# Choose good advisers, keep notes – and consult with stakeholders

**Alison Goldthorp** explains the different legal responsibilities of fixed charge receivers, administrative receivers, administrators and liquidators in property disposals

The duties of an office-holder when disposing of property have been under the spotlight in the courts in a number of cases over recent years, the latest detailed decision being *One Blackfriars Limited* [2021] EWHC 684 Ch. In that case the liquidators of the company made an unsuccessful claim against the former administrators for breaches of duty in relation to the sale in December 2011 of the real estate property development owned by the company, maintaining that the sale was at a significant undervalue. The value of the site had fallen very significantly during financial crisis in 2008. The issues in the case turned on the valuation of the site at the time of sale in 2011, and the steps taken by the former administrators to market and sell it.

In the current economic turbulence post-pandemic, with economic headwinds caused by the war in Ukraine and the energy crisis, it is a good time to review the potential pitfalls for office-holders of disposing of property. Those disposals are likely to be scrutinised by creditors and shareholders who, disappointed with the value obtained, make claims against the office-holder with the benefit of hindsight for breach of duty. Increasing numbers of claims that office-holders have sold property at an undervalue are inevitable.

The duties of the office-holder depend on whether they are administrators, liquidators, administrative receivers or fixed charge receivers and there are important differences to consider prior to taking an appointment.

## Fixed charge receivers

Fixed charge receivers are appointed by the fixed charge holder under the terms of the charge granted over the property and have powers under the charge document and the Law of Property Act 1925. The judgment of Sir Richard Scott V-C in *Medforth v Blake* [2000] Ch 86 and the decision of the Court of Appeal in *Sliven Properties Limited v Royal Bank of Scotland* [2003] EWCA CIV 1409 are the leading authorities on the duties of the receiver. Receivers are required to exercise the power of sale acting in good faith with a view to securing the repayment of the debt to the chargeholder by the conversion of the security into money. The timing of the sale is left to the receiver and there is no obligation to incur expense to improve the security to sell at a higher price, or to make applications for planning permission to improve the value of the site, which would be likely to delay any sale beyond the normal period of marketing. Receivers are obliged to take reasonable care and skill to obtain the best price reasonably obtainable. This duty is owed to those interested in the equity of redemption and the mortgagor.

> **The cases show the importance for the administrators to keep notes of internal and external meetings and email correspondence**

If the receiver manages and runs a mortgaged business following appointment, it is clear from the judgment of Sir Richard Scott V-C in *Medforth v Blake* they are not required to continue to run the business: "*The receiver is not obliged to carry on the business. He can decide not to do so. He can decide to close it down. In taking these decisions he is entitled, perhaps bound, to have regard to the interests of the mortgagee in obtaining repayment of the secured debt. Provided he acts in good faith he is entitled to sacrifice the interest of the mortgagor in pursuit of that end…*"

## Administrative receivers

The administrative receiver is a creature of statute, and their powers and duties are set out in the Insolvency Act 1986 as amended. Following the changes implemented by the Enterprise Act 2002, they can only now be appointed by a qualifying floating charge holder of a charge created prior to 15 September 2003, unless one of the statutory exceptions set out in sections 72B to 72GA IA 86 applies. These include a capital market arrangement, a public private partnership, or a project finance arrangement. As a result, administrative receivership is less common.

The principal duty of an administrative receiver is to realise the property of the company to repay the amounts due to the secured creditor who appointed them. Their duties are owed primarily to their appointor, with a secondary duty to the company over which they are appointed, as the company and its unsecured creditors have an interest in the equity of redemption in the charged assets. This is a duty to exercise reasonable care to avoid preventable loss.

As a result, the duties are very different to those of an administrator. The administrative receiver acts as agent over the borrower entity which granted security to their appointor, but is not required to consider whether the entity can be rescued (*Ahmad v Bank of Scotland*). The administrative receiver is not an officer of the court but can make an application to court for directions.

One of the reasons for the limiting of the ability of secured creditors to appoint

## Purpose of administration

Paragraph 3 (1), Schedule B of the Insolvency Act 1986:

*"The administrator of a company must perform his functions with the objective of—*

*(a) rescuing the company as a going concern, or*

*(b) 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), or*

*(c) realising property in order to make a distribution to one or more secured or preferential creditors."*

administrative receivers in 2002 was to promote the rescue of companies and to meet the criticism that administrative receivers often sold property for a price that repaid the secured creditor but did not factor in the steps that could be taken to increase the potential price and the chances of realisations for the unsecured creditors. As a result, administration has been the most common insolvency procedure for trading businesses after 2003.

> **John Kimbell QC concluded that administrators are entitled to reasonably rely on advice from advisers that appeared to be competent as to the best price … The administrator could however be liable in negligence for the choice of agent or if their instructions to the advisers were negligent**

## Administrators

The starting point for understanding the duties of administrators in relation to the sale of property is paragraph 3(1) of Schedule B1 IA 86. The duties of the administrator are to all creditors and are to achieve the three-part purpose set out in paragraph 3 (1) which sets out a waterfall of three objectives. The administrator must first look to rescue the company as a going concern (objective 1). Only if they consider that this is not reasonably practicable can they then pursue the second objective which 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. This is usually achieved by a sale as a going concern. If that is not reasonably practicable the administrators should perform their functions in order to make a distribution to one or more secured creditors, with the *proviso* set out in paragraph 3 (4)(b) that "*he does not unnecessarily harm the interests of the creditors of the company as a whole.*"

This provision was considered in some detail in the decision of Snowden J in *Davey v Money* [2018] EWHC 766 (Ch). The conclusions reached by Snowden J were endorsed by Judge John Kimbell QC in *One Blackfriars*.

The good news for office-holders is that the decision as to which objective is reasonably and practically achievable is "*a matter for the judgment of the administrator*". The judgment of the administrator as to which of the statutory objectives he or she is going to pursue is "*a dynamic and iterative process which involves the exercise of commercial judgment. It begins before appointment and continues after appointment*". Finally, that decision can only be challenged if there has been bad faith on the part of the administrators, and the decision taken by the administrators was one that no reasonable administrator properly advised would take.

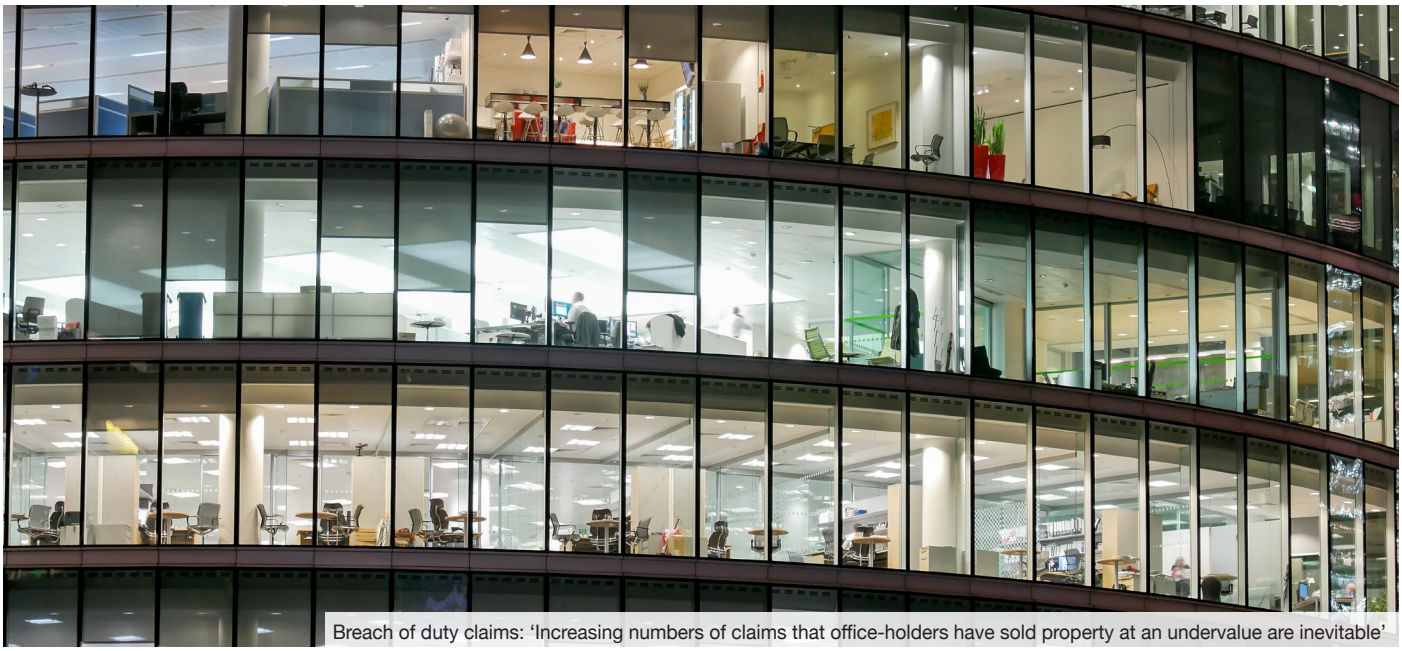
The cases show the importance for the administrators to keep notes of internal and external meetings and email correspondence. Record keeping is required by the Code of Ethics in any event, and also provides an invaluable contemporaneous record of the steps taken in the administration in the event of a subsequent challenge which may well take place long after the actual sale itself.

> **Choose advisers carefully having considered the skillset required and their experience. Draft instructions carefully and review whether instructions need updating. Ensure that you brief your advisers so that they understand your duties as office-holder**

## Duty to obtain the best price

In terms of the price to be achieved for the sale of property, the duty was set out by Millet J in *Re Charnley Davies Limited (No 2)* [1990] BCC 605 at 618 B-C: "*It is to be observed that it is not an absolute duty to obtain the best price that the circumstances permit but only to take reasonable care to do so; and that in my judgment means the best price that circumstances as he reasonably perceives them to be permit*".

John Kimbell QC concluded that administrators are entitled to reasonably rely on advice from advisers that appeared to be competent as to the best price. Any claim against the advisers for negligence will be a claim which the company in liquidation can bring for the benefit of the creditors. The administrator could however be liable



Breach of duty claims: 'Increasing numbers of claims that office-holders have sold property at an undervalue are inevitable'

in negligence for the choice of agent or if their instructions to the advisers were negligent. This contrasts with the position of receivers who are not permitted to delegate responsibility to an agent and have strict liability for the duty to obtain the best price that the circumstances permit.

### Do you need to get a new valuation?

There was much debate in *One Blackfriars* as to whether a further valuation should have been obtained during the administration in addition to the valuations that the company and the lenders had obtained prior to the administration. The judge considered, having heard the expert evidence, that a further valuation would not have added anything, provided that the marketing process had been properly carried out in order to test the market. The market value was the best price that a purchaser was prepared to pay in the open market at the time of sale. It would not have been 'wrong' to get a further valuation, but the fact one was not obtained was not a breach of duty in the circumstances of the case.

### What about looking to increase the value of the site?

A major issue in *One Blackfriars* was whether the administrators should have pursued an application for an amended planning permission. The judge considered that the administrators would need to weigh up the risks of losing the application, the costs and the delay, and the availability of funding in reaching a decision on whether or not making such an application would assist with achieving the purpose. On the facts of the case there was no breach of duty as a result of the decision not to apply for amended planning permission.

### Liquidators

A liquidator sells property without the qualification in paragraph 3(4)(b) Schedule B1 IA 86 (that they do not unnecessarily harm the interests of the creditors of the company as a whole), but they must still exercise reasonable care and skill. This was considered recently in *Absolute Living Developments (in liquidation)* [2021] EWHC 2311 where an application for an injunction to prevent the sale of a property by a liquidator failed. The judge considered that the view taken by the liquidator regarding the sales process for the realisation of assets should not be challenged unless it was negligent or dishonest. In this case such an argument was hopeless and unarguable on the evidence.


*One Blackfriars*: 'The judge considered that a further valuation would not have added anything, provided that the marketing process had been properly carried out in order to test the market'

> **Regularly canvas directors, shareholders and lenders for their views on the sales process, and any possibilities of a refinancing, and record those conversations on your file**

### Practical steps for office-holders

So, what are the practical steps follow from the above for office-holders?

- Consider carefully the duties which apply to the office you hold in each case and review the latest case law applying to that particular office.
- Keep detailed attendance notes and email chains to demonstrate all decisions taken and make sure they are archived to be available if there is a subsequent challenge.
- Review any valuations obtained by the company and the lenders and consider whether the costs of obtaining a further valuation would be worthwhile.
- Choose advisers carefully having considered the skillset required for the particular job and the experience of possible advisers. Draft instructions carefully and review whether instructions need updating. Ensure that you brief your advisers so that they understand your duties as office-holder in the particular assignment.
- Regularly canvas directors, shareholders and lenders for their views on the sales process, and any possibilities of a refinancing, and record those conversations on your file.
- If you are an administrator, regularly review the objectives and the progress on achieving the purpose of administration, and make sure your progress reports reflect your current views on the objectives.
- A 'light touch' administration (where fees are limited as the administrators are not trading the business) is OK provided that the administrators do not fetter their discretion, and continue to regularly review the objectives and purpose of administration.

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