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# High Court finds administrator breached his duty-to the tune of £750,000

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It was a painful outcome for the administrator of ARY Digital UK Limited ("**ARY**") when he was found in breach of duty and liable to pay £743,750.

The case of *Brewer and another (as joint liquidators of ARY Digital UK Ltd)* v *Iqbal* [2019] EWHC 182 (Ch) reminds office holders of the importance of understanding what assets they are selling, ensuring that correct marketing processes are employed and obtaining proper valuations.

It also highlights the importance of administrators exercising their own judgment and independence and of the duty to act in the best interest of creditors.  Whilst this might sound obvious to an experienced office holder; the case does highlight the financial consequences of failing do this. Simply going through the motions with a marketing and sales process without proper consideration of the nature of the asset being sold, could have serious monetary consequences, as the administrator of ARY discovered.

## Brief facts

Mr Iqbal was appointed administrator of ARY Digital UK Limited ("**ARY**") on 19 May 2011. ARY was a television broadcaster. To facilitate broadcasts over the British Sky Broadcasting Limited ("**SKY**") network, ARY had acquired Electronic Programming Guides ("**EPG**"). The EPGs meant that ARY content would be accessible from the SKY menu displaying current and upcoming television programmes.

There were 3 EPG television channels to be dealt with on Mr Iqbal's appointment. Mr Iqbal already had interest from the directors of ARY to acquire them at £40,000 and asked Edwards Symmons to advertise the EPGs on their own website. Edward Symmons were told that, if no offers were forthcoming he wanted to proceed with a deal to directors 7 days later.

The description given on website was "…satellite broadcasting company serving UK and Europe. Three channels catering to a wide audience with entertainment, news and religious broadcasting". The assets were listed under "plant and machinery". The advertisement did not state that EPGs were for sale or identify what channel numbers were attached to the EPGs.

Absent any offers for the EPGs Edward Symmons were instructed to invoice the assets 1 week later notwithstanding Edward Symmons' suggestion they allow more time for a potential purchaser to get in touch. It was clear Mr Iqbal was under pressure from the directors to sell and feared that SKY might "switch off" the channels rendering the assets worthless (a fear derived purely from what the directors had told him).

Mr Iqbal's administration proposals were rejected by creditor and ARY went into liquidation. The liquidators brought proceedings against Mr Iqbal for breach of duty.

The liquidators focused on Mr Iqbal's dealings with an associated purchaser, noted that he failed to obtain a proper valuation prior to selling the EPGs, accepted a value provided by the directors or their accountant on their behalf and allowed a very short marketing time to suit the directors. The liquidators argued that Mr Iqbal was effectively acting for the purchaser and not the creditors.

## Acting without due care and skill

At court, Mr Iqbal accepted he did not have much knowledge of SIP 16 and SIP 13 and that he did not keep much by way of written record. He accepted he had no knowledge of EPGs or their value and had no steer from the company accounts since they did not attribute a value for the EPGs.

The court concluded that Mr Iqbal had failed to understand the nature of EPGs and their true value which in consequence led to a failure to properly market the EPGs. There was no evidence of attempting to negotiate the price with the directors. The advertisement itself made no reference to the EPGs or channel numbers that were for sale (certain channel numbers should attract a premium or semi-premium price), there was no mention of audience numbers. EPGs were listed under "Plant and Machinery" and would not have targeted the best audience. The sale proceeded notwithstanding advice to give the assets more time to sell. The assets were not exposed to a specialist market (and it was clear there were experts in this field who could have been identified and approached) and not for an adequate time. The buyer had been protected by not advertising all the information that would have been reasonable to do. He failed to make adequate enquires of the agent used and did not try to seek out anyone more specialist.

The court found he acted without due care and skill.

## Breach of duty

Mr Iqbal made a conscious decision to exclude the name of ARY and its location when advertising its assets for sale and overall he failed to act with "single-minded" loyalty to the creditors of ARY. He chose not to expose the EPGs to the market (even if it was to a non-specialist market) for a reasonable time. His concern the EPGs would be "switched off" was only a perceived risk because the directors told him it was. The court heard expert evidence that SKY in fact operated a 60 day "non-black-out policy" so he would have had more time to market the assets had he checked. He failed in his duty to properly understand ARY's true asset position, which in turn led to failures in his decision-making process.

The court concluded that Mr Iqbal breached the wider fiduciary duty concerning decision making.

## Financial consequences

Based on the evidence received, the judge concluded the value of the EPGs were circa £2m. He accepted evidence that an administrator would have probably had to sell the assets at some 50-80% reduction to account for special factors, including the company insolvency, the fact there were 3 EPGs in the same genre, and 3 available at once, and there was a risk the EPGs could be "switched off". Even with this discount (the judge based on the value of the EPGs at the time of his finding of breach of fiduciary duty as opposed to the value at the time of sale) it still resulted in a monetary sum of nearly £750,000 to be paid by Mr Iqbal as equitable compensation for the breaches.

## Comment

Mr Iqbal clearly "went through the motions" in terms of getting agents involved and advertising the assets before they were sold but:

- there was no proper consideration (or attempt to consider) the nature and value of this unique asset;
- there was a lack of independent due diligence undertaken;
- there was over-reliance on and deference to the directors (who wanted the asset for themselves).

This case should not cause insolvency practitioners to unduly panic, but as a matter of good practice where there is an unusual asset to be sold, office holders should check if there are specialists who either sell or can advise on its true value and try to get an understanding of the nature of the asset in question as the picture may be different to that painted by the directors.

Understanding the company, the nature of the assets, the potential market and tailoring the marketing and sales process to suit is key to ensuring that an administrator acts in the best interests of creditors and the case of *Brewer* is another example, following a long line of recent cases, of what not to do.

Note that the court picked up on a recurring theme that Mr Iqbal had generally not taken notes of anything as the case progressed and the court was not persuaded by his oral evidence. Clearly it is not going to be feasible to keep written records of everything in the early days of an administration, but material conversations or decisions should always be noted and filed in case ever called upon.

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