

ADMINISTRATIVE RECEIVERS I

Background

A company may grant a fixed and floating charge over all of its assets. This is sometimes called a debenture. This type of security allows the lender to take control of the company, lock stock and barrel upon enforcement by the appointment of an administrative receiver. This type of receiver is different and much more extensive than a fixed charge receiver as described in this guide. The administrative receiver runs the entire business as opposed to managing the secured property only.

The position of an administrative receiver is broadly the same as a company receiver under a fixed and floating charge in Ireland. The principal difference is that the role and duties of an administrative receiver are regulated by legislation, which has no direct Irish equivalent.

The law on administrative receivers was changed fundamentally in September 2003. In the case of floating charges / debenture deeds signed after that date, it is not possible to appoint an administrative receiver. Instead, an administrator may be appointed. The law was changed because it was perceived that receiverships were unfair on unsecured non-preferential creditors and did not give sufficient opportunity to try to rescue the company.

In the case of the charges signed after 15th September 2003, a floating charge holder can appoint an administrator only. See our chapters on administrators. An administrator has wider duties than a receiver. He must consider whether the company can be rescued or whether some alternative realisation proposal can be implemented, which is better than liquidation.

The 2003 changes give the general unsecured creditors a share of the proceeds of the floating charge assets. A floating charge does not take priority over certain payments due to employees and certain pension contributions. A floating charge given within 12 months before insolvency, can be set aside in certain circumstances.

Crystallisation

When a floating charge is enforced, it “crystallises” on all the assets within the wording of the floating charge at that time. The borrower would have been entitled to use and transfer the circulating assets in the course of its business prior to the crystallisation. At that point, the charge fixes on the assets and becomes a fixed charge on those assets. Generally, the following events cause crystallisation to take place;

- ❖ company enters liquidation;
- ❖ receiver appointed by another charge holder;
- ❖ borrower company defaults on payments;
- ❖ borrower company defaults on loan terms;
- ❖ another creditor enforces security;
- ❖ a material adverse change takes place.

In some cases, crystallisation is automatic. In other cases, a demand followed by the appointment of a receiver crystallizes the charge on the assets. The wording of the mortgage debenture determines the position.

Because of the disadvantages of a floating charge, some mortgage debentures attempt to create fixed charges on book debts. This is because accounts receivable frequently comprise one of the company's most valuable assets. There are practical difficulties in creating a fixed charge on debts. Some attempts to create fixed charges fail, because the borrower is allowed control over the bank account. If the borrower can deal with the account without the lender's consent, it is likely to be labeled a floating charge and treated accordingly.

An administrative receiver must be an insolvency practitioner. This is different to the position of a fixed charge receiver. A receiver may be both a fixed and floating charge receiver.

A receiver may be appointed over part or one of the company's businesses as opposed to all of the company's assets and businesses. An “administrative receiver” is receiver of the whole or substantially the whole of the company's assets.

Appointment

Generally, the lender will make a demand for payment. The receiver is then appointed in writing, if the demand is not complied with. The form of appointment is not laid down by law. Generally, the insolvency practitioner will require an indemnity in relation to possible liabilities.

There is legislation which protects a receiver against defects in his appointment. Although this gives some protection, this will not assist if the debenture deed itself is invalid. A receiver may be sued for acting without legal authority. For example, a liquidator may seek to attack the appointment of a receiver under a floating charge which is invalidated by reason of being made within 12 months of insolvency, without new consideration.

Agent of Mortgagor

An administrative receiver, like a fixed charge receiver, is deemed an agent of the company. This puts the receiver at arms length from the lender. The receiver will usually have full control of the company's business under the terms of the debenture and the appointment as agent. The borrower cannot dismiss the receiver and has no control over him. The principal effect of the receiver being the agent of the borrower, is that the borrower company is responsible for his acts and the lender is not responsible.

The directors of the company do not necessarily cease to act, but the scope of their responsibility is greatly limited. The directors' powers may remain in respect of assets outside the receivership.

Effect of Appointment

The appointment of an administrative receiver has following consequences:

- ❖ usually crystallises all other floating charges;
- ❖ prevents an administrator being appointed;
- ❖ generally does not terminate employment contracts;
- ❖ suspends directors' powers.

The administrative receiver has powers:

- ❖ to collect the company property;
- ❖ take possession of the company's assets;
- ❖ undertake legal proceedings where necessary;
- ❖ sell the company's assets;
- ❖ borrow money and grant security;
- ❖ retain a solicitor or accountant or other agents;
- ❖ appoint agents and contractors;
- ❖ realise the assets;
- ❖ carry on the business, if necessary;
- ❖ establish subsidiaries; and
- ❖ reorganise companies.

Position of Receiver

The receiver may sell company assets, prior to the company going into liquidation either as agent of the company under the power of attorney in the debenture or as mortgagee in possession. Selling as mortgagee in possession overrides lower ranking security holders and gives the purchaser title free from them. The receiver must account for any surplus proceeds (if any) to the lower ranking security holders.

A receiver may be personally liable for his actions. The receiver is entitled to an indemnity out of the company's assets. Receivers generally attempt to exclude personal liability in contracts that they sign. The company remains liable for the receiver's acts but outsiders may not be satisfied with the company as a party to a contract (e.g. on a debt).

The receiver is not personally liable, where he acts as agent of the company. If the company is placed in liquidation, the administrative receiver is no longer the agent of

the company. He can only sell assets as mortgagee after that point in time.

In a receivership, other creditors may continue to enforce their rights against the company e.g. by repossession, forfeiture etc. (unlike the case with a liquidation). A receiver is not liable if he repudiates and does not perform contracts which had been entered by the company. This leaves the company liable for the breach, but this may be of little relevance if the company is insolvent.

A company is bound by property rights of third parties. If, for example, the company has contracted to sell assets prior to the receivership (other than in breach of the debenture), the receiver must perform the contract. The borrower would usually have had authority to sell floating charge assets. This would not apply if the asset was subject to the fixed charge and the proposed sale did not have the chargeholder's consent.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.