



How to Tame Your Phoenix

Early sales, to connected parties, in administrations.

A briefing on the new regulations.

How to Tame Your Phoenix

- Why? New Regulations!
- When? Soon!
- What? What is a Phoenix?
- How? How to tame your Phoenix.
- Who? About Evaluators.
- Where? Where will you end up if you don't Tame Your Phoenix?

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The New Regulations

- **The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021**
 - TARoDetCPR
- **The Phoenix Pre Pack Regs**
- **And expect to see...**
 - New SIP 16 (Pre-packaged Sales in Administrations),
 - And perhaps...
 - New SIP 13 (Disposal of Assets to Connected Parties in an Insolvency Process)

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When do the Phoenix Pre Pack Regs bite?

- Scheduled to take effect on 30 April 2021
- They won't apply to administrations that start on an earlier date

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What is a Phoenix?

- A Phoenix is a 'Substantial Disposal'
- A Substantial Disposal triggers the Phoenix Pre Pack Regs

What is a Substantial Disposal?

- A 'Substantial Disposal' is
 - **Disposal**, hiring out, or sale
 - Of a **substantial part** of BustCo's business or assets (or all of it)
 - By an **administrator**
 - Within **8 weeks** after BustCo goes into administration
 - (Count 56 days. The appointment date is Day One.)
 - In a single transaction or series of transactions
 - To a **connected person**

How much is a 'substantial part'?

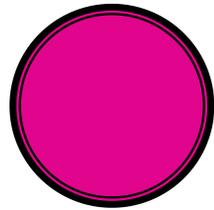
- It's a big bit.
- Err on the side of caution?
- Even in a break-up sale your agent might sell a 'substantial part'?
- A property sold at auction might be a 'substantial part'?
- A laptop holding the marketing database might be a 'substantial part'?

- *Action points for administrations:*
 - *Review instruction letters to agents.*
 - *Review instruction letters to auctioneers (or solicitors preparing auction terms)*

What is a 'Connected' party?

- This is a definition of '**Connected**' that's used only in the Phoenix Pre Pack Regs.
 - It's in **¶60A(3) of Schedule B1**.
 - Put there by SBEEA'15 to allow legal regulation of phoenixes.
 - It was due to expire – it contained a 'sunset clause'.
 - But extended to 30 June 2021 by CIGA'20.

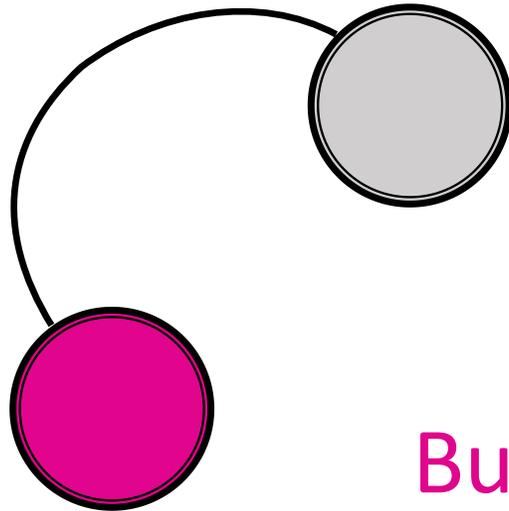
Connected?



BustCo



Connected?

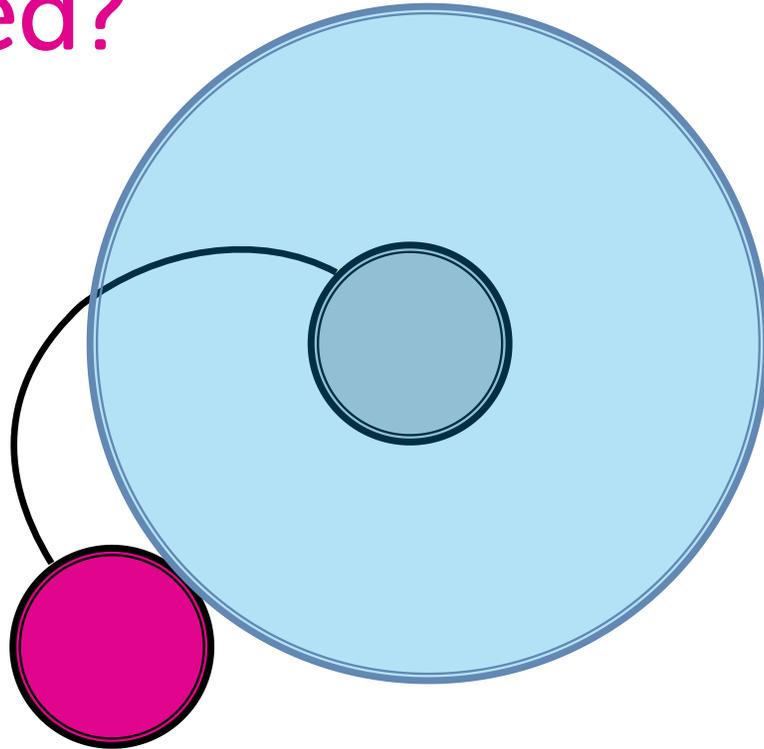


BustCo's directors
(shadow directors
and other officers), etc

BustCo



Connected?



BustCo's directors (etc)
- Their associates

BustCo's directors (etc)

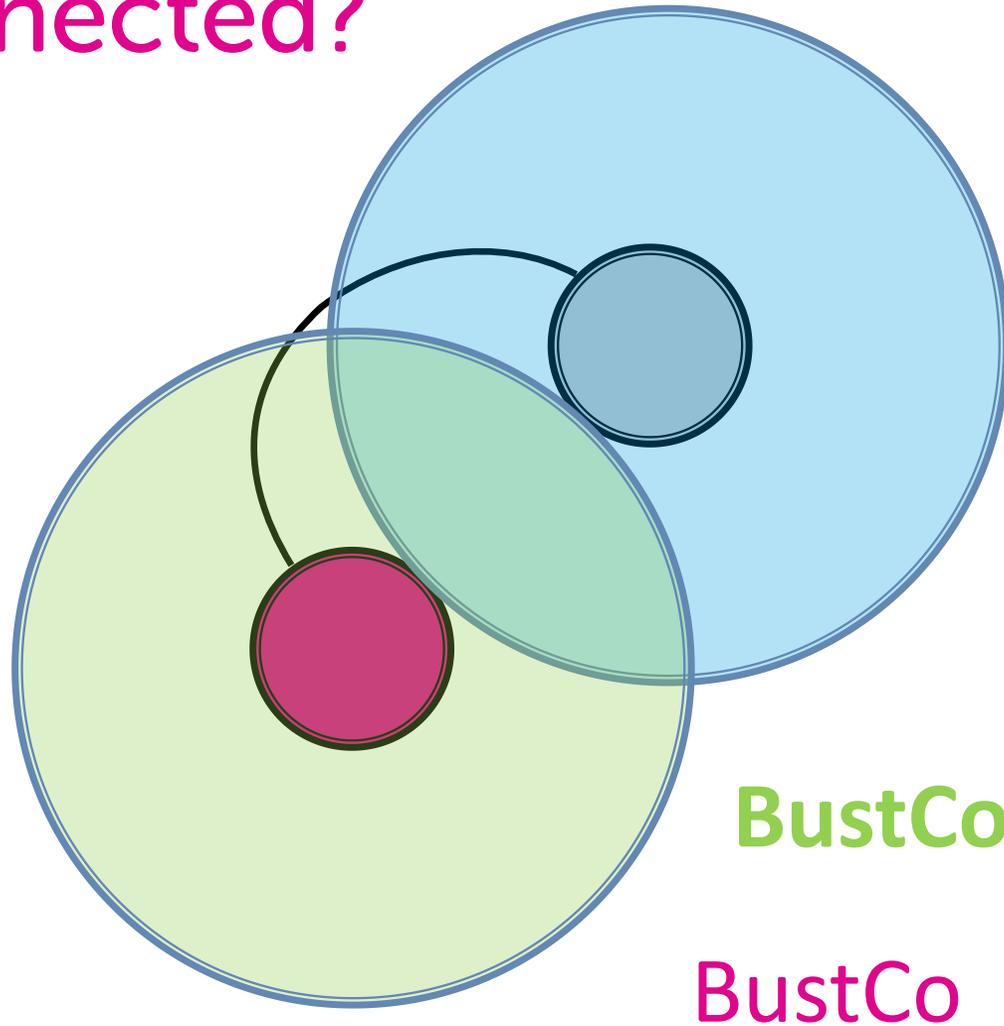
BustCo



Associates?

- As defined in s435 Insolvency Act 1986
 - Family
 - Business partners
 - [Employees] – but cut out of the definition for the Phoenix Pre Pack Regs
 - Trustees and beneficiaries in a trust
 - Companies under common control (even if the link is through associates)
 - Companies and their controllers (even if the control is through associates)
 - Control of a company can be by actual control
 - Control of a company can be through one third of the voting rights (and that through other companies)

Connected?



BustCo's directors (etc)
- Their associates

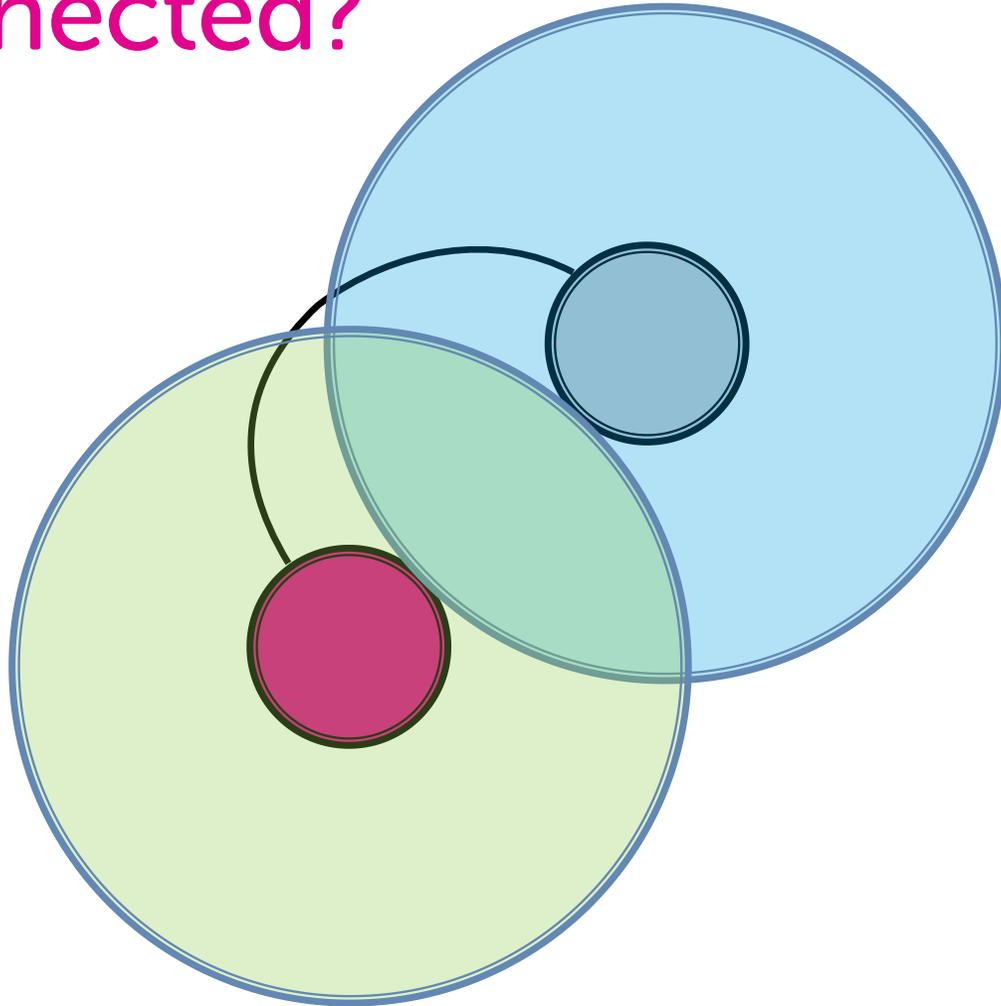
BustCo's directors (etc)

BustCo's associates

BustCo

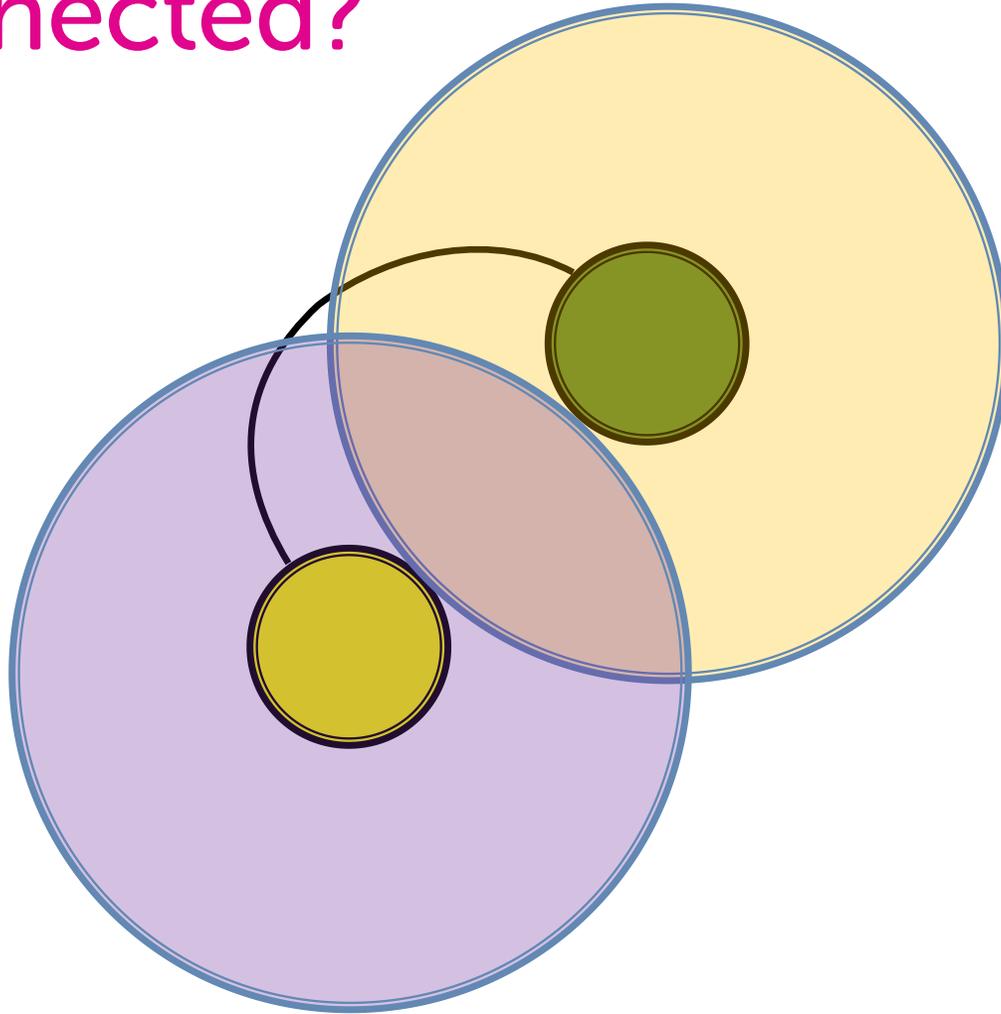


Connected?



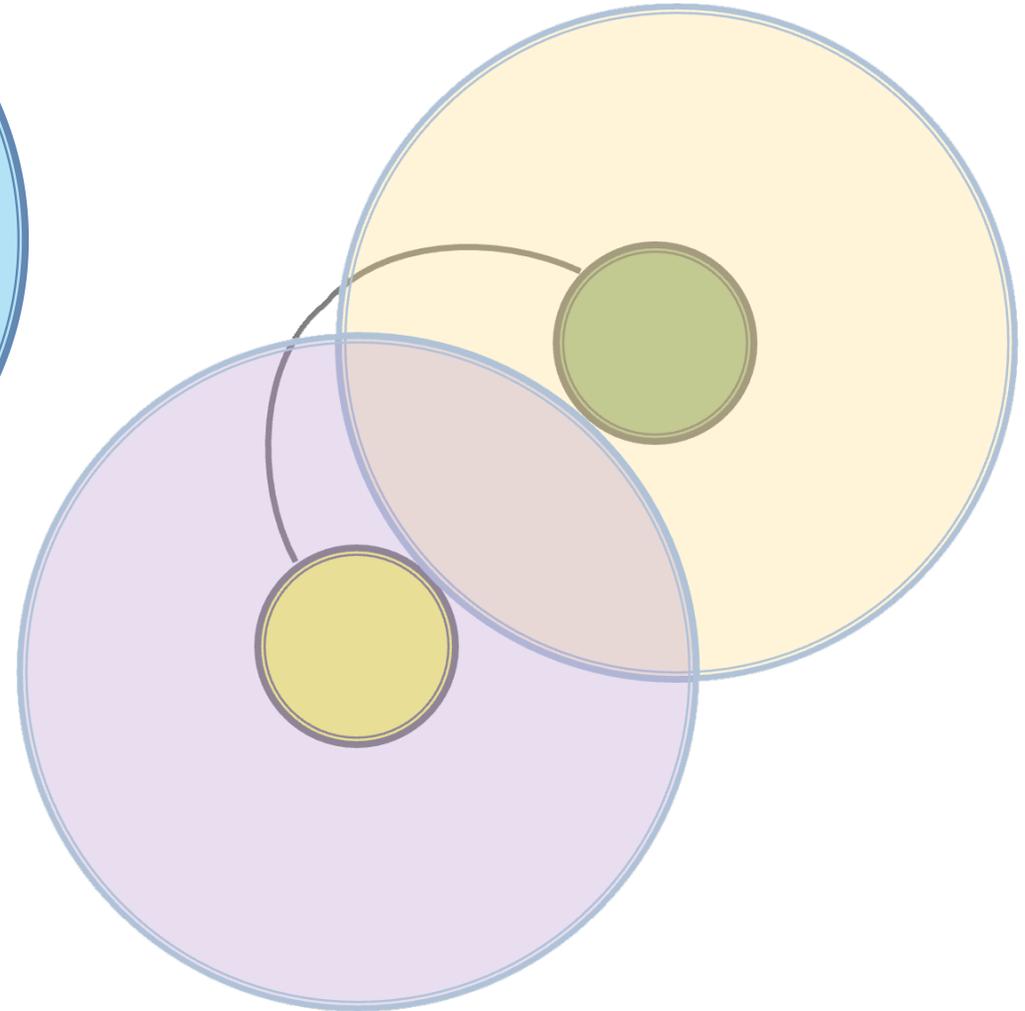
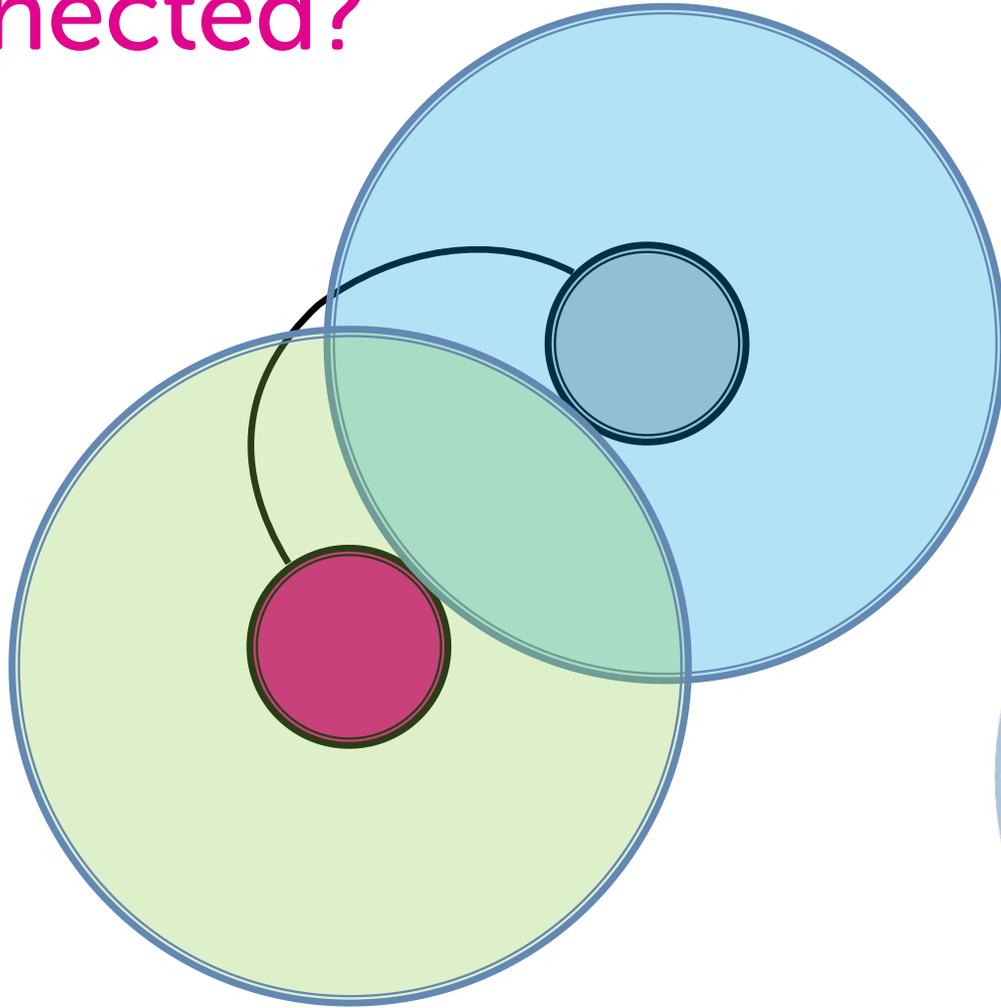
**BustCo,
Its directors (etc)
And the associates
Of both**

Connected?

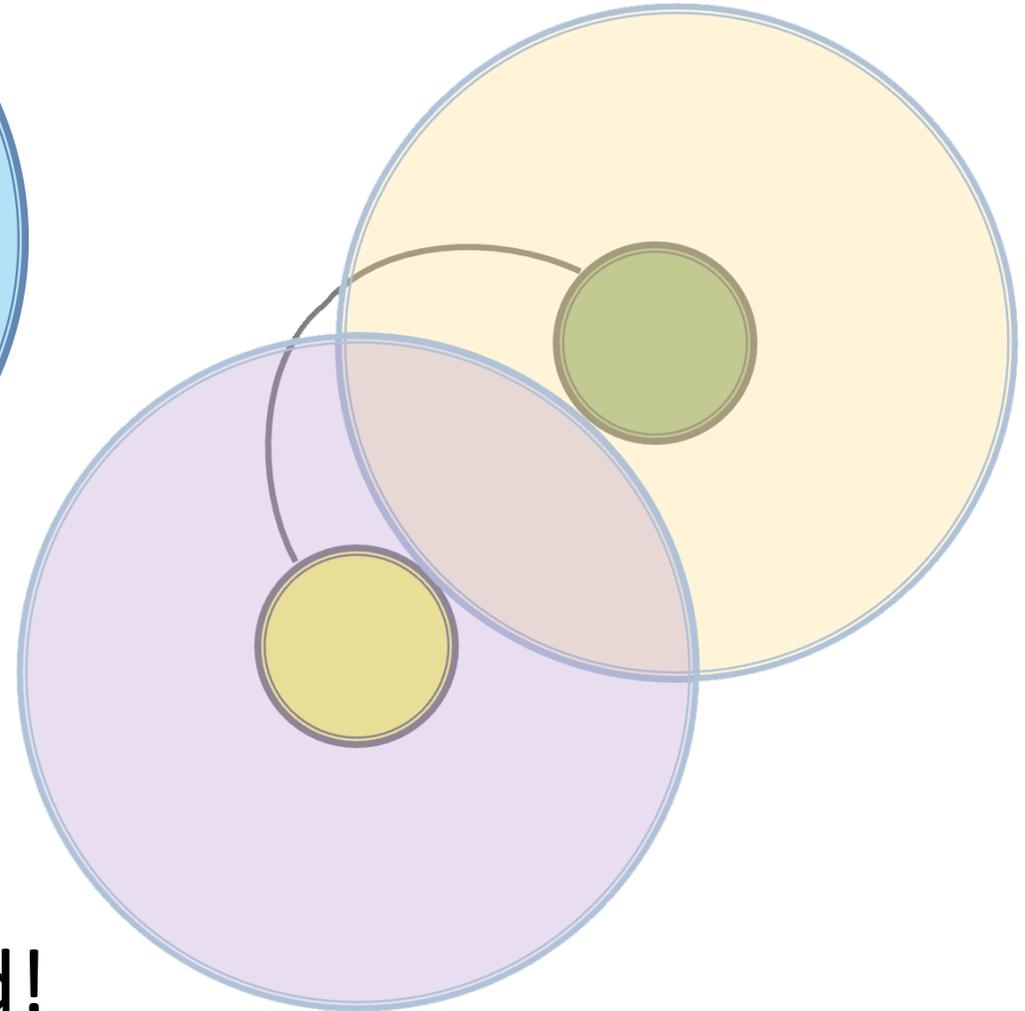
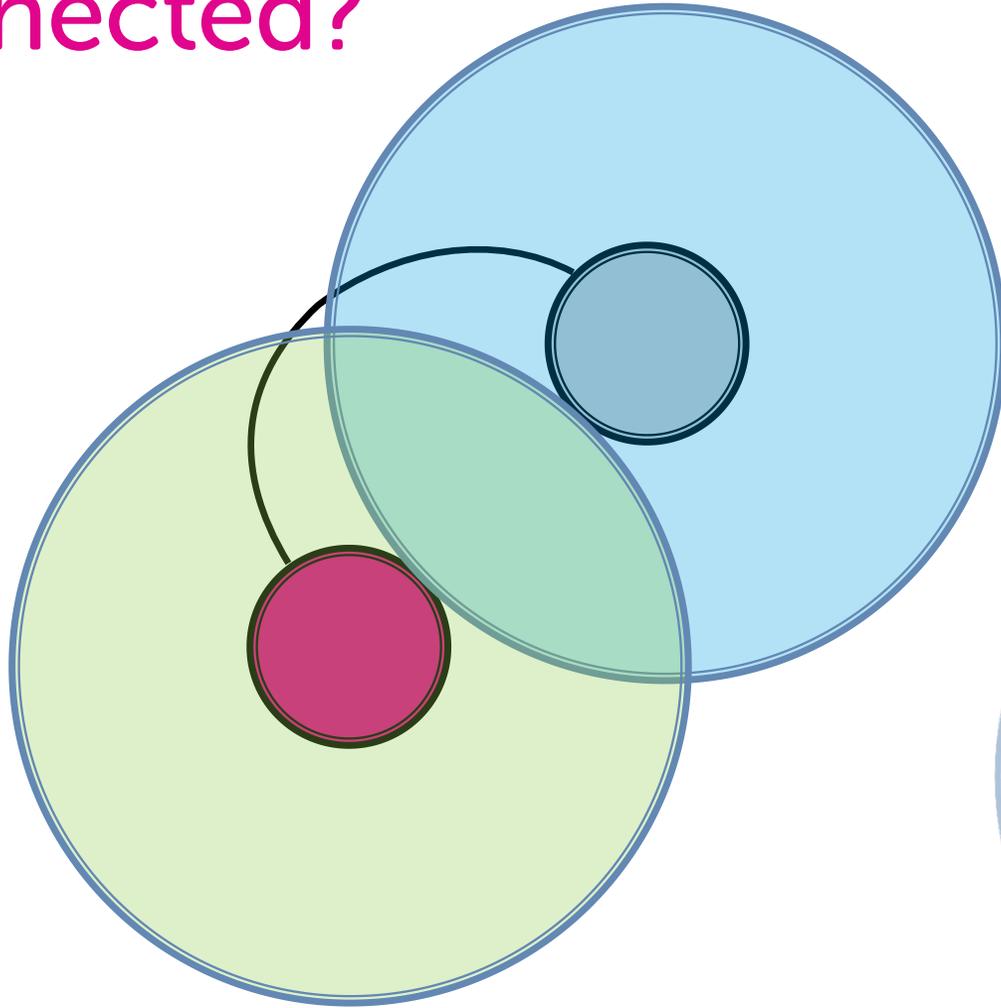


**The buying company,
Its directors (etc)
And the associates
Of both**

Connected?



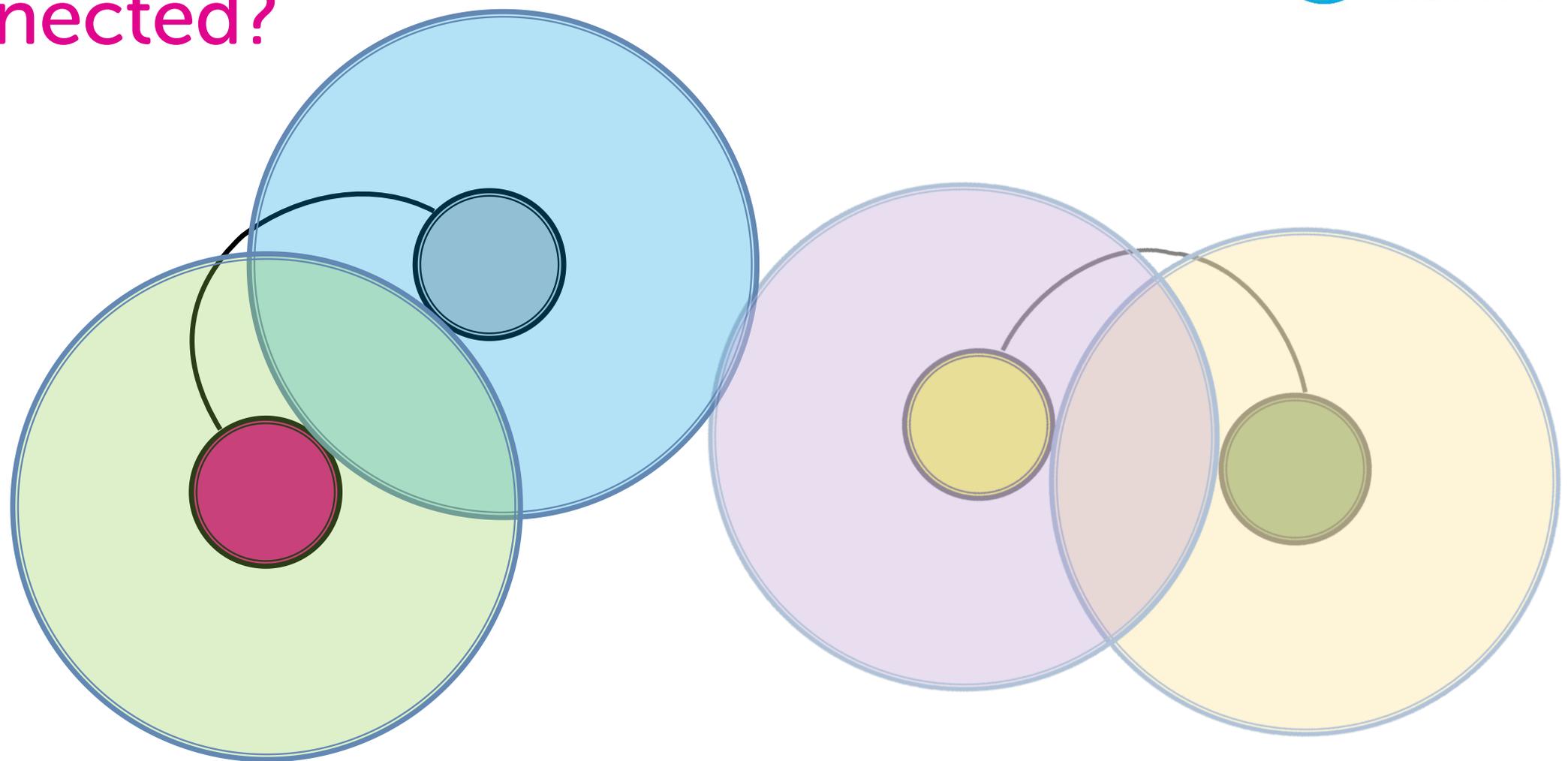
Connected?



Not connected!



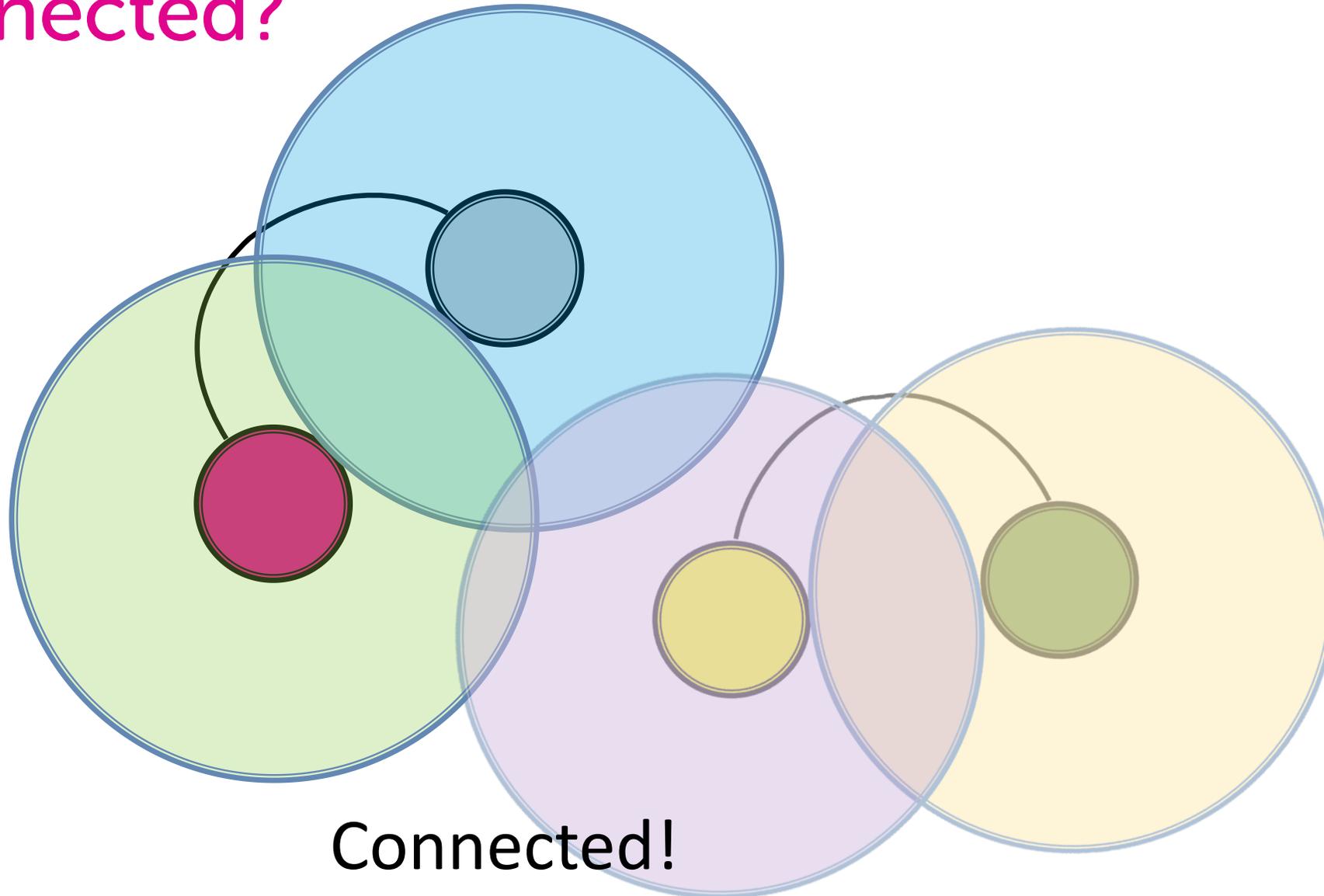
Connected?



Connected!



Connected?



Connected?

- Suppose any person is (or ever has been)
 - An associate of BustCo (other than only an employee); or
 - A director (officer, or shadow director) of BustCo; or
 - An associate of a director (etc) of BustCo (other than only an employee);
- And...
 - An associate of NewCo (other than only an employee); or
 - A director (officer, or shadow director) of NewCo; or
 - An associate of a director (etc) of NewCo (other than only an employee);
- Then...
 - **BustCo and NewCo are connected.**

Connected?

- And, when the buyer is not a company...
- Suppose the buyer is (or ever has been)
 - An associate of BustCo (other than only an employee); or
 - A director (officer, or shadow director) of BustCo; or
 - An associate of a director (etc) of BustCo (other than only and employee);
- Then...
 - **BustCo and the buyer are connected.**

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How to Tame Your Phoenix – compliance!

- Legitimate Avoidance:
 - Put BustCo into liquidation
 - Wait 8 weeks
 - Don't sell a substantial part
 - Don't sell to a connected party
- Compliance
 - Creditor approval
 - A 'Qualifying Report' (from an 'Evaluator')
- What won't work:
 - Interim licences
 - Hiring out is a disposal
 - Selling to the director's mate
 - A series of transactions

Compliance – creditor approval

- Does this need to be in advance?
 - Possibly not.
- How do you get it?
 - Circulate details in the administrator's proposals.
 - Then ask for a decision (as a separate resolution).
- What majority is needed?
 - Simple majority.
- By deemed consent?
 - Yes – no requirement to use a decision procedure.
- Can creditors modify?
 - Yes – but only with the administrator's consent.

Compliance – Qualifying Report

- Prepared by an Evaluator.
- The Connected Party commissions the Report.
- The administrator decides if the Evaluator is up to the job.
 - (Think about their knowledge and experience.)
 - (But otherwise give them the benefit of the doubt.)
- The administrator has to:
 - Consider the report.
 - Certify it as a Qualifying Report.
- The Report says:
 - The Evaluator is satisfied; or
 - That they are not (a 'Case Not Made Opinion')

A Helpful Qualifying Report

- The Evaluator will be:
 - Suitably experienced
 - Properly insured.
- The Qualifying Report will:
 - Contain all the Proper Guff.
 - The administrator checks that.
 - Say the Evaluator is satisfied that:
 - The price is right; and
 - The grounds are reasonable.
- The administrator will send the (redacted) Qualifying Report to:
 - Companies House; and
 - Creditors.

An Unhelpful Qualifying Report

- Suppose (all else is fine, but):
 - The Evaluator gives a Case Not Made Opinion because:
 - The price is not reasonable; or
 - The grounds are not reasonable.
- The administrator can still sell the assets to the connected party.
- But:
 - Must report on why they are doing so:
 - With the report filed at Companies House; and
 - With the report sent to each creditor.
- Remember ¶ 74 of Schedule B1:
 - creditors' actions to prevent unfair harm by an administrator...

Burying bad news...

- Suppose the Evaluator prepares a draft 'Case Not Made Opinion.'
- And the Connected Party fires them and appoints another?
- The New Evaluator will have to disclose the Previous Report in their Qualifying Report.
 - Evaluator's engagement terms will have to deal with that.
- And the administrator will have to deal with the Previous Report as if it were a Qualifying Report by reporting on it to:
 - Companies House; and
 - Creditors.

Stuff happens...

- Suppose the administrator can see that the Qualifying Report is badly out of date, and there are material changes to:
 - The assets being transferred; or
 - The terms of the transaction; or
 - The circumstances of the transaction?
- In that case, the administrator should not certify it as a Qualifying Report.
- The Connected Party should commission another.

How do you get a Qualifying Report?

- Sorry! Only 30 minutes today!
 - If you'd like a short run through – in this sort of format – please type 'Yes Please!' in the chat box.
 - If there's the interest, we can run another session on that point to follow on from this.

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Evaluators

- Evaluators self-certify that
 - They have the right knowledge and experience.
 - They are properly insured.
 - They are independent.
 - They are not disbarred.
- The administrator must also decide whether the Evaluator is up to the job.
 - They must think about the Evaluator's knowledge and experience.
 - But can otherwise give them the benefit of the doubt.

Evaluators' independence

- Evaluators must not be connected with:
 - BustCo
 - Its associates
 - Anyone connected with a connected party.
- Evaluators must **not**:
 - have any (financial) interest that might cause a conflict of interest.
 - have given related advice to the company or connected party in the last year.
 - be the administrator.
 - have gone to prison for a crime of dishonesty.
 - be insolvent.

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Consequences of breach

- Regulatory
- ¶ 74 (court oversight of administrators)
- ¶ 81 (court ending administration because of an improper motivation by the administrator)
- Invalid sale?

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 - **Compliance!**

How to Tame Your Phoenix

- Consider the alternatives:
 - Liquidation
 - Delayed sale.
- Approval
 - Involve creditors pre-appointment
 - Have a friendly Evaluator (and be ready for the process)

How to Tame Your Phoenix

- Knock on effects of the Regs
 - Sales within 8 weeks:
 - A 'substantial part' may be quite small. (And clear only in hindsight.)
 - Make sure agents comply.
 - Contracts must contain warranties of independence by purchasers.
 - Best practice might be to
 - disclose (in the proposals) every connected party sale and
 - validate them with a deemed consent resolution.
 - Retrospective resolutions or reports?
 - Someone will get their fingers burned.

How to Tame Your Phoenix

- Knock on effects of the Regs
 - Pre-appointment sales?
 - Will probably need – in effect – a pre-appointment Qualifying Report to protect the buyer.
 - So, why not do it by the book?



If you'd like to contact us...

Malcolm Niekirk

Solicitor | Insolvency Practitioner

(Licensed by ICAEW)

01202 491769

07413 164814

mniekirk@frettens.co.uk

