

19. Fixed Charge Receivers

Overview

A receiver is one of a number of means by which a mortgagee can enforce a mortgage. A receiver under a mortgage granted by an individual is often referred to as a **fixed charge** receiver. This is to distinguish this kind of receiver from a floating charge receiver (or "manager") 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. It is most suited to investment properties.

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.

Fixed charge receivers have been rarely used in recent times in Ireland. They have been used to a much greater extent in England, under almost identical legislation. 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 in England. There is no Irish equivalent.

An advantage of appointing a receiver is that the mortgagee does not become a mortgagee in possession. The mortgagee does not, for example, assume the responsibilities of a 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, such as in terminating tenancies. On the other hand, a well drafted mortgage deed may give receivers extended powers to deal with the land and with tenants.

Appointment

There may be a specific power to appoint a receiver in a mortgage deed of property. Even if there is not, there is a right under the Conveyancing Act (which is preserved under the 2009 law reforms), which applies in the absence of anything to the contrary. The Conveyancing Act power 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.

If there is no signed mortgage or no signed and registered charge in place, it is possible to apply to court to have a receiver appointed. See our chapter on court appointed receivers.

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. In the event that the statutory power is not expanded, it may be possible to delegate the mortgagee's power of sale to the same agent who acts as receiver.

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

- ❖ notice requiring payment of the mortgage monies has been served on the mortgage and there are three months default in payment;
- ❖ interest is in arrears and unpaid two months after becoming due or;
- ❖ or there is breach of the conditions of the mortgage (e.g. non-financial conditions).

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 already 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 commonly done so as to act as a control. A receiver will generally be appointed by way of a written document or deed. The receiver may also be removed in writing.

Commonly, companies execute fixed charges in the buy to let sector. A person appointing a receiver over 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 principally to cover the risk that there is invalidity in the appointment or the mortgage deed.

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.

Role of Receiver

The Conveyancing Act (and the 2009 law reforms) 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 is 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.

In the case is a mortgage by an individual, moveable goods will not be included in the mortgage. Where the property is let, the rent must be apportioned between the land and the movable items.

Duties of Fixed Charge Receiver

The primary duty of the receiver is to the mortgagor who appoints him. His powers may be exercised to the disadvantage of the mortgagor. The receiver has limited obligations to the mortgagor and subsequent mortgagees. He must exercise his powers in good faith for the purpose of recovering the mortgage debt.

The receiver is obliged to take reasonable care in performing his duties. He must, for example, enforce the terms of lease rent reviews. There are slight differences in views regarding the extent to which the receiver owes duties to lower ranking mortgagees, the mortgagor and guarantors.

The receiver does not have a duty to immediately realise assets. Decisions taken in good faith regarding trading or renting as

opposed to selling, are primarily for the receiver to decide. He is not compelled to adopt any particular course.

A receiver may be liable if he abuses his powers by failing to use them for the purpose of preserving and realising the security for the benefit of the mortgagee. If the receiver acts in bad faith or improperly, he may be challenged. There are views that the duty may be broader, namely to manage the property with due diligence. He must take reasonable steps to operate profitably.

The receiver's primary duty is to ensure the debt is serviced and interest paid. He also has a duty to try to bring about a situation where 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.

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 Conveyancing Act 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. 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 to the borrower, the receiver can still demand the rent over again.

Sale by Receiver

A receiver does not have a power of sale under the "default" rules. A mortgage deed will commonly give the receiver a power of sale. 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. See the our chapter in relation to the power of sale.

The Companies Acts provide that a receiver in selling company property must exercise reasonable care to obtain the best price reasonably attainable for the property at the time of sale. The balance of opinion is that the receiver is in much the same position as a mortgagee in possession. He is not obliged to wait for the market to rise but must take proper steps to secure the best available price at the time of sale. The fact that it might later appear he could have got a better price, will not generally make the receiver liable.

The Companies Act restricts a receiver who wishes to sell a non-cash asset of a certain value by private contract, to anyone who was a shareholder, director, or had control of the company, in the previous three years. The receiver must give at least 14 days notice of his intention to all creditors of the company. This does not apply to a sale by public auction.

Application of Funds

The order of application of proceeds are set out in the Conveyancing Act and restated in the 2009 Act in similar (but not identical) terms.

The receiver shall apply money as follows:-

- in discharge of rents taxes, rates and outgoings affecting the property;
- keeping down annual sums, payments, interest and principal sums having priority to the mortgage under which it is appointed;
- in payment of his commission premiums and insurances, properly payable under the deed;
- costs on executing necessary or proper repair directed by the mortgagee;
- in payment of interest accruing due

in respect of principal money under the mortgage;

- and the residue to the person who but for at the possession after receiver could have been entitled to receive the income after property or who is otherwise entitled.

After payment of interest and principal money, any surplus is to be paid to the person who but for the possession of the receiver, would have been entitled to the income of the property. Under the 2009 Act, it is expressly stated that the balance may be paid towards reduction of the principal.

Remuneration

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 in the mortgage deed 5% commission applies. Alternatively, the court may fix a different rate.

There is a question as to whether this rate of commission can be varied by the mortgage deed, where the statutory power is invoked. A leading English authority (on identical legislation) highlights the doubts and

indicates that it may be possible to vary the commission rate by the mortgage deed. It indicates that the more prudent course may be, not to rely on the statutory power but, to provide a separate power to appoint a receiver, independent of the statutory power. This is commonly done in the case of receivers under floating charges.

2009 Reforms

The power to appoint a receiver has been preserved in the 2009 reforms. However some restrictions have been placed on the exercise of the rights for mortgages signed after the 2009 law reforms commence. These may be changed by the mortgage deed, other than in housing loan cases.

The right to appoint a receiver will not be exercisable until after 28 days notice in the prescribed form has been given to the mortgagor. The purpose of exercising the right must be to protect the property or realise the security. The right to appoint will arise on the creation of this security. It will not be dependent on the mortgage money becoming due. However, there are certain conditions in relation to its exercise.

The mortgagee may not be receiver and mortgagee at the same time. However, a mortgagee in possession may appoint a receiver. A receiver may resign or be

removed in which event the mortgagee can become mortgagee in possession.

Court Receiver

Where the statutory power of appointment of a receiver is not available, an application to court may be made for appointment of a receiver. In this case, the receiver owes obligations to the court. A court appointed receiver is a flexible means of enforcing security against a range of assets such as shares in a partnership trading business, and so on. See our chapter on court receivers.

This is an extract from our "Legal Guide to the Management and Enforcement of Security in Ireland" (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 October 2009.

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