

Pre-packed lunch

Business Money talks to City barrister Professor **Mark Watson-Gandy** about the latest developments in pre-pack administrations



Q Let's start with the basics. What is an administration?

A It's an insolvency process designed to enable a rescue, restructure or sale to take place while creditors' rights are subject to a moratorium (IA 1986 Sch B1 para 42-44); in effect a breathing space is allowed so that proposals can be put to creditors as to how the administrator will achieve the objectives of the administration.

An administration may be commenced by an application to the court or by simply filing papers. The administrator, whether appointed in or out of court, is an officer of the court: *Re Christophorus 3* [2014].

Q What are the objectives?

A The three objectives on an administration, in order of priority, are as follows:

1. Rescuing the company as a going concern.
2. Achieving 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).
3. Realising property in order to make a distribution to one or more secured or preferential creditors.

Whichever objective he is seeking to achieve, the administrator will be expected to perform his functions as quickly and efficiently as reasonably practicable: *Re Sabre International* [1991].

Q And what is a pre-pack?

A Trading on an insolvent business is not without risk, even for an administrator. Thus, pre-packs were invented. A pre-pack sale is a sale of the assets and business of an insolvent company that is negotiated and agreed in advance of the entry of the company into administration. The sale is then carried out by the administrators almost immediately after their appointment.

The court has confirmed that an administrator may lawfully dispose of the company's business and assets prior to the creditors' meeting: *Re Transbus International Ltd* (in liquidation)

[2004]. In negotiating a pre-pack sale, directors must act in the best interests of all creditors, not just the major creditor or in a way that puts the preservation of the company's business above the interests of the company and its creditors as a whole: *System Building Services Group* (in liquidation) [2020], *Capital For Enterprise Fund v Bibby Financial Services* [2015]. In a pre-pack, administrators have to comply with Statement of Insolvency Practice 16 ('SIP 16'). However, pre-packs have been controversial.

Q Has something changed?

A Yes. The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 came into force on 30 April this year, and apply to administrations commenced on or after 1 May. It applies to all companies regardless of size. The regulations prohibit an administrator from disposing of all or a substantial part of the company's business and assets to connected persons within eight weeks of the commencement of the administration unless one of two exceptions apply. A connected person includes directors, shadow directors or other officers of the company, non-employee associates, and their connected companies.

Q What are the two exceptions?

A The first is if the administrator obtains creditor approval by putting forward the disposal in his statement of proposals or by way of a separate decision-making process. The creditors can approve of the proposed disposal without modifications or with modifications to which the administrator consents. The second exception is if the connected person obtains a written qualifying report by an evaluator and submits it to the administrator for his consideration.

Q Who is the evaluator?

A A person who must be independent of the connected person and must consider him self to have the relevant knowledge and experience to make the report. He is required to have professional indemnity insurance against

liabilities to the administrator, the connected person and creditors.

Certain individuals are excluded from acting as evaluators, such as those with convictions for dishonesty, former bankrupts and those subject to a disqualification order under the Company Directors Disqualification Act 1986.

Q What will the qualifying report say?

A It must state the nature and value of the consideration for the disposal, identify the connected person, and state that the consideration and grounds for the substantial disposal are reasonable (or that they are not), giving reasons and setting out the evidence relied upon. The administrator is required to send a copy of the report to Companies House and to all creditors after the sale.

Q And what if the evaluator says no?

A A negative report – that is to say, one stating that the grounds for disposal or the consideration are not reasonable – does not prevent the administrator from completing the disposal. But, if he goes ahead, he must make a statement setting out his reasons for doing so.

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