

29. Administrative Receivers

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 in the event of enforcement, by way of the appointment of an administrative receiver. This type of receiver is different and much more extensive than a fixed charge receiver as described earlier 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 mortgages signed after that date, 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 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 next chapter on Administration. 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 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 loan terms;
- ❖ another creditor enforces security
- ❖ material adverse change takes place.

In some cases, crystallisation is automatic. In other cases, the a demand for payment and the appointment of a receiver crystallises 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 most valuable assets. See our chapter on non-property security in relation to the difficulties of creating such a fixed charge on debts. Some attempts to create fixed charges fail because the borrower is allowed too much 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 at the same time.

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 for some reason, such as 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 responsibilities are likely to be greatly limited. The director's 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 most 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.

The receiver may sell company assets prior to the company going into liquidation either as agent of the company under the power of attorney 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.

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.

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 goes into liquidation, the receiver can no longer act on behalf of the company. He is no longer the company's agent. He is personally liable on any contract carried out in the course of his functions after that time, unless he excludes liability by the terms of the contract.

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 or if the agreement to sell was in breach of the debenture.

Employees

The appointment of a receiver does not automatically terminate employment contracts. The receiver may dismiss employees and /or retain those crucial to the business. There is no obligation on the receiver to keep employees on.

A receiver who does not terminate an employee's employment within 14 days may be personally liable for services rendered after the contract is deemed adopted. A receiver is entitled to an indemnity out of the charged assets for this liability, which will rank as an expense of the receivership and be paid ahead of the preferential creditors and the debenture holder.

A receiver may be liable where he adopts an employee's contract. This liability is limited

to payment for work actually carried out during the receivership. These charges will be added as a cost of the receivership. There is no liability to employees during the first 14 days.

In the case of an LPA receiver, he may be personally liable where, for example, he continues to employ hotel employees.

Other Priority Creditors

Certain creditors may have priority over the receiver. A landlord with rental arrears is allowed to recover from the property directly by taking goods under a particular procedure..

Persons enforcing court orders may only keep assets taken from the company under a completed execution. Owners under leasing and hire purchase arrangements can normally retake their goods. Likewise goods to which title has been retained by the seller may be taken by the sellers.

Suppliers of utilities such as gas and electricity cannot make payment of existing liability, a condition for continued supply to the company in receivership. They may only require receiver's personal liability for new supply.

Duties of Receiver

A receiver's primary duty is to the debenture holder who appointed him. There is a secondary duty to the company and other parties who are interested in the proceeds of sale. No duty is owed to the directors or shareholders of the company nor to unsecured creditors.

The law on the extent of receiver's duties to others has been subject to different opinions. One view is that it is limited to acting in good faith. Another view is that there is some obligation to obtain proper market value or best price for the assets at the moment the mortgagee chooses to sell. It is clear that there is no duty to wait, and only sell at the best possible moment.

A receiver cannot simply leave the property empty indefinitely and wait for market conditions to improve. He must account for actual receipts and must take reasonable care to realise value.

The extent of the receiver's duties depend on the circumstances. The receiver is not obliged to continue carrying on a business. If he does carry on a business, he must take reasonable steps to try to do so profitably. A receiver may sell a business as a going concern, if this is reasonable in the circumstances.

Enquiries and Report

Administrative receivers are entitled to obtain statements in relation to the company's affairs from various present and previous directors and employees. The receiver must obtain statements, prepare a report and file it with the Registrar of Companies. Unsecured creditors must be sent a copy or be notified as to its publication and how they can access the report.

The report must contain a summary of the statement of affairs and the administrator's comments. It should set out the circumstances of the receivership, the disposals or intended disposals of company assets, the amount owing to the debenture holder and preferential creditors and the amounts, if any, likely to be available to other creditors. The receiver need not include information which would prejudice his functions.

Effect of Liquidator

The administrative receiver's function is, if possible, to realise enough of the assets to pay off the lender. This may involve running the business for a time. It may involve the sale of certain fixed assets to pay off capital and interest or it may involve the sale of the company as a going concern.

The appointment of a liquidator does not terminate the powers of the receiver. However, the receiver ceases to be agent of the company. The receiver may not commit the company to new liability. The receiver may not carry on the business of the company. The receiver is still capable of getting in and realising the secured assets.

Order of Priority

The following is the order of payment, on the sale of floating charge assets;

- ❖ creditors with priority
- ❖ administrative receiver's costs, expenses and remuneration;
- ❖ fixed charges within the debenture under which the administrative receivers was appointed;
- ❖ debts due to preferential creditors;
- ❖ excess money if any, due to lower ranking mortgagees.

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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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