SPOTLIGHT ON RECEIVERS

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Introduction

1. This paper is intended to shine a light on some of the difficult questions which surround the uneasy relationship between receivers and their appointing lenders on the one hand, and the debtors whose assets they receive and manage on the other. In particular we will review the court's current attitude to the duties owed by the receiver to each of the lender (mortgagee or debenture holder) and the debtor (the mortgagor), and then reflect on some of the incidents of the peculiar agency relationship which exists between the receiver and the debtor, with reference to two recent cases.

Receivership – a quick reminder

2. Receivership under a power in a mortgage is usually an out of court procedure available where a mortgagee's security has become enforceable. The court has a well established power to appoint receivers to assist enforcement, but the time and cost involved in pursuing a court appointment makes it far less attractive and generally only used if there is some doubt as to the ability to appoint out of court. There is no need for receivers appointed out of court to be qualified IPs nor are they officers of the court. They have a duty to account for their receipts and payments but there are no formal statutory reporting obligations or requirements to formulate formal proposals for the conduct of the receivership. Their powers are circumscribed by the nature of the assets over which they are appointed. Section 101(3) of the Law of Property Act 1925 permits charge documents to contain wide ranging powers but a receiver cannot trade the business of a company where he has only been appointed over one property in a larger portfolio (his role is rather confined to collecting rent, creating leases or selling).

3. By contrast, administrative receivership differs from simple receivership in that an administrative receiver is appointed over all of the assets and undertaking of the company. When section 250 of the Enterprise Act came into force on 15 September 2003 this date was intended to mark the passing of the entire institution of administrative receivership. Such a receivership only remains possible under pre- 15 September 2003 security (see IA 1986, s 72A) and limited categories of special cases (found in IA 1986, ss 72B - 72GA) including capital market arrangements, public- private partnerships, utilities, urban regeneration projects, project finance, financial markets, registered social landlords and protected railway companies. However, as will be seen below, there are still administrative receivers being appointed under old debentures, and the institution continues some 10 years after its scheduled extinction.

Receivers, Lenders and Debtors – a ménage a trois?

4. There is an uncomfortable tripartite relationship between receivers, the lenders who appoint them and the debtors over whose property they are appointed. The obvious juridical difficulty is that the receiver is appointed by the lender, and yet is the agent of the debtor. His appointment is intended to benefit the lender, but the debtor is his principal. Thus the receiver has two possible masters with two competing (and often conflicting) interests – the lender wishes to recover his debt, the debtor may wish to stall for time to rescue his business or to get the maximum potential return from the assets. In such a position of conflict, how is the receiver to reconcile the interests of the two entities his decisions will most affect (for he undoubtedly could cause great financial harm to the debtor)?

The duties owed

5. In *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 Jenkins LJ explained at page 661 that the primary duty of the receiver is to the debenture holder and not to the debtor company, since he is manager and receiver of the property of the company for the debenture holder and "*the whole purpose of the receiver and manager's appointment would be stultified if the company*

could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors and managers".

6. However, this was the high water mark of freedom from responsibility to the debtor and there have been significant judicial inroads. Although there is at least one reported decision[1] in which the debtor successfully managed to bring a claim in common law negligence against receivers in relation to their conduct of a business, subsequently the courts resiled from the view that a receiver owes any general common law duty of care. But a similar outcome has been achieved by reliance on the equitable duties owed by the receiver.

7. This was explored by the Court of Appeal in *Medforth v Blake and Ors* [2000] Ch 86 where the defendants, who had been appointed as receivers over the pig farming business of the claimant, were sued by the claimant who alleged that the receivers had been negligent in failing to negotiate discounts for the purchase of pig feed. The judge determined as a preliminary issue that the receivers owed the claimant, over and above a duty of good faith, an equitable duty of care when conducting the business (to reach the standard of a reasonably competent receiver), since no sensible distinction could be drawn between exercising the power of sale (to which such an equitable duty applied) and exercising the power to manage a business. The defendant's appeal was dismissed.

8. The Court of Appeal considered that the proposition that, in managing and carrying on the mortgaged business, the receiver owes the mortgagor no duty other than that of good faith offends commercial sense. Imposing on receivers who decide to manage a debtor's business, a duty to do so with reasonable competence would in no way undermine the system of receivership. Nor was case law inconsistent with such a duty. The authorities established that (1) a mortgagee must take reasonable care to obtain a proper price on a sale: *Cuckmere Brick Co. Ltd. v Mutual Finance Ltd.* [1971] Ch. 949, (2) this duty, owed to those interested in the equity of redemption, is not tortious or contractual but owed in equity, (3) the receiver owes the same specific duties when exercising the power of sale as are owed by a mortgagee when exercising that power, but (4) there is no general duty of care in dealing with the assets of the company: *Downsview Nominees Ltd v First City Corporation* [1993] A.C. 295 (Privy Council). The combined effect of these cases is that a receiver who sells but fails to take reasonable care to obtain a proper price, may incur liability notwithstanding the absence of bad faith. Why should the approach be any different if what is under review is not the conduct of a sale but the conduct of carrying on a business?

9. Further, the Court of Appeal considered that the duties imposed by equity on a receiver are:

> "*imposed in order to ensure that a receiver, while discharging his duties to manage the property with a view to repayment of the secured debt, nonetheless in doing so takes account of the interests of the mortgagor and others interested in the mortgaged property. These duties are not inflexible. What a mortgagee or a receiver must do to discharge them depends upon the particular facts of the particular case. A want of good faith or the exercise of powers for an improper motive will always suffice to establish a breach of duty. What else may suffice will depend upon the facts*."[2]

10. The Court of Appeal therefore laid down seven propositions:

    (1) A receiver managing mortgaged property owes duties to the mortgagor and anyone else with an interest in the equity of redemption.

    (2) The duties include, but are not necessarily confined to, a duty of good faith.

[1] *Knight v. Lawrence* [1993] B.C.L.C. 215.
[2] Per Sir Richard Scott VC at page 101-102.

(3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of the particular case.

(4) In exercising his powers of management the primary duty of the receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid.

(5) Subject to that primary duty, the receiver owes a duty to manage the property with due diligence.

(6) Due diligence does not oblige the receiver to continue to carry on a business on the mortgaged premises previously carried on by the mortgagor.

(7) If the receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps to be taken in order to try to do so profitably.

11. The Court of Appeal had to consider a slightly different question in *Raja* v *Austin Gray (A Firm)* [2003] 1 EGLR 91. In that case the claimant mortgaged tenanted properties to DFL and DFL in turn granted a debenture to Midland as security for a loan. Midland appointed receivers pursuant to its power in the debenture. The receivers sold the properties at an alleged undervalue relying on a negligent valuation.

12. The receivers accepted that they owed a "*Medforth*" duty of care to DFL (who, vis a vis the receivers, was in the position of the mortgagor/debtor), and that DFL also owed a duty of care to the claimant as the claimant's mortgagee. However, the receivers argued that they should owe no direct duty of care to the claimant, which could lead to double recovery against them (by both DFL and the claimant).

13. The matter came forward as a preliminary issue on two points (1) whether the receivers owed a duty of care to the claimant, and (2) whether the valuer owed a common law duty of care to the claimant. As to (1), the Court of Appeal felt that the claimant was within the *Medforth* principle since the claimant was a person interested in the mortgaged properties – the crucial point being that the receivers were not just selling DFL's interest in the properties under the mortgages, but the properties themselves. Therefore the receivers did owe an equitable duty of care to the claimant when they exercised a power of sale of the properties, even though the receivers were appointed by the mortgagee of DFL (Midland) and not by DFL itself. As to (2), the Court of Appeal held that the claimant was not an advisee and cannot have been expected to rely on the valuations so it could not be held that the valuers had assumed responsibility to him, nor was there sufficient proximity to satisfy the parallel test for imposing a duty of care established in *Smith v Eric Bush* [1990] 1 AC 831. It was also not fair, just and reasonable to impose such a duty given that the claimant already had a remedy against the receivers for breach of the equitable duty.

14. While equitable duties have been recognised, the level of resistance to the notion of a receiver owing tortious liability to the debtor and others with an interest in the equity of redemption (e.g. guarantors and subsequent incumbrancers) may stem from the perception that a receiver might well be inhibited from attending to the needs of the secured creditor if he or she feels under threat of litigation at the instance of the debtor. The concept of a fact sensitive equitable duty of care may be seen to be more flexible than a common law duty, and better able to be applied sensitively in the various difficult factual situations which may arise.

The rule against reflective loss

15. Recently, the relationship between the comparable duties owed to lenders and debtors has been considered in the context of a decision about the ambit of the rule against reflective loss (that is the rule that a shareholder or creditor of a company should not be entitled to recover loss which is really loss suffered by the company: see *Johnson v Gore Wood & Co* [2002] 2 AC 1 and *Gardner v Parker* [2004] EWCA Civ 781). The issue before Edward Bartley Jones

QC (sitting as a deputy High Court Judge) in *International Leisure Ltd and another v First National Trustee Co UK Ltd and others* [2012] EWHC 1971 (Ch) was whether the rule against reflective loss debars a secured creditor of a company who has suffered loss (as a result of breaches of duties owed by the defendant both to the secured creditor and the company itself) from recovering that loss because the company is entitled to recover it. The first instance judge had found that it did. The judge hearing the appeal recognised that this was an issue of some importance since if the appeal were to fail the duties owed by an administrative receiver to his appointing debenture holder could be deprived of meaningful effect.

16. The facts of the case were as follows. ILL owed Citibid nearly £4 million, secured (inter alia) by a floating charge under which Mr Kent (a partner of Maidment Judd) was appointed as administrative receiver of ILL. It appeared that ILL's debt to Citibid exceeded its assets. Citibid and ILL were both dissatisfied by the way in which Mr Kent conducted the administrative receivership and both launched broadly identical actions (save that Citibid's contained a plea of breach of contract in addition) against Mr Kent alleging negligence and breach of fiduciary and statutory duty causing broadly identical loss. The claims were consolidated and Mr Kent applied for an order striking out Citibid's claim as being for reflective loss. This application was acceded to by the District judge, who was satisfied on the authorities that the reflective loss principle was not limited to claims by shareholders but included claims by creditors and the touchstone was not the nature or source of the duties owed but the nature of the loss claimed: Citibid had identified no losses separate from (or which were not reflective of) loss suffered by ILL and accordingly its claims offended against the reflective loss rule. The proper action was to replenish ILL's assets as lost through Mr Kent's alleged defaults which would put it in funds to reduce or eliminate the debt to Citibid. The claim by Citibid was therefore otiose at best and could lead to double recovery and prejudice other creditors.

17. On appeal, the court considered[3] the nature of the duties owed to each claimant. While the court considered it was unnecessary to examine in any detail the ambit or source of the undoubted duties owed to Citibid as appointing debenture holder, it emphasised the important point stressed in the authorities (including *Re B Johnson & Co (Builders) Ltd, Downsview Nominees Ltd. v. First City Corporation* and *Medford v Blake,* supra) that the primary duty is owed to the debenture holder and not to the company. The fact that the primary duty of the receiver is to try to bring about a situation in which the secured debt can be repaid underpinned these latter two decisions and coloured and qualified the nature of the duties held to be owed to the mortgagor.

18. The court considered that *Medforth v Blake* (supra) established that although the duties of a receiver are capable of being wider than a duty to act in good faith and to obtain a proper price, "*none of the duties as owed to the mortgagor can restrict the primary duty of the receiver to protect, and act in the best interests of, his appointor (even if that causes damage to the company). Thus the receiver remains entitled to look to the secular interests of the debenture holder, even if that causes damage to the mortgagor, without being in breach of duty to the mortgagor (so long as the receiver acts in good faith)".* It follows that "*it will be an unusual set of circumstances where breach of duty owed to the mortgagor does not also constitute breach of duty to the debenture holder. Conversely, a set of circumstances where a particular duty is a breach of duty owed to the debenture holder but not a breach of duty owed to the mortgagor will not be unusual".* [4]

19. Here, not only were the primary duties owed to Citibid, but the party primarily "entitled to the loss" was Citibid, since ILL's loss could only be retained by ILL to the extent that it exceeded the sums due under the debenture. There was nothing in *Johnson's* case which required an extension of the rule against reflective loss to a case where the creditor is secured. The rule had been extended to unsecured creditors (in *Gardiner,* supra) but there are fundamental distinctions between the position of an unsecured creditor and a secured creditor: no duty is owed by the receiver to an unsecured creditor[5] and the unsecured creditor has no primary

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[3] At paragraphs 28-32.
[4] At paragraphs 30 and 31.
[5] E.g. *Lathia v Dronsfield Bros Ltd* [1987] BCLC 321.

entitlement to obtain and retain all damages awarded for breach of duty (his prejudice arises only through depletion of the assets of the company).

20. In the circumstances, as ILL would only have entitlement to loss to the extent that it exceeded the sums secured by the debenture, the Court gave some time in case ILL wished to amend its claim before seeking to exercise its case management powers to strike out the claim.

21. Interestingly, a subsidiary argument was raised as to whether either under the terms of the debenture or by reason of crystallisation of the floating charge, ILL had been deprived of its cause of action to sue for the claimed losses, with that cause of action being vested in Citibid up to the value of sums secured by the debenture. It was unnecessary for the Court to decide this issue and it declined to do so without the benefit of full oral argument, although indicating that some interesting and difficult points were raised.

Receivers and Debtors – a perverted agency?

Historical origin

22. Prior to 1860 a mortgagee had no power to appoint a receiver unless he had expressly stipulated for it in the mortgage. If he did appoint a receiver, not having stipulated for any power to do so, the receiver was the mortgagee's agent and, in taking possession of the mortgaged property, rendered the mortgagee (his principal) liable to account to the mortgagor on the footing of wilful default. Mortgagees therefore, in order to avoid the disadvantages of becoming mortgagees in possession, began to insist on a contractual provision requiring the mortgagor to appoint a receiver at the request of the mortgagee, with the receiver being directed to apply the income of the mortgaged property in paying the interest on the secured debt and any surplus to the mortgagor. All directions given to and powers conferred on the receiver were, in form if not in substance, given and conferred by the mortgagor whose agent the receiver became. This practice was first given statutory recognition in Lord Cranworth's Act 1860. The relevant statutory provisions are now contained in section 109 of the Law of Property Act 1925.

23. So the main reason for the development of the system under which the receiver is appointed by the mortgagee, but is treated nonetheless as the agent of the mortgagor, is to enable the mortgagee to avoid becoming a mortgagee in possession (and all the incidents that carries with it) while enjoying the advantages of his nominee, the receiver, displacing the mortgagor from control of the mortgaged property and from the receipt of the income derived from it.

24. Nevertheless, the mortgagee can still, by words or conduct, cause the receiver to be regarded as the mortgagee’s agent. Since the recognition that a receiver owes comparable duties to the duties of a mortgagee when exercising powers conferred by the mortgage, the mortgagee who appoints a friendly receiver who will to all intents and purposes do his bidding, will not therefore avoid liability. In *Medforth v Blake* (supra) one of the arguments on behalf of the receiver was to the effect that the law should refrain from holding the receivers liable to the mortgagor because to do so would lead to liability being imposed also on the mortgagee and that that would, in effect, be treating the mortgagee as a mortgagee in possession, a role mortgagees had sought to avoid. The Court did not feel this was an undesirable end – “ *if the mortgagee chooses to instruct the receivers to carry on the business in a manner that is a breach of the receivers' duty to the mortgagor, it seems to me quite right that the mortgagee, as well as the receivers, should incur liability. This conclusion does not in the least undermine the receivership system. What it might do is to promote caution on the part of mortgagees in seeking to direct receivers as to the manner in which they (the receivers) should exercise their powers. I would regard that as salutary*” (per Sir Richard Scott VC at 95).

No ordinary agency?

25. Given the fact that it has been commonplace for the receiver to be appointed as agent for the mortgagor, it is perhaps surprising that the question of whether this relationship imposed certain wider obligations on the receivers to act in the interests of their principal (beyond

those owed by the mortgagee) was not addressed head on in the case law until as late as October 2003 in *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997 (CA). The claimant mortgagors argued that, by virtue of the receiver's status as their agents they owed them greater duties than had previously been recognised in the authorities, including a duty to increase the value of the properties by seeking planning permission and/or by granting leases before selling, contrary to the wishes of the appointing lender. The Court of Appeal recognised that this raised an issue of law of considerable practical importance and that it was in the interests of mortgagees, mortgagors and receivers that any doubt should be resolved.

26. The Court first noted that the accepted modern view is that this agency is a formula for making the debtor, rather than the lender, liable for the receiver's acts[6], but that the agency is a real one[7] with real incidents, evident, for example, in the continuity after the appointment of receivers of the rateable occupation of the mortgagor through the agency of the receivers (see *Ratford v Northavon District Council [1987] QB 357*) and the absence of personal liability of the receivers for tax in respect of receipts which come to the hands of the receivers as agents (see *In re Piacentini [2003] QB 1497*).

27. The agency does, however, have certain peculiar incidents:

    a. The debtor, although the principal, has no say at all in the appointment or the identity of the receiver, is not entitled to give the receiver any instructions or to dismiss him. In the words of Rigby LJ in *Gaskell v Gosling [1896] 1 QB 669*, 692: "For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with";

    b. There is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only;

    c. The equitable duty is owed to the mortgagee as well as the mortgagor. The relationship created by the mortgage is tripartite involving the mortgagor, the mortgagee and the receiver;

    d. The duty owed by the receiver (like the duty owed by a mortgagee) to the mortgagor is not owed to him individually but to him as one of the persons interested in the equity of redemption.The class character of the right is reflected in the class character of the relief to be granted in case of a breach of this duty. That relief is an order that the receiver account to the persons interested in the equity of redemption for what he would have held as receiver but for his default;

    e. Not only does the receiver owe a duty of care to the mortgagee as well as the mortgagor, but his primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid (as held in the *Medforth* case at p 86); and

    f. The receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee: see *In re B Johnson & Co (Builders) Ltd [1955] Ch 634*, 661, per Jenkins LJ. His powers of management are really ancillary to that duty: *Gomba Holdings UK Ltd v Homan [1986] 1 WLR 1301*, 1305, per Hoffmann J.

28. The Court of Appeal recognised that the relationship between receiver and mortgagor is no ordinary agency and is primarily a device to protect the mortgagee, and therefore that general agency principles are of limited assistance in identifying the duties owed by the receiver to the mortgagor, relying on *Gomba Holdings UK Ltd v Homan [1986] 1 WLR 1301*, 1305b–d at first instance (Hoffmann J) and in the Court of Appeal*: [1988] 1 WLR 1231*, 1233d–h (Fox LJ). By accepting office as receivers of the claimant's properties, the receivers assumed a fiduciary

[6] Mr Peter Millett in "*The Conveyancing Powers of Receivers After Liquidation*" (1977) 41 Conv (NS) 83, 88.
[7] See *In re Offshore Ventilation (1988) 5 BCC 160*, 166a–b.

(or equitable) duty of care to the bank, the claimants and all (if any) others interested in the equity of redemption. The appointment of the receivers as agents of the claimants having regard to the special character of the agency does not affect the scope or the content of the duty. The scope or content of the duty must depend on and reflect the special nature of the relationship between the bank, the claimants and the receivers arising under the terms of the mortgages and the appointments of the receivers, and in particular the role of the receivers in securing repayment of the secured debt and the primacy of their obligations in this regard to the bank. These circumstances precluded the assumption by, or imposition on, the receivers of an obligation to take the pre-marketing steps for which the claimants contended.

Sub Agents?

29. A question which arises from the agency of a receiver is whether agents employed by a receiver become sub-agents of the receiver's principal (the mortgagor/debtor) on the basis that "the agent of my agent is my agent".

30. This was recently explored in *Edenwest Ltd v CMS Cameron Mckenna* [2013] BCC 152 (ChD). The claimant carried on business as a wholesaler of perfumes. Habib Bank AG Zurich (Habib), the claimant's bankers, held a debenture granted by the claimant and a legal charge over the claimant's premises. On 7/8 August 2003 the premises and its contents were destroyed or damaged. Insurance cover was in place with Norwich Union and Royal and Sun Alliance such cover having been effected through brokers. The insurers repudiated the policies for non-disclosure and misrepresentation. The claimant's assets included possible claims against the insurers as well as the brokers. The claimant took advice on the claims to the effect that the prospects of successfully making out the claims against the insurers were poor but there was an arguable case against the brokers which justified further investigation.

31. By the end of 2003 the claimant was in substantial financial difficulty. In March 2004 Habib retained the defendant solicitors and in May/early June 2004 it contemplated for the first time the appointment of administrative receivers with a view to selling the claimant's assets (which included the claims). Two KPMG partners were identified as possible administrative receivers. Habib and KPMG took advice from the defendant as to the merits of the claims. Although the defendant's report was addressed to Habib it was also shared with KPMG. To put the matter shortly, the claims were regarded as speculative.

32. The claimant alleged that the report was provided to KPMG personnel as prospective and actual receivers of the claimant and for their use and reliance in that capacity. The defendant solicitors also advised in an email sent to KPMG as to the duties of administrative receivers when appointed in respect of any sale. But there was no written retainer.

33. It was common ground that what was contemplated was a pre-pack style administrative receivership and sale. A purchaser was found and the terms of the sale were agreed before the administrative receivers were appointed on 12 or 13 August 2004. A Receivership Sale of Assets Agreement was entered into on 13 August 2004 between the claimant acting by the receivers, the receivers and the purchaser. It included a standard clause excluding personal liability on the part of the receivers. The price apportioned to the claims was £100,000 out of £3,802,203. The receivership ended on 3 August 2007 and, by a deed of release, the claimant released Habib and the receivers from any claims which they might have in relation to the administrative receivership.

34. No claim was made by the purchaser against the insurers but a claim against the brokers was settled in September 2008. The exact settlement figure was not known but was materially in excess of £100,000. The claimant believed that it had suffered loss since (i) the valuation was alleged to be excessively low and (ii) it believed the sale agreement ought to have included a clawback provision entitling it to take the benefit of enhanced recovery under the claim. A claim could potentially lie against the receivers (who are not excused from selling assets at an undervalue by relying on professional advice), but for the exclusion clause and the deed of release.

35. The claimant therefore brought a claim against the defendant solicitors, alleging (1) that a retainer between it and the defendant was established, ratified or novated immediately upon the appointment of the administrative receivers (as the claimant's agents) so that the claimant had a contractual claim, and (2) in advising on the merits of the claim the defendant came under a common law duty to exercise reasonable care and skill which it owed to the claimant.

36. The defendant (1) denied ever having been retained by or on behalf of the claimant as opposed to the administrative receivers, (2) averred that the common law does not impose upon an adviser to an administrative receiver a duty of care owed to the company so there can be no claim in tort either, and (3) denied having given negligent advice in any event. The defendant applied for the claims to be struck out, alternatively for summary judgment.

37. Hildyard J first considered the nature of the agency between the receivers and the claimant. The agency of the receivers was a real one and not a fiction, since it had legal substance, but it was in some ways artificial or contrived in the ways set out by the Court of Appeal in *Silven* (supra), which were derived from the fact that the agency relationship is primarily a device to protect the mortgagee and to insulate it from liability for the receivers' acts. Therefore general agency principles are of limited assistance in identifying the duties of receivers to mortgagors.

38. The fact that receivers can contract on behalf of a company does not mean that every contract made by a receiver has to be treated as being made with the company. The question in every case is whether the specific contract was one which the receiver intended to make on behalf of the company or on his own behalf. It is a question of fact (including inferences from the primary facts) whether administrative receivers are seeking particular advice in the exercise of their duties to the mortgagee and/or for their own protection or whether they are obtaining advice on behalf of the company itself. But given that administrative receivers owe no duty in contract or tort to the company, they have no duty and little reason to seek advice on behalf of the company itself. The judge considered matters would be different if a receiver owed the company a duty to take reasonable care to deal with its assets (as an administrator does) (para 70).

39. The equitable duty owed by receivers is owed to the mortgagor as a person interested in the equity of redemption and is to take care to obtain the best price reasonably obtainable. It extends to ensuring that reasonable care is taken by any agent or professional adviser employed by the receiver in the sale. On this understanding it is clear that the receivers would have had little reason to seek advice on behalf of the claimant. In the ordinary case the claimant would have had a cause of action against the receivers who in turn could have sought recovery against its advisers.

40. A corollary of this is that, ordinarily, an adviser instructed by receivers acting in their own name (whether before their appointment when they have no choice, or after their appointment, at which time they could contract in the name of the company) would not without more become a party to a contract with the company in receivership on the appointment of the receivers. To bring the company into a contractual relationship with such an adviser requires some specific act or instruction on behalf of the company and acceptance of the retainer by the adviser. This is not the automatic effect of the receiver being appointed and becoming agent of the company (paras 73 and 74).

41. If it were otherwise, so that in every case where a solicitor is appointed by an administrative receiver who is agent of the company the firm is treated as retained by the company, this would make a nonsense of the clear legal distinction between the duties of a receiver and duties of corporate management. It would also cause the solicitor to have two masters, given that the primary duty of the receivers as to sale is to the debenture holder and not the company. Such a potential conflict of interest would preclude a general retainer in acting for the debenture holder, the receivers and the claimant, although it may have been permissible for the defendant to advise the claimant on specific issues of common interest. The claimant therefore had to establish that a specific retainer arose at the date of appointment of the receivers which did not offend against the no conflict rule. The legal basis on which the defendant solicitors could be said to have been retained by the company was unclear to the Judge. It appeared to be based on the idea that the retainer originally established between

the defendant and the receivers had been ratified by the claimant once the receivers had been appointed. The judge considered there was no evidence to support the proposition that the claimant was initially intended to be a party to the retainer (and ratified it through the agency of the receivers) and it appeared unlikely given that the retainer was initially very broad. Further there was no evidence that the retainer between the defendant solicitors and the receivers should have been supplemented by a narrower discrete one which did not offend against the no conflicts rule.

42. The Judge separately considered whether the claimant could make out its case that the defendant assumed a responsibility to the claimant under common law tort principles, to exercise reasonable skill and care in the course of its retainer with the receivers. The Judge also determined that assertion against the claimant on the basis of the Court of Appeal case of *Raja v Austin Gray* (above). Although the relationship between the defendant and the claimant was more proximate because of (1) the agency relationship between the claimant and the administrative receiver and (2) the fact that the property was the claimant's own (albeit charged) property, the claimant could still not be described as an "advisee". Further, the exclusion clause which prevented the receivers from being personally liable in respect of the sale agreement did not alter the fairness, justness and reasonableness of the position, since (a) such a clause could not be effective to release the equitable duty owed by the receiver to the claimant and (b) the claimant could not confer upon itself a claim against the receivers' advisers by its own act in releasing the receivers themselves. Summary judgment was therefore granted in favour of the defendant.

43. *Edenwest* was applied in *SNR Denton UK LLP v Kirwan and others* [2012] UKEAT 0158/12/1007 (Langstaff J, 10 July 2012) in the context of an administration (contrary it would appear to the expectation of Hildyard J set out in paragraph 70 of *Edenwest*).

44. In *Kirwan* the claimant (a solicitor) worked for a company in a role which predominantly involved disposing of the company's service contracts. The company went into administration. The claimant was made redundant and the appellant solicitors were engaged by the administrators to dispose of the company assets which included the service contracts. The claimant brought a claim before the ET arguing that there had been a service provision change under Reg 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) on the basis that the appellant solicitors performed the same activities during the administration as the claimant had done prior to the administration in respect of the disposal of service contracts. The claimant argued that those services were performed for the same client on the basis that the administrators acted as agents for the company. As a result, the claimant argued that her employment contract transferred to the appellant under TUPE. The ET found for the claimant but the solicitors appealed to the EAT.

45. It was held by the EAT that there was no relevant distinction for the purposes of determining the effect of the agency of either office holder in respect of a company to which they are appointed. Accordingly it was wrong to assume the solicitors retained by the administrators were necessarily acting on behalf of the company. This would be determined on the specific facts of each case. On the facts of the present case, to hold that the appellant solicitors were engaged by the administrators to act on behalf of the company could bring them into a position of conflict (since the administrator owes overriding duties to the creditors rather than the company), which militated against that proposition being correct. In this case, therefore, the provision of legal services was to the administrator, not to the company.

46. The EAT therefore allowed the appeal, finding that the appellant solicitors were retained by the administrators, and not by the company and that consequently the "activities" were not being carried out for the same "client" for the purposes of reg 3(1)(b) of TUPE. It followed that there had not been a service provision change.

Conclusion

47. The legal status of receivers continues to give rise to controversy as a result of the different capacities in which they may act: for some purposes contracting in their own right, for others acting as the debtor's agent, yet appointed by and acting in the interests of the lender. The

48. *International Leisure* case shows how the receiver's status can obscure identification of the party (debtor or lender) suffering loss from a receiver's acts or omissions. The *Edenwest* case shows how the receiver's status can obscure identification of the true principal (debtor, lender or receiver). The one key lesson which we suggest can be learned from the case law is that even if the receiver's agency for the debtor is properly described as "real", it is unlike most usual forms of agency and when controversies arise the right answer is unlikely to be found by the application of conventional agency principles.

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