to get two people – much less two lawyers – to agree on whether a given asset has been sold for its true value.

4. If there is such a thing as the "*right value*", then it can only be understood as the price obtained for an asset where an insolvency practitioner ("**IP**") takes all the right steps. That raises the question: what are the right steps?

5. The goal tonight is to provide an answer to that question, at least in overview, by reference to the authorities and lessons learnt from past experience.

Overview on receivers and administrators

6. We start with a brief refresher on the nature of the roles of receiver and administrator, and the duties which are imposed on those who occupy them.

Receivers

7. Receivers come in different forms:

    (a) Where the receiver is appointed under a lending agreement, they are known as a "*fixed-charge receiver*".

    (b) Where appointed under the Law of Property Act 1925, the receiver is commonly referred to as an "*LPA receiver*".

8. There is also a special type of receiver, known as an "*administrative receiver*" who is appointed over all, or nearly all, of a company's assets. Today the office of administration has all but replaced the administrative receivership. That is in large part due to the restrictions imposed by the Enterprise Act 2002 (the "**EA 2002**") on appointing administrative receivers in respect of floating charges created after 15 September 2003. Administrative receiverships are therefore less common to encounter in practice. So much of what is said tonight will be directed at fixed-charge and LPA receivers.

9. What is the function of a receiver? Well, as the name suggests, the primary function of a receiver is to *receive* property or income for the benefit of another. In some cases, however, a receiver will be tasked with selling the property over which they are appointed.

10. *Devon Commercial Property* was an example of such a situation. The material facts in that case were as follows:

(a) The Claimant acquired a large plot of land, which at the time had one of the largest stand-alone bottling factories located on it.

(b) The Claimant leased the factory to the Devon Cider Company, a connected company, to bottle cider.

(c) The bottling company ran into financial difficulties and entered administration.

(d) As part of the restructuring, the Claimant granted a mortgage over the property to a lender.

(e) The bottling business was moved to a new company, but that company also ran into financial trouble and went into administration also.

(f) The administrators of the new bottling company sold most of its assets to a competitor, Aston Manor. Aston Manor also acquired the mortgage. In effect, it had obtained everything but the freehold of the said property.

(g) Eventually, the Claimant defaulted, and Aston Manor appointed LPA receivers over the property. The receivers sold the property to a subsidiary of Aston Manor for a price which meant there was no surplus returnable to the Claimant as mortgagor.

(h) The Claimant challenged that sale on a number of grounds, including that the receivers were in a position of conflict of interest and/or acting under the control of Aston Manor.

11. Ultimately, the learned judge sided with the LPA receivers. The judgment contains a useful summary of the duties owed by a receiver. In particular:

(a) It confirmed that the receiver owes fiduciary duties to the mortgagee and all others interested in the equity of redemption.

(b) The receiver, therefore, must exercise a power of sale in good faith and solely for the purpose of realising the security to repay the debt. So, for example, it would be a breach of duty for a receiver to exercise a power of sale solely to injure a commercial competitor of the mortgagee. That is not what security is granted for.

(c) It is important to appreciate that there can still be a breach of fiduciary duty in the absence of dishonesty or fraud. So, for example, in *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) at 19, Millet LJ (as he then was) said that "*Conduct which is in breach of [the duty of good faith] need not be dishonest but it must be intentional*". Of course, conduct such as taking a bribe would be an obvious breach of fiduciary duty.

(d) While the receiver is not permitted to sell to themselves, they can sell to the mortgagee. *Devon Commercial* shows that the receiver's interest is separate from those of the mortgagee who appoints them. It was therefore not a breach of duty for the receivers in that case to sell the property to the competitor as the receivers had nothing to gain from the sale.

(e) The judgment also makes plain that there is no rule which forbids a receiver from putting themselves in a position where the interests of the mortgagee and mortgagor conflict. On the contrary, the receiver will usually be obliged, in exercising the powers for a proper purpose, to prefer the interests of the mortgagee.

(f) Finally, *Devon Commercial* confirms that a receiver is subject to the equitable duty to obtain the best price reasonably obtainable for that asset at the time of sale. Later we will discuss what practical steps a receiver can take to comply with that duty.

12. Where a receiver breaches one or more of the duties, then a claim can be brought directly against them for, say, breach of fiduciary duty or breach of the equitable duty to obtain the best price reasonably obtainable at the time of sale, usually by

way of Part 7 procedure. The general approach of the courts is to find a receiver in breach of the latter duty only where they are plainly on the wrong side of the line.

Administrators

13. An administrator's function is very different from that of a receiver. In *re Opes Prime Stockbroking Ltd* [2008] FCA 1425, Finkelstein J, sitting in the Federal Court of Australia, gave the following summary:

> "The function of a liquidator […] is to preside over the death of a company. An administrator appointed in rescue proceedings strives for the opposite result (even though the company may yet in the end die). A receiver appointed by a secured creditor does neither of those things, being largely unconcerned about the fate of the company. From any perspective, the offices are poles apart."

14. In this jurisdiction, the function of an administrator is slightly more nuanced. An administrator is a creature of statute and must perform their functions with one of three purposes of the administration as set out in the Insolvency Act 1986, Schedule B1, paragraph 3. By way of reminder:

(a) The default position is that an administrator must rescue the company as a going concern. That is objective one in every sense.

(b) Objective two is to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration. So for example, it may be better for creditors as a whole if the assets of the business are sold as a going concern rather than in the kind of piecemeal sale one would expect in a liquidation. Crucially, an administrator may only pursue the second objective if they "*think"* that it is not reasonably practicable to achieve objective one or they "*think"* that objective two will achieve a better result for the company's creditors as a whole.

(c) Objective three is realising property in order to make a distribution to one or more secured or preferential creditors. This is a matter of last resort in that an administrator is only entitled to pursue that objective if they think that it is not reasonably practicable to achieve objectives one or two and the administrator does not unnecessarily harm the interests of the creditors of the company as a whole.

15. One would be forgiven for thinking that where an administrator pursues the objective of realising property in order to make a distribution to one or more secured or preferential creditors, then they in effect act as a quasi-receiver. That notion, however, was rejected by Snowden J in *Davey v Money* at [254], who said:

> "[…] there is a significant difference between the role of the office-holder in an administration on the one hand and in a receivership or administrative receivership on the other. A receiver or administrative receiver owes his primary duties to his appointor and is generally free to determine when and how to realise assets to repay the secured debt without consideration for the interests of the unsecured creditors or the company itself. In contrast, in deciding how to run the administration, an administrator is required to have regard to the interests of all of the company's creditors, and he can only limit his ambition to seeking to realise assets to repay the secured creditor if he thinks that it is not reasonably practicable to achieve anything else. Even then, he must not unnecessarily harm the interests of the creditors as a whole."

Davey v Money

16. The duties of an administrator were considered extensively in the *Davey v Money* case. In that case:

(a) Ms Davey was the sole shareholder of a company whose sole asset was a property in Tower Hamlets known as Angel House.

(b) Ms Davey borrowed money from Dunbar to fund the purchase, and Dunbar took security in the form of a debenture and a personal guarantee.

(c) After failing to obtain planning permission for the property, the company failed to keep up with payments to Dunbar. Dunbar, therefore, appointed joint administrators, who sold the property for less than the total of Dunbar's debt.

(d) Ms Davey brought a claim against the administrators under the IA 1986, alleging that they had failed in their duties as administrators by favouring the interests of Dunbar over those of the company and its other creditors.

17. To summarise, Snowden J accepted that an administrator owed the company, among other things:

(a) A statutory duty to select the statutory objective of the administrator and perform their functions in accordance with one of three statutory objectives;

(b) Fiduciary duties to act in good faith, loyally and for proper purposes;

(c) A statutory and fiduciary duty to exercise independent judgment;

(d) A common law duty to exercise reasonable care and skill; and

(e) The equitable duty to obtain the best price reasonably obtainable in the circumstances.

18. In the subsequent case of *Brewer v Iqbal* [2019] EWHC 182 (Ch), Chief ICCJ Briggs confirmed that an administrator also owes a fiduciary duty to consider relevant and not irrelevant matters when performing their function.

19. Where a shareholder or creditor is dissatisfied with how an administrator has conducted the administration, then the procedural route is to bring an application under paragraph 75 of Schedule B1 of the IA 1986. That paragraph does not create a new head of liability but instead provides a summary method by which the administrator may be rendered accountable for a breach of duty.

20. If the application succeeds, a court may order the administrator to repay, restore or account for money or property or to contribute a sum to the company's property by way of compensation.

One Blackfriars

21. As the name suggests, the trial is centred around the One Blackfriars development by Blackfriars Bridge.

22. It is relevant to tonight's topic as one of the central allegations in the claim is that the development was sold at an undervalue. However, the judgment in *One Blackfriars* has not yet been handed down. Submissions that were made in open court are repeated here, but the learned judge will decide on those issue in due course.

23. The Joint Liquidators alleged, among other things, that the Former Administrators improperly agreed with the senior secured creditors to conduct a "*light touch*" administration, in the sense that:

    (a) The Former Administrators would treat the senior secured creditors as the only stakeholders;

    (b) They would adopt those creditor's realisation strategy

    (c) They would work with agents appointed by those creditors to sell the development on an unconditional basis so as to recover as much of the senior debt as soon as possible.

24. One important issue that has arisen is the extent to which a court should afford administrators a degree of latitude when it comes to:

    (a) <u>First</u>, selecting the purpose of administration; and

    (b) <u>Second</u>, taking steps to achieve that purpose?

25. The Former Administrators argued that *Davey v Money* should be understood as holding that the decision as to statutory objective is only capable of challenge on the grounds of a lack of good faith or irrationality.

26. The Joint Liquidators disagreed. Undoubtedly, it is true that IPs are frequently confronted with situations involving a variety of stakeholder groups and in which they are required to make difficult decisions. There is always a risk that a mistake will occur. However, there is also no doubt that the EA 2002 was designed to afford greater protection to unsecured creditors. The Joint Liquidators, therefore, argued, among other things, that the prohibition on causing "*unnecessary harm*" on the interests of creditors as a whole invites greater scrutiny from a court both

as to the administrator's choice of statutory objective and as to the methods adopted.

27. Many of those present will be familiar with the judgment of Millet J, as he was then, in *Re Charnley Davies Ltd (No 2)* [1990] BCC 605, where he held that the standard of care required of an administrator is that of "*an ordinary, skilled practitioner*", and that to show a breach of the duty to obtain the best price in the circumstances, it must be shown that the administrator "*made an error which a reasonably skilled and careful IP would not have made*". Millet J also said that administrator's duty was to obtain what the administrator *perceived* to be the best price and that an administrator *"is not to be made liable because his perception is wrong, unless it is unreasonable*."

28. That issue was not subject to argument in *Re Charnley Davies* and, of course, pre-dated the EA 2002, and in particular an administrator's duty to avoid causing "*unnecessary harm*" to the company's creditors as a whole. The Joint Liquidators have argued in the *One Blackfriars* case that a more intensive approach is required under the new regime.

<u>Information gathering</u>

29. One of the first things an IP should do after an appointment is ensure that they have all of the relevant available information.

30. An IP's obligation to gather information is an aspect of its duty to obtain the best price reasonably obtainable for an asset at the time of sale. So, for example, in *Michael v Miller* [2004] EWCA Civ 282, Parker LJ stated that "*The need for the mortgagee to exercise informed judgment in exercising his power of sale in turn means that a prudent mortgagee will take advice, including (where appropriate) valuation advice, from a duly qualified agent.*" This applies to both receivers and administrators.

31. Moreover, as fiduciaries, it is incumbent on receivers and administrators to take into account relevant matters, which includes gathering sufficient information to carry out their respective functions. So, for example, in *Brewer v Iqbal*, the administrator was held to be in breach of his fiduciary duties in failing to seek

appropriate advice as to the value of the electronic programming guides before selling those assets.

32. In the case of an administrator, in particular, one of the things they must do early on in the administration is to select the statutory purpose of the administration. In the *One Blackfriars* case, it was argued that it was implicit within an administrator's duty to "*think*" that they act rationally, which in turn requires them to be properly advised. It was further argued that the statutory language impliedly limits the pursuit of the third objective to circumstances where no return can be made to unsecured creditors, which means that an administrator must gather sufficient information to ascertain whether such a return can be made before pursuing the third statutory objective.

33. In terms of how an IP should go about getting a sense of the value of the relevant asset(s), in some cases, it may be possible to rely on, at least in part, valuations that have been produced pre-appointment by, say, the shareholders, the directors or the lenders. In any event, an IP would be well advised to review those valuations for it is a common charge in undervalue claims that one valuation or another has been disregarded by an IP.

34. However, as we will discuss later tonight, some valuations that have been commissioned pre-appointment may need to be treated with care. Important questions to ask include who has this valuation been prepared for, what was the context, on what assumptions and what was the quality of the valuation itself?

35. In most cases, the safest course will be for an IP is to commission an independent Redbook or equivalent valuation of the assets in question. Obtaining a valuation of this kind is all the more important where the IP is selling, or thinking about selling, a unique asset or an asset in a specialist market or a developable, partly developed or convertible asset. That is clearly shown by the case of *Brewer v Iqbal*, where the Court held that the administrator was in breach of duty in failing to understand the specialist electronic programming guide market.

36. Notwithstanding the obligation of an IP to gather information, in *One Blackfriars* it was submitted the value of an asset could be determined by what is achieved in

the market when the asset is sold. The market will set the price as opposed to relying on the theoretical value based on Redbook assumptions. The learned judge is now considering the debate on this issue.

37. Such an approach, however, is risky for an IP. The Joint Liquidators submitted, among other things, that a formal valuation is more than a means of determining the existing value of an asset. It is also a means of determining its potential future value. As we shall discuss later, administrators, unlike receivers, are under a unique obligation to consider taking advantageous pre-marketing steps to improve the value of an asset before selling it.

38. A valuation is also an important part of an IP's toolkit when marketing and negotiating the sale of an asset. In *One Blackfriars* it was submitted that it could assist in that:

(a) <u>First</u>, a valuation can inform an IP as to whether to set a guide price and if so at what level.

(b) <u>Second</u>, a valuation can inform an IP as to where to set incentives when negotiating the fee structure for a sales agent.

(c) <u>Third</u>, a valuation can provide equality of arms, in that purchasers will often have one of their own and may use that in order to drive the price down.

(d) <u>Fourth</u>, a valuation can assist an IP in determining whether or not a marketing and sales process has been successful, not to mention providing the IP with something on which they can rely should it become necessary to defend that process.

39. So, generally speaking, if you want to sell an asset, then you should take reasonable steps to understand its value.

<u>Relying on others only insofar as appropriate to do so</u>

40. IPs will invariably need to rely on others when carrying out their functions. This could be solicitors, marketing and sales agents or valuers. This reliance is

necessary not least because, in many cases, an IP will be under pressure to get the job done as quickly and efficiently as possible. There is also a perception that an IP can insulate themselves from liability by delegating tasks to suitably qualified third parties. We will return to that later.

41. Not only are there are good practical reasons for an IP to rely on others, but there are many cases where an IP failing to do so could be considered by a court to be a breach of duty. As we have mentioned ready, an IP can be in breach of duty for failing to seek valuation advice.

42. However, an IP must be careful when relying on others. To take an extreme example, an IP who relies on an obviously incompetent or unqualified sales agent will open themselves up to an allegation that they have been negligent. The same is true of an IP who relies on an agent whose own interests conflict with those of the IP's principal. For example, in *Brewer v Iqbal*, the administrator relied only on the valuation advice of the directors who ultimately purchased the relevant assets, and that was held to be improper.

43. In *Davey v Money*, Snowden J said that:

> "The essential question in all cases will be whether the agents to be appointed are <u>competent</u> and able to discharge their <u>fiduciary duties</u> to the company." (emphasis added)

44. Where one is concerned with a receiver, the position is relatively straightforward in that the receiver can ordinarily rely on professionals who have acted for the mortgagee. That is because the receiver's primary duty is to the mortgagee. As noted in *Devon Commercial Property Ltd v Barnett*:

> "It is very convenient for receivers who, at the outset of the receivership, have no immediate cash with which to pay bills to ask the mortgagee's solicitors for legal advice. The mortgagee's solicitors will have all the relevant documents and be fully up to speed, and therefore will cost less than any newly instructed firm. And the costs will probably be paid directly by the mortgagee in any event."

45. However, the position in relation to administrators can be more complex, at least where it is possible that there may be a return on sale to unsecured creditors. In particular, secured creditors will usually be interested in a quick sale which will

see themselves repaid. Unsecured creditors and shareholders, however, may wish to hold out and/or take additional steps to improve the realisable value of an asset.

46. In Australia, the courts have indicated some disapproval of solicitors advising secured creditors and then going on to be appointed by administrators.

47. In England and Wales, Snowden J held in the *Davey v Money* case that there was no hard and fast rule against an administrator relying on or appointing professionals who have previously been engaged by secured creditors.

48. However, it is worth noting that Snowden J *did* say that there may in general terms be good reasons for an administrator to consider holding a competitive tendering process for agent roles in such cases and that the facts of each case would vary widely. On some occasions, beauty parades of that kind will be possible and, on others, time pressures will preclude them.

49. While there is no hard and fast rule against an agent who *previously* acted for a secured creditor being relied upon by an administrator in a potential conflict situation, the position is less certain where the agent *continues* to act for the secured creditor. Is it permissible for an agent to act for both at the same time?

50. In *One Blackfriars*, the Joint Liquidators argued that the decision of Henry Carr J in *Re Zinc Hotels* shed some light on this issue. In that case, an application was brought to appoint additional concurrent administrators in order to represent shareholders' interests in respect of a proposed sale of a number of Hilton Hotels. One of the arguments advanced by the shareholders was that the existing administrators were conflicted because the firm of solicitors upon which they relied was acting for both the administrators and secured creditors at one stage.

51. While Henry Carr J held that there was no strict bar to the same firm of solicitors acting for both IP and secured creditor, he noted that once there appeared a real possibility of a surplus for shareholders, it was recognised that there was then a potential conflict between the interests of the lenders to have their secured debt repaid and the duties of the administrators, which also involved taking into account the interests of unsecured creditors and shareholders.

52. In the *One Blackfriars* case, it was argued on behalf of the Joint Liquidators that the Former Administrators were in breach of duty in relying on agents who continued to act on behalf of the senior secured creditors. In short, the argument was that an agent who acts for two principals with potentially conflicting interests is in breach of the obligation of undivided loyalty, and in particular what Millet LJ referred to as "*the double employment rule*" in *Bristol & West Building Society v Mothews*. By that logic, the agents relied upon by the Former Administrators were unable to discharge their fiduciary duties, which of course includes the no-conflict rule, and it followed that the Former Administrators not only could not shield behind those agents but were in breach of duty in appointing them. Among other authorities, the judgment of *Re Zinc Hotels* was relied upon.

53. Against this, the Former Administrators argued, amongst other things, that *Re Zinc Hotels* did not establish any bar on an administrator relying on an agent who continued to act for the senior secured creditor in a potential surplus situation. They also argued that there was no potential conflict on the facts, and if there was a potential conflict, it was extinguished by the administrators agreeing on a fee ratchet arrangement with the relevant agent which, they said, sufficiently incentivised that agent to get the best price reasonably obtainable.

54. It is expected, therefore, that the judgment in the *One Blackfriars* case will provide clarity on the circumstances in which it will be appropriate for an administrator to rely on agents who have acted, or continue to act, for certain creditors.

55. So if the first "*do*" in this talk is to seek appropriate expert advice where needed, the first "*do not*" is to avoid relying on professionals whose competence and or loyalties may call the administrator's own into question.

56. That is essentially the point which the Code of Ethics for IPs makes:

> "When an IP intends to rely on the advice or work of another, the IP should evaluate whether such reliance is warranted. The IP should consider factors such as reputation, expertise, resources available and applicable professional and ethical standards."

<u>Relying on others - a shield?</u>

57. As mentioned, there is a perception that so long as an IP relies on an agent who appears to be reasonably competent, then this will provide a defence to an undervalue claim.

58. However, it is not clear that this will shield an IP from liability in every case. Indeed, insofar as receivers are concerned, it is settled law that the equitable duty to achieve the best price reasonably obtainable is non-delegable in the sense that the receiver's duty extends to ensuring that reasonable care is taken by any agent or professional adviser employed by them in the sale. In effect, this creates a form of strict liability on the receiver. So, for example, in *Raja v Austin Gray* [2002] EWCA Civ 1965, it was held that it was no defence for the receiver to say that they had entrusted the sale of an asset to apparently competent professionals.

59. In *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, Cross LJ, then in the Court of Appeal, said that the non-delegable rule arose out of the need to achieve justice between the parties in the days when the mortgagor did not have a direct cause of action against the mortgagee's agent. By holding the mortgagee responsible, this ensured a remedy to the mortgagor. The mortgagee could, in turn, recover from the relevant agent.

60. In *Davey v Money*, Snowden J considered whether the non-delegable rule extended to administrators, and concluded that it did not. This was, in essence, because the company would have a cause of action against the agent such that there was no need to hold the administrator strictly liable.

61. However, that first instance conclusion was challenged by the Joint Liquidators in the *One Blackfriars* case for a number of reasons, not least because Snowden J had not been referred to the judgment of Kitchen LJ, as he then was, in *Glatt v Sinclair*. That judgment expressed some doubts about similar reasoning in respect of court-appointed receivers.

62. The unusual effect of the decision in *Davey v Money* is that administrators would seemingly be subject to a less stringent duty than mortgagees and receivers, notwithstanding:

63. First, that they share the duty to obtain the best price reasonable obtainable (albeit the administrator's duty is to obtain the best price reasonably obtainable *in the circumstances*, whereas the duty of the mortgagee or receiver is only to obtain the best price reasonably obtainable *on sale*); and

64. Second, that the EA 2002 places a number of additional statutory duties on administrators which were designed to improve the position of unsecured creditors as compared with receivership.

65. Time will tell whether *Davey v Money* will be followed in this respect.

Duty to take advantageous pre-marketing steps to increase value

66. The next step which we are going to discuss tonight is the duty to improve the value of an asset before the sale.

67. This duty is largely unique to administrators. In particular, it is established that both mortgagees and receivers are entitled to sell the property in the condition it is in when they took possession without awaiting or effecting any increase in value or improvement in the asset.

68. This was confirmed by the Court of Appeal in *Silven Properties Ltd v Royal Bank of Scotland* [2004] 1 WLR 997. There it was suggested that the defendant receivers were under a duty to pursue planning applications for the development of the relevant properties in order to obtain the best price reasonably obtainable. That suggestion was rejected by the Court.

69. In rejecting the argument, the Court noted, however, that the administrator as agent for the company owes a duty of care to the company in the choice of time to sell and by parity of reasoning in the decision whether to take the appropriate available advantageous pre-marketing steps which are calculated to achieve the best price.

70. In *Davey v Money*, Snowden J cited that passage with approval and noted that an administrator having a wider duty than a receiver accurately reflected the changes introduced by the EA 2002. So, he said:

> "[…] the administrator cannot simply decide to sell the company's assets at a time to suit the interests of the secured creditor, if by doing so he causes harm to the unsecured creditors which is not necessary for the protection of the interests of the secured creditor. The interests of the unsecured creditors therefore receive enhanced protection in an administration compared with a receivership."

71. Accordingly, if there are steps which an administrator considers are likely to increase the overall size of the pie, then they would be well advised to pursue those steps even if the secured creditors wish for a quick unconditional sale. What that means in practice will vary depending on the nature of the asset. Where one is dealing with real property, often it will mean investigating alternative planning permission.

72. While the secured creditors may drag their heels, the statutory regime gives administrators the power to raise funds from other sources. At the very least, an administrator should explore alternative sources of funding where there is a large potential upside to creditors as a whole.

73. Whatever course an administrator adopts, they would be well advised to document any cost-benefit analysis undertaken.

<u>Marketing</u>

74. A key step that any IP will have to take in the performance of their duty to obtain the best price reasonably obtainable will be to ensure that the asset is properly marketed.

75. So, for example, in *Cuckmere Brick v Mutual Finance*, the mortgagee was held to be in breach of duty for failing to mention obtained planning permission which would almost certainly have increased the selling price.

76. In *Bishop v Blake* [2006] EWHC 831 (Ch), Sir Francis Ferris held that a mortgagee was liable to account for failing to take care to achieve the proper market price for an inn. The relevant advertisement had been inserted at the last minute; the mortgagee failed to include elementary contact details, and, according to the learned judge, the contract of sale was entered into before "*even the most alert reader of that publication had a realistic opportunity to respond*."

77. In *Glatt v Sinclair* [2011] EWCA Civ 1317, the Court of Appeal stated that a receiver should obtain marketing advice and advice on the market generally and should not rely solely on a valuation on an open market basis. There, several offers were quickly received when the property was marketed at a price reflecting an open market valuation. The purchaser was able to flip the property at a substantially higher price a few months after completion.

78. These decisions apply equally to receivers, and with even greater force to administrators given their wider duties.

79. In *Brewer v Iqbal*, the learned judge found that the administrator's failure to understand the nature of the electronic programming guides and their true value led to a failure to properly market those guides to a potential special purchaser. The learned judge also found that the assets had not been exposed to the market for a sufficient period of time. The explanation given by the administrator for this was that he had been advised by the directors that if the assets were not sold quickly, the electronic programming guides would be switched off. The learned judge found that relying on the advice of the directors in this way was evidence of serving two masters and failing to act with loyalty to the principal, namely the company.

80. In practical terms, an IP should ensure that they have retained agents upon whom they can reasonably rely, and should use the independent valuation as a cross-check or benchmark by which to assess whether marketing has been successful.

Overage

81. An IP would be well advised to consider including an overage or anti-embarrassment provision in a sale contract. The aim of such provision is to prevent criticism of an IP should the purchaser manage to flip the property for a much higher value than it was obtained for. This is a particularly good idea where the IP is, firstly, confronted with a range of valuations and, secondly, where the asset belongs to a specialist market or is unique.

Loss

82. Finally, if an IP is held to have failed in one or more of their duties relating to the sale of an asset, then it will fall to a court to assess the loss. Ordinarily, this will be the difference between what was achieved in the market compared with what would have been obtained if the pre-sale and sale processes were properly conducted. It is no answer for an IP to rely on the market value actually achieved, as it is only where a property has been properly exposed to a market and competently marketed than it can be said that the price achieved is cogent evidence of the open market value of the property.

Conclusion

83. So, to recap:

(e) Whether an IP wears the hat of receiver or administrator, they will be under a duty to obtain the best price reasonably obtainable for an asset on sale.

(f) Such practitioners are well-advised to take steps to understand and document what exactly it is they are selling, and how best to sell it.

(g) An administrator, however, has wider duties than a receiver in that they must avoid causing unnecessary harm to creditors as a whole.

(h) In practical terms, that means an administrator may be required to delay the sale of an asset and take advantageous pre-marketing steps to increase the asset's value, such as obtaining, or investigating obtaining, planning permission. Again, if necessary, an administrator should seek appropriate expert advice as to how the value of the relevant asset might be improved.

(i) However, an administrator's wider duties mean that it needs to be careful when relying on third parties to perform their functions. The forthcoming judgment in *One Blackfriars* will shed some light on the circumstances in which it is permissible to rely on agents who have acted or continue to act for the secured creditors and the circumstances in which an administrator can shield behind the mistakes of others.

(j) The judgment in *One Blackfriars* is also likely to provide guidance on the circumstances in which a court will intervene in the decision-making process of administrators. It remains to be seen whether the approach in *Davey v Money* and the pre-EA 2002 approach in *re Charnley Davies* will be followed.

Simon Davenport QC
James Gale
3 Hare Court
16 February 2021