WHEN PROCESSES COLLIDE

BANKS, RECEIVERS, ADMINISTRATORS & LIQUIDATORS

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1. This talk will focus on a case study about the inter-action between banks, receivers, administrators and liquidators. Before considering the specific issues raised by the case study, we contrast some of the powers and duties of mortgagees, receivers, administrators and liquidators.

Mortgagees

2. The following points about the duties of mortgages are taken from *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997 (CA), paras 13-20:

    a. A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value, or to realise his security. He is entitled to remain totally passive.

    b. If the mortgagee takes possession, he becomes the manager of the charged property. He thereby assumes a duty to take reasonable care of the property secured. This requires him to be active in protecting and exploiting the security, maximising the return, but without taking undue risks.

    c. A mortgagee has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor. It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price.

    d. The mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or increase its value. There is no obligation to take any pre-marketing steps to increase the value of the property.

    e. There is no duty on the part of a mortgagee to postpone exercising the power of sale until after the further pursuit (let alone the outcome) of an application for planning permission or the grant of a lease of the mortgaged property, though the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and price obtained on sale.

    f. The mortgagee is free (in his own interest as well as that of the mortgagor) to investigate whether and how he can “unlock” the potential for an increase in value of the property mortgaged (e.g. by an application for planning permission or the grant of a lease) and indeed (going further) he can proceed with such an application or grant. But he is likewise free at any time to halt his efforts and proceed instead immediately with a sale. By commencing on this path the mortgagee does not in any way preclude himself from calling a halt at will: he does not assume any such obligation of care to the mortgagor in respect of its continuance.

    g. If however the mortgagee is to seek to charge to the mortgagor the costs of the exercise which he has undertaken of obtaining planning permission or of granting a lease, subject to any applicable terms of the mortgage, the mortgagee may only be entitled to do so if he acted reasonably in incurring those costs and fairly balanced the costs of the exercise against the potential benefits taking fully into account the possibility that he might at any moment “pull the plug” on these efforts and the consequences for the mortgagor if he did so.

h. The one method available to the mortgagor to prevent the mortgagee exercising the rights conferred upon him by the mortgage is to redeem the mortgage.

i. When and if the mortgagee does exercise the power of sale, he comes under a duty in equity (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for the mortgaged property at the date of the sale.

j. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off his debt. He must take proper care, whether by fairly and properly exposing the property to the market or otherwise, to obtain the best price reasonably obtainable at the date of sale.

k. A mortgagee is under a duty to take reasonable care to obtain a sale price which reflects the added value available on the grant of planning permission and the grant of a lease of a vacant property and (as a means of achieving this end) to ensure that the potential is brought to the notice of prospective purchasers and accordingly taken into account in their offers.

l. The remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received.

3. We add the following observations:

a. The power of a mortgagee to take possession of land without a court order is limited to legal mortgages and charges. An equitable mortgagee or chargee needs a court order.[1]

b. The mortgagee will usually be bound by tenancies granted before he took his mortgage, or which the mortgagor had power to grant, or which the mortgagor granted with the mortgagee's consent. Where bound by tenancies, the mortgagee takes possession by directing the tenant to pay rent to him instead of to the mortgagor.

c. A mortgagee whose mortgage is made by deed has statutory powers to appoint a receiver and/or to sell the mortgaged property (LPA 1925 s 101). Despite some doubts on the point, in *Swift 1 Ltd v Colin* [2011] EWHC 2410 (Ch) HH Judge Purle QC considered that a mortgagee under an equitable mortgage made by deed, could convey the legal estate in exercise of its power of sale.

d. Sale by a mortgagee has overreaching effect, conferring title on a purchaser free from subsequent charges and encumbrances.[2]

e. A mortgagee in possession is in the same position as the owner of the premises so far as concerns responsibility for outgoings such as rates.

f. In practice mortgagees are reluctant to take possession in cases of any complexity for fear of incurring the liabilities which attach to a mortgagee in possession. Often the mortgagee will not have the in-house expertise to manage realisation of the security, and may wish to avoid possible adverse publicity.

Receivers

4. The following principles are also taken from the *Silven Properties* case (paras 21-29):

[1] There is some old unsatisfactory authority that an equitable mortgagee may have the right to possession if the mortgage deed says so: Fisher & Lightwood's Law of Mortgage, 13th ed (2010) para 29.8.
[2] Law of Property Act ("LPA") 1925, s 88 (freehold property) & s 89 (leasehold property).

a. A receiver has no right to remain passive if that course would be damaging to the interests of the mortgagor or mortgagee. In the absence of a provision to the contrary in the mortgage or his appointment, the receiver must be active in the protection and preservation of the charged property over which he is appointed. Thus if the mortgaged property is let, the receiver is duty bound to inspect the lease and, if the lease contains an upwards only rent review, to trigger that rent review in due time.

b. In the exercise of any power of sale conferred on them by the mortgage deed, receivers owe the same equitable duty to the mortgagor and others interested in the equity of redemption as is owed by the mortgagee: they are both obliged to take care to obtain the best price reasonably obtainable. The remedy for breach of this duty 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.

c. A receiver's management duties will ordinarily impose on him no general duty to exercise the power of sale. But a duty may arise if e.g. goods are perishable and a failure to sell would cause loss to the mortgagee and mortgagor.

d. A receiver is (subject as mentioned below) deemed to be the agent of the mortgagor. The agency is a formula for making the mortgagor, rather than the mortgagee, liable for the receiver's acts. But the agency is a real one, even though it has some peculiar incidents. So, even after receivers are appointed over property, the mortgagor continues to be in rateable occupation, and the receivers have no personal liability for tax in respect of receipts which come to the hands of the receivers as agents. The peculiar incidents of the agency include the following.

e. The agency is one where the principal, the mortgagor, has no say in the appointment or identity of the receiver, is not entitled to give any instructions to the receiver or to dismiss the receiver, and the mortgagor has no unrestricted right of access to receivership documents.

f. 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. The equitable duty is owed to the mortgagee as well as the mortgagor: it is a fiduciary duty of care.

g. 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. The receiver's primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid.

h. The receiver can sell in the name of the mortgagor and is entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property. So, for example, receivers are not obliged before sale to spend money on repairs, to make the property more attractive before marketing it, or to "work" an estate by refurbishing it.

i. Likewise, receivers have no obligation to take pre-marketing steps, and do not become obliged to take any even if they investigate and (for a period) proceed with applications for planning permission. They are at all times free to halt those steps and exercise their right to proceed with an immediate sale of the mortgaged properties.

5. We add the following observations specifically with regard to the position of receivers appointed under security granted by a company:

a. Receivership under a power in a mortgage is usually an out of court procedure available when the mortgagee's security has become enforceable. Although the court has a well established power to appoint receivers to assist enforcement, the time and

cost involved in pursuing a court appointment makes it far less attractive and generally only used where there is some doubt as to the ability to appoint out of court.

b. There is no need for the receiver to be qualified as an insolvency practitioner and a receiver appointed out of court is not an officer of the court (so the receiver does not have the responsibility which attaches to the status of officer of the court to act for the benefit of all interested parties).

c. Although receivers appointed out of court have a duty to account for their receipts and payments, they do not have the formal statutory reporting obligations such as are imposed on liquidators, nor do they need to formulate formal proposals for the conduct of the receivership.

d. A receiver's powers are circumscribed by the nature of the assets over which he is appointed. Although charge documents contain wide ranging powers (which the Law of Property Act permits[3]), a receiver would not be able to trade the business of a company where he has only been appointed over one property in a larger portfolio.

e. "Old-style" administrative receivership under security over substantially all of a company's property remains possible only under pre-15.9.03 security[4] and limited categories of special cases including capital market arrangements, public-private partnerships, utilities, urban regeneration projects, project finance, financial markets, registered social landlords and protected railway companies.[5] Outside of those special cases, corporate receivership under post-15.9.03 security is generally limited to cases where the receiver is appointed under a fixed charge on specific assets (usually freehold or leasehold land where the receiver's role will be to collect rent, create leases or sell). This may be supplemented by a floating charge if limited in scope so as not to catch substantially all of the company's property. Given those limitations, in cases where a mortgagee needs control of a company's management and trading activities, receivership is unlikely to be an available or appropriate remedy.

f. Administration and old-style administrative receivership are mutually exclusive. Administration can only supervene during administrative receivership by court appointment in limited circumstances, and such appointment forces any administrative receiver to vacate.[6]

g. Receivership does not carry with it any moratorium or prohibition on winding-up proceedings. This may be particularly significant if the company operates in manufacturing, retail or service sectors where it is likely to have obligations to numerous third parties, such as suppliers. But receivership and liquidation can and do frequently live side by side. A receiver may be appointed pre or post-liquidation. A receiver appointed post-liquidation would need leave of the court to take possession of the charged assets, but this would usually be given as of right.[7]

h. It has been held that the agency of the receiver for a company ceases when the company goes into liquidation.[8] The receiver then acts as principal in his own right, unless the mortgagee by its words or deeds effectively makes the receiver its own agent and the receiver by his words or deeds effectively accepts that new status.[9] Why the agency should terminate on liquidation is not obvious when (a) the appointment is made under a power contained in a mortgage deed and is not in substance different from the kind of irrevocable power of attorney which by statute[10]

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[3] LPA s 101(3).
[4] Insolvency Act ("IA") 1986, s 72A.
[5] IA 1986, ss 72B-72GA.
[6] IA Sch B1 paras 17, 39 & 41.
[7] *Re Potters Oils Ltd (No 2)* [1986] 1 WLR 201 (Hoffmann J), 206.
[8] *Rees v Boston CC; Re Beck Foods Ltd* [2002] 1 WLR 1304 (CA), [76].
[9] *RBS v O'Shea* (Unrep) 3 February 1998 (CA).
[10] Powers of Attorney Act 1971, s 4.

survives liquidation and (b) the agency is expressed by statute without qualification.[11] However, a power of attorney granted to a receiver by a mortgage deed may lapse on liquidation given that there are no obligations owed by the company to the receiver himself, and so arguably the power cannot be a "security power" within the meaning of the LPA[12].

i. A receiver's power to control charged assets continues despite a supervening liquidation.[13] The extent of the receiver's powers depends on the way they are expressed in the security under which the receiver is appointed. They are usually expressed in wide terms to include a power to take possession, grant leases, sell and do anything the company could have done.

j. By virtue of his agency, a receiver is not personally liable on contracts he makes so long as the contract makes this clear.[14] But since the receiver's agency for the company falls away on liquidation, he is likely to be personally liable on new contracts he enters into after liquidation.

k. For contracts a receiver makes in exercise of the powers conferred on him by the security under which he is appointed, he has a right to an indemnity out of assets in his hands,[15] and he similarly has a right to use receipts to pay rents, taxes, rates and outgoings affecting the mortgaged property.[16] But in relation to floating charge assets, the amount available for this purpose will be depleted by the prescribed part[17] and by the fact that liquidation expenses generally now have priority.[18]

l. VAT on rents and sale proceeds collected by the receiver must be accounted for to HMRC.[19] There is doubt over the ability of receivers to set-off input VAT (incurred on the costs of repairs, professional fees and the like) when accounting for VAT to HMRC.[20]

m. There is some doubt whether, after liquidation, the receiver can convey property in the name of the company. On one view, there needs to be a power of attorney on which he can rely in the mortgage deed to enable him to do so.[21]

n. It has been held that the receiver can continue litigation which was started before liquidation, or even start a new claim in the name of the company provided the claim can fairly be regarded as within the scope of the charged assets to which the appointment relates.[22] However, it seems the receiver may be personally liable for adverse costs orders.

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[11] LPA 1925, s 109(2).

[12] *Barrows v Chief Land Registrar*, Times, 20 Oct 1977, a decision described as "open to criticism on this point" in Law Commission Consultation Paper No 143 para 8.38, and subjected to persuasive arguments to the contrary by Peter Millett QC "The Conveyancing Powers of Receivers After Liquidation" (1977) 41 Conv 83. See further footnote 21 below.

[13] *Sowman v David Samuel Trust Ltd* [1978] 1 WLR 22, 30A.

[14] See IA 1986, s 37(1)(a).

[15] IA 1986, s 37(1)(b).

[16] LPA 1925, s 109(8), unless excluded by the terms of the mortgage deed.

[17] IA 1986 s 176A.

[18] IA 1986 s 176ZA (applicable to windings-up commenced on/after 6 April 2008: SI 2008/674, Sch 3 para 6).

[19] *Sargent v C&E* [1995] 1 WLR 821 (CA).

[20] See VAT Focus, Tax Journal 2010 No 1044 and recent guidance from the Non-Administrative Receivers Association (NARA).

[21] Lightman & Moss, The Law of Administrators & Receivers of Companies, 5th ed para 11-123. But in *Barrows v Chief Land Registrar* (footnote 12 above) the court held that a separate power (as opposed to a power of attorney) given to the receiver by the terms of the charge to dispose of the charged property and to do so in the name and on behalf of the company, survived the liquidation of the company. That view is reflected in Land Registry Practice Guide 36 on Administration & Receivership at para 7, which indicates that even if the power of attorney cannot be relied on after liquidation, the receiver's right to sell, or otherwise dispose of the company's property, will include the right to execute in the name and on behalf of the company and such a right will continue after winding-up commences.

[22] *Gough's Garages v Pugsley* [1930] 1 KB 615.

o. If the receiver requires a broader indemnity than otherwise available to him, he will have to request one from the mortgagee, which may or may not be prepared to oblige.

p. The receiver's remuneration is usually a matter for agreement with the party appointing him,[23] although post-liquidation a liquidator has the ability to apply to court to fix the receiver's remuneration.[24]

q. Receivership and administration can be concurrent. An administrator can require a receiver of part of a company's property to vacate office, but is not obliged to do so.[25] Given that the administrator acts as agent of the company,[26] it would seem to follow that upon administration, the receiver's agency for the company should cease on administration as it does in the case of company liquidation, but this point is yet to be determined by the courts.

Administration

6. Unlike receivership, administration by the out-of-court route is only available to the company, its directors and to the holder of a qualifying floating charge (effectively a creditor with security on substantially all the company's property).[27]

7. The administrator has to a qualified insolvency practitioner. He acts as an officer of the court[28] and is therefore subject to the court's direction.[29] He is agent for the company[30] and as a result will not generally incur personal liability for obligations he enters into on behalf of the company.[31] He also has a statutory duty to act as quickly and efficiently as reasonably practicable[32] and, unlike a receiver who manages property for the benefit of the mortgagee, the administrator must act with the interests of creditors as a whole in mind.[33]

8. In contrast with both receivership and liquidation, the statutory purpose of administration is framed so as to give primacy to rescuing the company as a going concern. The reality in many cases is that rescue is not reasonably practicable, in which case the next objective is to achieve a better result for creditors as a whole than winding-up.[34] Only if that too is not reasonably practicable, can administration be used for the third statutory objective of realising assets for distribution to secured or preferential creditors, but in pursuing this objective the administrator is nevertheless required to ensure that the interests of creditors as a whole are not unnecessarily harmed.[35]

9. Unlike a fixed-charge receiver, an administrator has extensive statutory powers to do anything necessary for the management of the affairs, business and property of the company,[36] including power to continue the company's business, establish subsidiaries,[37] and power to appoint and dismiss directors.[38] The court may also enable the administrator to dispose of property which is subject to a security (other than a floating charge) as if it were

[23] Otherwise the issue is left to the unsatisfactory provisions of s 109(6) LPA.
[24] IA 1986, s 36.
[25] IA 1986, Sch B1 para 41.
[26] IA 1986, Sch B1 para 69.
[27] IA 1986, Sch B1 para 2 & 14.
[28] IA 1986, Sch B1 para 5
[29] *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1992] 1 WLR 1253, 1259.
[30] IA 1986, sch B1 para 69.
[31] See *Wright Hassall LLP v Duncan Morris* [2012] EWHC 188 (Ch).
[32] IA 1986, Sch B1 para 4.
[33] IA 1986, Sch B1 para 3(2).
[34] Which may apparently include investigation and pursuit of an undervalue claim funded by the applicant*: Re Logitext UK Ltd* [2005] 1 BCLC 326.
[35] IA 1986, Sch B1 para 3(3).
[36] IA 1986, sch B1 para 59.
[37] IA 1986, sch B1 para 60 & Sch 1.
[38] IA 1986, sch B1 para 61.

not subject to the security, if satisfied this would be likely to promote the purpose of the administration and provided that the proceeds are applied to discharge the secured liability.[39]

10. In practice in advance of an appointment, a proposed administrator will usually have reviewed the company's position with a view to considering whether in his opinion it is reasonably likely that the objective of the administration will be achieved, as well as the timing and method of appointment.

11. Achieving the objective of administration commonly involves sale of the company's business as a going concern, hiving-down assets of the company to a new subsidiary, or a pre-pack sale of assets. Sale as a going concern (even in pre-packs[40]) often requires transfer of employee contracts. Under TUPE[41] the purchaser may assume responsibility for liabilities which the company incurred to employees, which may be substantial and affect the price a purchaser will pay. Hiving down assets allows a subsidiary to trade free from the company's debts, including VAT, and may enable trading losses to be carried forward to set against future profits. A pre-pack sale (that is a sale which takes place almost immediately administration commences) can facilitate continuity of the company's business and avoid trading during administration, but the administrator needs to have regard to the detailed guidance on pre-pack sales contained in Statement of Insolvency Practice (SIP) 16. Following administration, pre-administration costs incurred in connection with a pre-pack sale will require approval by creditors or the court.[42] Whichever of these routes is taken the administrator will usually need to ensure there is no objection to his strategy from any debenture holder.

12. If any significant period of trading is required during the administration, sources and availability of funding need to be identified. Assets subject to a floating charge can be used to pay the expenses of administration in priority to the claims of the holder.[43]

13. The statutory objectives of administration make administration and liquidation mutually exclusive. During liquidation the liquidator or a holder of a qualifying floating charge may apply to the court to put a company into administration, but the administration in such circumstances brings the liquidation to an end.[44]

14. A significant benefit of administration over receivership is the imposition of the statutory moratorium preventing steps being taken to enforce security over the company's property and legal proceedings being started or continued against the company without the administrator's consent or permission from the court.[45] In an administration for the first two statutory objectives (rescue and better outcome than liquidation) a creditor wishing to enforce will usually need to make out a case that significant loss[46] is likely if permission to enforce is not given. A secured creditor may find that difficult to establish unless the value of his security is insufficient to cover the debt owed. Where an administrator allowed a third party possession of leased premises in breach of covenant, the landlord was given permission to enforce its right of re-entry where on the facts the rights of the unsecured creditors in the administration were unlikely to be affected.[47] In contrast, where the third party's occupation was allowing the company to continue to trade and collect book debts, the on-going benefits to the unsecured creditors took precedence and the landlord was refused permission to re-enter.[48]

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[39] IA 1986, Sch B1 para 71.
[40] *Key2Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1567.
[41] Transfer of Undertakings (Protection of Employment) Regs 2006 (SI 2006/246). For more detail see the separate papers presented by Nick Smith & Douglas Leach.
[42] IR 1986, r 2.67A.
[43] IA 1986, Sch B1 para 99.
[44] IA 1986, Sch B1 paras 8, 37 & 37.
[45] IA 1986, Sch B1 para 43.
[46] The phrase used in the leading case of *Re Atlantic Computer Systems Plc* [1992] Ch 505 (CA); for a recent example of a case where permission was given to enforce a lien on goods, see *Re La Senza Ltd* (Unrep) 14 March 2012 (Ch D).
[47] *Metro Nominees (Wansworth) (No 1) Ltd v Rayment* [2008] BCC 40.
[48] *Innovate Logistics Ltd v Sunberry Properties Ltd* [2009] BCC 164 (CA).

15. Other benefits of administration include the ability of the administrator to apply to the court for directions on issues which arise. But creditors and members have an express statutory right to challenge conduct of the administrator which unfairly harms their interests,[49] and on-going reporting costs can inevitably add to the expense of administration.

16. In contrast with receivership and liquidation, the administrator's appointment lasts one year. The administrator's time in office can be extended with the consent of creditors only once for up to six months; otherwise a court order is required.[50]

Liquidation

17. In contrast to administration and receivership, the purpose of liquidation is to bring the life of the company to an end. The company's free assets become subject to the statutory scheme imposed by the Insolvency Act for distribution to unsecured creditors. Any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.[51]

18. In winding-up by the court (but not voluntary) liquidation, the liquidator is an officer of the court. The liquidator has power to carry on the company's business for the limited purpose of its beneficial winding-up, but in a winding-up by the court he requires the sanction or the court or liquidation committee to do so. A liquidator is therefore less likely to continue trading than an administrator, and this could result in loss of an opportunity to obtain a better price for the company's assets than in an organised and staged realisation. This may be a particular issue for trading companies with significant numbers of employees and which are reliant on stock for manufacturing or retail, or where a secured lender is trying to effect a sale of charged assets as part of the sale of the company as a going concern, so as to maximize realisations.

19. Winding-up divests the directors of powers to manage the company's business, although authority may be conferred on them in a members' voluntary liquidation by the liquidator or members, or by the liquidation committee in a creditors' voluntary liquidation.

20. The liquidator acts in the name of the company. Providing he discloses the fact of the company's liquidation, he has no personal liability for obligations incurred in carrying on its business which are treated as costs of the liquidation payable out of the available assets in priority to pre-liquidation liabilities.

21. On a winding-up by the court there are equivalent restrictions to the statutory moratorium in administration against proceedings being commended or continued against the company, without leave of the court.[52]

Case Study

22. Big Bank plc has an investment property loan on its portfolio, an industrial site owned by the Bank's corporate customer. The site has been under-performing since 2008, with rental income barely able to service interest. The five year term of the company's loan is about to expire, and the loan then becomes repayable. The Bank is not keen to refinance. It is not likely, given the current economic situation, that anyone else will refinance either.

23. Weighing up its options (buy, hold or sell), the Bank thinks that the best return will come from an enforcement of its security and a sale of the property though receivership.

24. Unfortunately the facility letter is covenant-light and contains little in the way of controls over rental income, save that all rent must be paid into a "General Account", which hitherto the company has been allowed to draw on by sweeping funds into an "operating account" on a monthly basis.

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[49] IA 1986, Sch B1 para 74.
[50] IA 1986, Sch B1 para 76
[51] IA 1986, s 127.
[52] IA 1986, s 130(2).

25. The loan is bilateral (that is to say it is not a syndicated loan provided by a group of lenders). The security was taken on the Bank's standard suite of security documentation, however equity was injected into the company by its owners, who have also taken subordinated security regulated by a rather anaemic deed of priority which does not provide for consultation between security holders and there is room for doubt whether "auto-release" provisions entitle the Bank to proceed on the footing that second or subsequent securities are deemed to have been released. The Bank has tried a consensual restructuring, but the shareholders are not playing along and have refused to accept that the auto-release provisions in the deed allow the Bank to effect a release of their security interest.

26. In the event, an interest payment is missed by the company on a due date, and the Bank proceeds to enforce by appointing receivers. The Bank appoints a well known local firm of property consultants, who set about contacting tenants to obtain payment of rent and marketing the property for sale.

27. Two months into the process, the local authority makes noises about rates, and threatens a winding up petition. Decision time has come for the Bank. It has three choices: (i) accelerate the sale and beat any winding up proceedings, (ii) do nothing and allow the winding up petition to go through then sell subsequently or (iii) appoint their own administrator. What route should they choose and why?

Issues and drivers for the key players

28. The following issues arise which have an impact on all three options.

The Bank

29. Has the Bank maintained a fixed charge on rental income?

30. On the face of it, the Bank's security on the site gives it (and through it, the receivers) the prior claim to receive the rents. That position is not affected by liquidation or administration. But query whether the fact that the company has been allowed fairly unrestricted access to the rental income through the sweeping of funds into the operating account causes any charge in respect of the rental income to be regarded as floating, not fixed.[53] If so, the rental income would become subject to claims of preferential creditors in winding-up, to the priority accorded to liquidation expenses, and to the prescribed part in winding-up or administration[54]. If for this reason funds have to pass through the administrator, the Bank will need to consider what will be disbursed out of them (expenses and remuneration in particular[55]).

31. If the Bank's security deed contains a separate assignment of rental income, it may be that the Bank can avoid the floating charge issue by perfecting the assignment by giving formal notice of the assignment to the tenant(s).[56]

32. If the Bank is confident that the rent will not fall into the asset pool, it will need to consider what benefits the administrator's appointment is likely to add bearing in mind that it already has receivers in place capable of collecting the rental income and/or marketing the site for sale. If the Bank considers there are benefits in administration it may also need to consider whether an indemnity for costs may be needed to be offered to the administrator (see below).

33. What will the administrator do? He's an outsider who owes duties to all creditors. If the situation changes, the administrator can require the receiver to vacate office and do his own thing. This includes applying to court to order a sale of the property notwithstanding the bank's security. These risks need to be borne in mind.

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[53] *Re Spectrum Plus Ltd* [2005] 2 AC 680.
[54] IA 1986 Sch B1 para 99
[55] IR 1986, Rule 2.67
[56] Thereby giving rise to a legal assignment within s 136 LPA 1925.

34. Ultimately, the Bank is likely to be asked to execute the transfer on sale of the site to overreach the subsequent charge holder, which means a mortgagee sale. As the Bank has appointed receivers, does it risk going into possession by doing so (which might cause it to inherit liability for environmental and planning issues)? Our view is that this is unlikely merely from the execution of the transfer, but the point merits consideration.

The receivers

35. Will the rental income streams (from which the receivers get paid) continue if the company goes into administration or liquidation?

36. This turns on the same issue as considered above as to whether the Bank's charge is to be considered fixed or floating.

37. Can the receivers continue to act? What are their powers if an administrator or liquidator is appointed, and what happens to their agency?

38. As detailed above, the receivers can continue to act but lose their agency for the company in the case of a liquidation and probably also in the case of administration. They then act as principals in their own right in dealings with third parties.

39. Who calls the shots if an administrator is appointed (given that the administrator can require the receivers to vacate office)?

40. If an administrator is appointed there is likely to have to be some formal or informal agreement between the receivers and administrator if the two are to operate in tandem. The benefits of administration may make it worthwhile agreeing a joint strategy for collection of rents and ultimate sale.

41. Will the receiver have to give an indemnity to the administrator in respect of acts which might cause detriment to the administrator? If so, how will that be funded?

42. As detailed above, generally receivers only get an indemnity from their assets. Any additional indemnity would have to be sought from the Bank. This kind of issue can often arise, for example in relation to the employment of security and caretaking staff. Consideration will need to be given to what happens to them once a sale of the site is ultimately effected and whether their contracts bind the administrator.

A potential administrator

43. Can he take the appointment? What are the purposes of the administration?

44. Rescuing the company is not a realistic option. Achieving a better return for creditors than achieved in liquidation may be in doubt (given the presence of a receiver and the possibility of an eventual sale by the mortgagee). Distribution to one or more secured creditors is possible. But the administrator will need to consider what if anything he can realistically do to achieve that purpose given that receivers are already on board. The administrator may have the ability to require the receivers to vacate office, but in practice it may well be better for him to rely on their expertise in specialist property management, marketing and sales. The administrator's role would necessarily be limited ("administration light"). Possibilities include the ability to reclaim VAT on rental income and preservation of ongoing trade.

45. How will the administrator get paid?

46. If the rental income flows to the receivers (and through them to the Bank) due to a perfected assignment, the administrator may be reliant on other returns which can be achieved through trading the company's business and on the existence of other floating charge assets from which the administrator's remuneration can be paid.

47. What likely expenses are there?

48. There may well be rates to pay and possible liabilities in respect of environmental clean-up. For this purpose the administrator will also need to ascertain whether there are floating charge assets out of which to meet such claims.

49. If there is a rent deposit deed, can the administrator insist on the landlord using it up? If not, can he get an indemnity from the Bank to cover it?

A potential liquidator

50. Will he be bound by the acts of the receivers?

51. As explained above, the receiver's powers continue notwithstanding the termination of his agency for the company, so the liquidator is likely to be bound by the acts of the receivers performed within the powers conferred on them by the Bank's security.

52. If the receiver or Bank makes a disposition, can the liquidator overturn the sale under s.127 IA 1986?

53. The object of s 127 is to prevent dissipation of the company's assets. In the case of a sale by a mortgagee, the disposition is of the mortgagee's proprietary interest and should not fall within s 127.[57]

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[57] *Sowman v David Samuel Trust Ltd* [1978] 1 WLR 22, 30C; see also Fisher & Lightwood's Law of Mortgage, 13th ed para 30.19 (where it is suggested that in the absence of a power of attorney the liquidator will have join in the sale) and Land Registry Practice Guide 36 on Administration & Receivership at para 7 where the view is expressed that so long as the debenture was created prior to winding-up, any subsequent disposition by the debenture holder *or receiver,* under powers contained in the debenture, does not fall foul of s 127 IA.