

19. Fixed Charge Receivers

Overview

A receiver is one of a number of means by which a bank / mortgagee can enforce a mortgage. A receiver under a mortgage granted by an individual is often referred to as a “fixed charge” or LPA (Law of Property Act) receiver. This is to distinguish this kind of receiver from a floating charge (or administrative) receiver who takes control of all of a company’s assets in much the same way as a liquidator.

The principal purpose of a fixed charge receiver is to put in place at arms length, an individual or a business who may collect the rent of a mortgaged property and (provided there is power of sale in the charge which has been delegated to the receiver) to sell the property. A receiver insulates the mortgagee from the legal obligations that arise from being a mortgagee in possession.

Acting as Receiver

There is no legal requirement for any particular registration or qualification in order to act as a fixed charge receiver. There are

very few restrictions on who may be appointed a fixed charge receiver. A company may not be receiver of the property of the company. An undischarged bankrupt may not act as a receiver

Unlike the case with other insolvency procedures in England and Wales, it is not necessary to appoint an insolvency practitioner (typically an accountant). Fixed charge receivers under English mortgages are usually Chartered Surveyors. The Association of Property and Fixed Charge Receivers is the trade body for fixed charge receivers.

The Fixed Charge Receivership Scheme was created in 1998 to provide a professional qualification for persons acting as LPA receivers. Its purpose is to create a professional code of conduct, standards and an effective monitoring process. The scheme is sponsored jointly by the Insolvency Practitioners Association, the Royal Institute of Chartered Surveyors and the Association of Chartered Certified Accountants.

An advantage of appointing a receiver is that the mortgagee does not become “mortgagee in possession”. The mortgagee does not, for example, assume the responsibilities of landlord. It is not liable to account for default in management to the same extent as if it

became mortgagee in possession.

The receiver is usually deemed to be agent of the mortgagor / borrower. This insulates the mortgagee from liability as mortgagee in possession.. On a practical level, it places the enforcement of the mortgage with an outsider on an arms length basis.

The disadvantage of a receiver is that unlike the mortgagee in possession, he does not take title to the land. This can be relevant in some circumstances, particularly where, the receiver's powers are sufficiently extensive in the mortgage deed.

Appointment

There is usually a specific power to appoint a receiver in a mortgage deed of property. Even if there is not, there is a right under the Law of Property Act, which applies in the absence of anything to the contrary. If there is no signed and registered charge in place, it is possible to apply to court to have a receiver appointed. However it is usually possible to appoint a receiver "out of court".

Fixed charge receivers are commonly called "LPA receivers" by reason of the statutory power deriving from the Law of Property Act 1925. The Law of Property Act 1925 provides a mortgagee with a statutory power to appoint a receiver over the income of a

mortgaged property. The mortgage must be made by deed, as will invariably be the case.

It is possible and usual to extend the powers of the receiver in the mortgage deed. For example, a receiver is often granted extended powers such as a power of sale and extensive powers of management. In the event that the statutory power is not expanded, it may be possible to delegate the implementation of the mortgagee's powers to the same agent who acts as receiver.

The circumstances in which a receiver may be appointed are the same as those in relation to exercise of the statutory power of sale. They apply when one of the following apply;

- ❖ notice requiring payment of the mortgage money has been served and default has been made in payment three months after service or
- ❖ interest is in arrears and unpaid two months after becoming due or
- ❖ there has been a breach of the conditions of the mortgage

The mortgage deed is commonly modified, so that the power to appoint a receiver may be exercised without these restrictions. The powers in a registered charge do not arise until the charge has been registered.

A mortgagee who has taken possession may appoint a receiver. It is usually possible to appoint and remove a receiver on multiple occasions. Two or more joint receivers are commonly appointed. This is done so as to act as a control, within the receivers' firm. A receiver will generally be appointed by way of a written document or deed. The receiver may also be removed in writing.

A receiver appointed over the property of a company must accept the appointment by the end of the business day following that on which the instrument, appointing him has been received. Commonly, companies execute fixed charges in the buy to let sector. A person appointing a receiver over a company's property must give seven days notice to the Registrar of Companies.

The receiver will usually require confirmation that he has been properly appointed. The appointing mortgagee will usually be obliged to indemnify the person appointed as a receiver in case of there is invalidity in the appointment.

Role and Duties of Receiver

The Law Property Act deems the receiver appointed under the statutory power to be agent of the mortgagor / borrower. This makes the mortgagor liable for his actions.

Although the receiver is agent of the mortgagor, his primary duty remains to realise the assets in the mortgage. He acts in the interests of the mortgagee. The mortgagor has no say in the appointment of the receiver. He cannot revoke the appointment.

The borrower may have granted a tenancy or lease, which is not binding on the mortgagee. The tenancy will not become binding on the mortgagee simply because rent is paid to the receiver. The mortgagee may still terminate the lease at a subsequent date. If the receiver collects rent on behalf of the mortgagee and does not flag that he is a receiver, the tenancy may become binding on the mortgagee.

The primary duty of the receiver is to the mortgagee who appoints him. His powers may be exercised to the disadvantage of the mortgagor. The receiver has no duty of care to the mortgagor and subsequent mortgagees. However, he must exercise his powers in good faith for the purpose of recovering the mortgage debt.

The receiver's primary duty is to try to bring about a situation where interest on the debt can be paid and the debt itself can be repaid. A receiver has no right to remain passive, if this would damage the interests of the mortgagee. He must be active in the

protection and preservation of the property.

A receiver is under no duty to exercise the power of sale, if he has such a power. If he does so, he must obtain the best price reasonably obtainable. His position is the same as a mortgagee exercising a power of sale.

The receiver is not just a rent collector. He has a duty to safeguard and manage the property. The receiver should insure the property against the usual risks. The receiver has a duty to account for receipts and outgoings.

A receiver appointed under the statute has the power to demand and recover rent of the property of which he is appointed receiver. He may bring legal proceedings or enforce the collection of rent using the legal power of distress (as recently modernised). He may take legal action in the name of either the mortgagee or mortgage. He can give effective receipt to the tenants. If the tenant pays rent to the borrower, the receiver can still demand the rent.

Application of Funds

Monies received by the receiver must be applied as follows

- ❖ in the discharge of taxes rates and outgoings of the property;

- ❖ paying annual sums and interest on all principal money having priority to the mortgage;
- ❖ paying commissions, including insurance premiums and necessary expenses;
- ❖ paying interest in respect of the principal money under the mortgage;
- ❖ in discharge of the principal money as directed by the mortgagee,
- ❖ any remaining monies are to be paid to the next mortgagee or owner.

A receiver appointed under the statutory power may retain monies for his remuneration in satisfaction of all cost charges and expenses incurred by him. A commission not exceeding 5% of the gross amount of all monies received may be retained. If no rate is specified, 5% commission applies. Alternatively, the court may fix a different rates. There is a question as to whether this rate of commission can be varied by the mortgage, where the statutory power is invoked.

A receiver's appointment can be terminated in writing from time to time. A receiver appointed by a later mortgagee will be replaced by a receiver subsequently appointed by a prior mortgagee.

Other Types of Receiver

The jurisdiction to appoint a receiver by court is not often used. It is usually done where there is a defect in the mortgage of some kind. A receiver appointed by court must give security. He has a duty to report back to the court. He may apply to the court for directions on certain matters.

An administrative receiver appointed under a floating charge will appear to take over the company "lock stock and barrel" and will typically carry on the company's trade. Floating charges by companies granted prior to the reform of the insolvency law in 2003 allow for the appointment of an administrative receiver. The power to appoint an administrative receiver has now been curtailed in respect of mortgages after September 2003. An administrator can now be appointed by a floating charge holder.

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This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The 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. It 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 it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1st August 2009.

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