

PRINCIPLES OF PROPERTY RECEIVERSHIP

Part E1 General Matters relating to LPA & Fixed Charge Receiverships

73. General Principles

- Qualification

An LPA Receiver does not need any qualification. Section 30 of the Insolvency Act 1986 states that “a body corporate is not qualified for appointment as receiver of the property of a company and any body corporate which acts as such is liable to a fine”. This suggests that a body corporate could be a receiver of an individual’s property but it is common practice for individuals to be appointed as receiver. The Registered Property Receivers’ Scheme was established as an initiative between RICS and the Insolvency Practitioners Association to encourage those involved in receivership to join and to take exams and undergo continuing professional development. NARA, originally Non Administrative Receivers’ Association but now known as Association of Fixed Charge Receivers but has retained the acronym “NARA”, was formed in 1995 as a professional body to represent and promote fixed charge receivers - it has a Code of Ethics and Guidance Notes. However, membership of NARA, or indeed any other professional body is not a requirement to be a fixed charge receiver. A Law Commission paper in 1991 did recommend that membership of an appropriate professional body should be a requirement before a person could be appointed an LPA Receiver but these recommendations were never implemented

Principles of Appointment

An LPA Receiver is appointed by a mortgagee when there is a default under the terms of the mortgage and the mortgagee wishes to take steps to enforce his powers under the mortgage. The appointment of an LPA Receiver is one of the remedies available to a mortgagee and is usually used by a mortgagee where there is rent to collect from an investment property and/or there are particular property issues requiring the expertise of a professional well versed in property matters. There are no strict guidelines as to when an LPA Receiver should be appointed or not – it does depend on the mortgagee and whether he is prepared to handle some of the issues relating to the secured property in house or whether he is more comfortable outsourcing. One of the main advantages of appointing an LPA Receiver is that the mortgagee distances himself from the mortgagor and an LPA Receiver can come with a fresh approach without the baggage which the mortgagor/mortgagee relationship may have. Also, importantly, a mortgagee would not be regarded as a mortgagee in possession if an LPA Receiver is appointed. A mortgagee in possession can incur

certain liabilities, for example for wilful default if the mortgaged property falls into disrepair or obligations under planning and environmental legislation.

Receiver to consider if they are independent enough to take appointment

Before accepting an appointment, an LPA Receiver must consider whether there is could be a possible conflict. Whilst the appointment is personal, an LPA Receiver should check to see if his firm had been involved in the initial valuation of the security for the mortgagee and if there is a chance of any issues arising from such valuation. Clearly an LPA Receiver should not find himself in a position where he may feel in a conflict between his duty to his firm and his duty to his Appointors. Furthermore, in obtaining valuation advice on the sale or management of the mortgaged property, it is advisable for an LPA Receiver not to instruct his own firm only .

Powers

The powers of an LPA Receiver fall into two categories. Firstly, statutory powers – which are limited to the collection of rent and to insure (s 109(3) and s 109(7) Law of Property Act 1925 respectively) S 101(3) Law of Property Act 1925 enables the mortgagee to extend the statutory powers and most mortgages do extend the powers. The normal powers of an LPA Receiver include the power of sale, to complete developments, to borrow and to conduct a business. It is very important that the express powers conferred on an LPA Receiver are carefully considered so that an LPA Receiver is satisfied that what he plans to do as part of his receivership fits within such powers.

Relationship with borrower

The legal relationship between the LPA Receiver and the borrower is that of agent and principal, unless the borrower is dead, bankrupt or, if a company, is in liquidation or has been wound up. An LPA Receiver may also be appointed an attorney under the terms of the mortgage. In practice, the LPA Receiver should attempt to obtain the assistance of the borrower - for example, to ascertain VAT position, what rents have been collected, have there been any breaches of covenant. I

Did the receivers provide the inception property valuation for the lender

If the firm in which the LPA Receiver is a partner or employee undertook the initial property valuation, he should consider whether there is a chance that there could be a conflict of interest in the future – for example, if there is a question of a claim against the firm arising from a negligent valuation. If there is any doubt, the LPA Receiver should refuse the appointment as to do otherwise could put him in a

compromising position with his Appointor.

Liabilities - personal liability

Personal liability should only arise if the LPA Receiver acts negligently. This can arise if, for example, he overlooks a rent review or sells the property at an undervalue. It is important for an LPA Receiver to ensure that he keeps his Appointor fully apprised of his actions in particular when the mortgaged property is to be sold. It should be appreciated that the mortgagee will need to consent to the sale as it the LPA Receiver will need to ensure that the mortgage will be discharged upon completion.

It is worthwhile for an LPA Receiver to seek an indemnity from his Appointor to cover possible liabilities he may incur – such indemnity would not normally cover negligence. However, an LPA Receiver may find himself involved in a dispute with the borrower – for example, over rent incorrectly collected by the borrower after the appointment – the LPA Receiver may incur costs for which he is liable. An express indemnity to cover such costs is advisable. It is accepted that indemnities are unlikely to be forthcoming from major lenders but in general if the LPA Receiver incurs costs and liabilities whilst undertaking his normal activities as a receiver and with the knowledge of the Appointor such costs and liabilities would be covered by the Appointor.

Obtaining legal advice where necessary

An LPA Receiver can be confronted with a bewildering array of legal problems. For example, he may need to consider whether employees need to be made redundant or whether an occupier has any rights of tenure. It is advisable for an LPA Receiver to seek not only legal advice on the validity of his appointment but advice on the extent of his powers and if there are concerns over the right of any occupiers then appropriate advice should be obtained at an early stage – acceptance of payment from an unlawful occupant may constitute an acceptance of his right to occupy.

74. Relationship with other parties

Mortgagee

Clearly the relationship with the mortgagee who appoints the LPA Receiver is critical. The appointing mortgagee relies on the advice and expertise of the LPA Receiver and the LPA Receiver needs to be aware of that and that, of course, future appointments will depend on how he conducts the receivership. The Mortgagee is owed a duty of care by the LPA Receiver it has appointed. However, the LPA Receiver does also owe a duty to other Mortgagees and to the Mortgagor. The LPA

Receiver must not lose sight of his wide duty of care and the need to maintain professional standards. Thus, he should not automatically assume that he needs to follow the instructions of the Mortgagee. If an LPA Receiver feels that he is in a difficult professional situation because of pressure from his Appointor he should seek independent legal advice and if necessary apply to the Court for directions. He can of course also resign although the Mortgagee is not obliged to accept such resignation.

Other mortgagees

As mentioned above an LPA Receiver does however owe a duty of care to other Mortgagees. Before accepting appointment, an LPA Receiver should check to see if there are other mortgages registered against the land. In a number of cases it does make sense for a Joint Appointment to be made so that the Receiver can represent all those parties with a secured interest in the property. Clearly the LPA Receiver must be mindful of possible conflicts between the registered Mortgagees. It should be appreciated that if an LPA Receiver is appointed under a second or subsequent mortgage prior mortgagees will need to be paid off ahead of the subsequent mortgagees. Furthermore, if the Receiver is selling the property he will need to arrange for the discharge of the mortgages over the land and therefore in the event of there being a shortfall should make an early approach to other Mortgagees who may be suffering a shortfall to ensure that they will consent to the discharge of their mortgage. Ultimately, the Mortgagee will be able to sell the property as mortgagee and overreach subsequent mortgages.

Effect of formal insolvency of mortgagor– administration/liquidation)

Insolvency of a mortgagor in the form of bankruptcy or administration or liquidation does not prevent a Mortgagee from appointing a Receiver nor does it automatically terminate an existing appointment. The death bankruptcy or liquidation of the Mortgagor will terminate the agency of an LPA Receiver who will cease to act as agent for the Mortgagor in that situation. As far as administration is concerned, if the company Mortgagor is already in administration then the consent of the Administrator is required before an LPA Receiver can be appointed (Section 10 of the Insolvency Act 1986). If an LPA Receiver has already been appointed and then the Mortgagor company goes into administration the LPA Receiver will need the consent of the Administrator to continue to act as Receiver.

Effect of formal insolvency of mortgagor – bankruptcy/IVA

In the event of a bankruptcy of an individual Mortgagor the present of the Receiver remains valid but he can cease to act as agent. An individual voluntary arrangement would have no effect on the Receiver

if he has already been appointed. If the Mortgagee has consented to the arrangement then he will be prevented from exercising remedies under the Mortgage which would include appointing a Receiver provided the terms of the arrangement are being kept.

Part E2 LPA Fixed Charge Receiverships

75. Review of Pre-appointment Documentation

Security documentation

LPA Receiver should arrange to check the security documentation ideally prior to his appointment. In practice this may be not feasible. The main events to check are that the Legal Charge is valid and that the power to appoint a Receiver has arisen under the terms of the Legal Charge. The Legal Charge if it is from a company will need to have been registered at Companies House. The Legal Charge also needs to be registered at the Land Registry as the power to appointment an LPA Receiver is conditional upon there being a valid Legal Charge in place.

Final Demand

A final demand under the terms of the Legal Charge is prerequisite to trigger the powers of authority under the Legal Charge. An LPA Receiver or his advisors should check to make sure that valid demand has been served. The consequences of Receivers being appointed in the event of an invalid security or demand not being served could result in the Receiver being liable for trespass or conversion.

Validity of Appointments

Not only must the security be checked and steps taken to ensure that the demand has been correctly served, but the actual form of the Deed of Appointment needs to be checked. The Appointment needs to be signed for and on behalf of the Mortgagee and must refer to the Receivers to be appointed and should refer to the correct property over which the Receiver or Receives have been appointed.

Separate powers

As seen before the statutory powers of the Receiver are limited. It is therefore important to check to see what powers are conferred on the LPA Receiver in the Legal Charge. The Receiver should review his strategy for dealing with the property over which he has been appointed and seek advice to ensure that such activity will afford his powers contained within the Legal Charge.

Indemnities

Receivers should approach his appointing mortgagee to see if an indemnity can be granted. The major banks do not normally offer such indemnity. However, an indemnity to cover any personal liability of the Receiver which shall be in the event of the security being invalid or the form of appointment being invalid is a precaution which the Receiver should seek. An indemnity will not extend to negligence by the Receivers.

Law of Property Act 1925 – Sections 101 and 103

Section 101 sets out the statutory powers of a Mortgagee which includes under Section 101(1)(iii) the power to appoint a Receiver, “*of the income of the mortgage property, or any part thereof*”. Section 103 sets out the conditions prior to the Mortgagee being able to exercise his powers. Notice requiring payment of the mortgage money needs to be served on the Mortgagor and a default has been made in payment for three months after service of the demand or interest is in arrears for two months or there has been a breach of some other provision contained in the Mortgage Deed. It should be noted that most mortgages do vary Section 103 so that the power of sale and the power to appoint a Receiver becomes exercisable immediately upon Court notice demand has been served on the Mortgagor.

76. Acceptance of Appointment

Time limits on acceptance

If the Mortgagor is a company, the Receiver needs to accept the appointment by close of business of the business day following receipt of the Deed of Appointment (Section 33 of the Insolvency Act 1986). Joint Receivers both need to accept although authorised secretary can sign on behalf of a Receiver. There is no similar requirement in respect of an individual Mortgagor but it is good practice to follow the same timescale.

Notice to Companies House

Under Section s 871 Companies Act 2006, Notice of the Appointment of Receiver needs to be served at Companies House where the Mortgagor is a company within 7 days of the Appointment. Failure to do so does not invalidate the Appointment but could make the Receiver liable to a fine.

Awareness of potential need to file Appointments in overseas jurisdiction

If the Mortgagor is a company incorporated outside the United Kingdom then advice should be obtained from local lawyers to see whether an appointment of a receiver needs to be notified to any

Registry or other body. At the time the loan was made and the security taken it would be normal to obtain a legal opinion from a law firm within the jurisdiction of the company and advice may have been obtained at that stage as to what steps needed to be followed in the event of enforcement.

Property concerns e.g. to contamination/environmental

At an early stage should enquire as to whether there are any such concerns regarding the property over which has been appointed. Enquiries of the local authority and the Environment Agency should assist. The Receiver's lawyers can undertake an environmental search which should provide some assistance in assessing any such potential risks.

Training

If the Receivers appointed over a property from which a business is undertaken (for example a hotel, pub or nursing home) he needs to be aware of the requirements he needs to comply with to ensure minimal interruption. For example, in the case of a nursing home appropriately qualified staff need to be employed to comply with the licensing requirement. Similarly, in regards to a hotel or pub and the liquor licence the Receiver will need to ensure that appropriate qualified persons can carry on trading. There are companies which are able to undertake such role and provide their own suitably qualified staff.

Previous Insolvency Appointments

A Receiver should check to see whether the Mortgagor has been subject to any previous insolvency arrangements, for example, appointment of an Administrator or Liquidator or subject to a Voluntary Arrangement. Searches at Companies House and the Land Registry will be able to assist. If the LPA Receiver is an insolvency practitioner he should check to see if he or any of his partners or colleagues have previously been involved with the Mortgagor.

77. Insurance

A Receiver should arrange immediate insurance of the property over which he is appointed. Some receivers' firms have arranged blanket cover for all properties over which their partners or employees become receivers. However, it is very important that the insurance position is checked. A receiver should not assume that the mortgagor has maintained insurance.

The insurance should be arranged in the receiver's name as receiver of the property. The receiver should of course ensure that the insurer is a recognised insurance company and complies with Financial Services

Authority requirements.

78. Plant, Machinery and Chattels

A legal mortgage charges the land and fixtures but not chattels or plant or fittings. There are specific requirements relating to a chattels mortgage under the Bill of Sales Act 1878. If a receiver is considering selling plant, chattels or fittings he does need to carefully check the wording of the legal charge. Some legal charges do give a receiver power to sell such items as agent for the mortgagor. It should be noted that as such items are not secured by the legal charge any sale proceeds from such items need to be held for the benefit of the mortgagor and not passed over to the mortgagee.

Specialist valuation advice on the value of plant and machinery needs to be obtained before the receiver considers selling them.

A receiver should be mindful of exercising some control over such items. For example, if a receiver is appointed over a building site with plant and machinery on the site, he needs to put in place adequate security to ensure that they are not removed.

79. Basic Property Knowledge

A receiver may have knowledge of the Landlord and Tenant Act 1954 but he should be aware of the provisions relating to holding over, excluded tenancies and what constitutes a business tenancy. In particular, he needs to consider whether a rent review is due and whether the appropriate notices to trigger the review have been served. Failure to observe these requirements could result in a negligence claim (see for example Knight v Lawrence (1991))

A receiver should be aware of the definitions used in valuations – such as “open market value” and “forced sale”. Reference should be made to the RICS web site for more detailed explanation.

An understanding of the requirements relating to forfeiture and surrender of leases should be known by a receiver. If a receiver is appointed over leasehold property, it would not normally result in the landlord being able to forfeit the lease – forfeiture only normally occurs upon the appointment of a liquidator or trustee in bankruptcy. One of the powers conferred on a receiver in the legal mortgage would normally include the power to grant and accept surrenders of leases.

Planning is another area of which the receiver should have some basic knowledge. If the borrower has used the mortgaged property in breach of planning regulations , a receiver will need to be aware of the various use classes orders - reference should be made to Town and Country Planning (Use Classes) (Amendment) Order 2010

An LPA Receiver will not normally be liable for rates on a property. The case of *Ratford and Hayward v Northavon District Council* in 1986 established that a receiver is not liable for business rates. However, if a receiver takes possession himself and is regarded as running his business from the premises, as opposed to acting merely as LPA Receiver for the owner/ mortgagor then he could be liable.

An LPA Receiver should be aware of possible environmental issues relating to the mortgaged property and take appropriate advice. In general terms, a receiver would not be regarded as liable for any breaches made by the mortgagor. However, if there is an existing breach, he should ensure that steps are taken to remedy such breaches to avoid enforcement action being taken by the appropriate authority which could prejudice the ability of the receiver to sell the property.

80. Duties to Appointor

The LPA Receiver does owe a duty of care to his Appointor as well as to other mortgagees and the borrower/mortgagor. As far as the Appointor is concerned, the receiver should ensure that he regularly reports to the Appointor and gives appropriate written advice prior to taking any significant steps in the receivership – for example, agreeing a sale or new lease.

A receiver should be aware that he has been appointed because of his expertise and experience and therefore an Appointor will be looking for strategic advice in addition to normal reporting.

As far as sales and granting of leases are concerned, the receiver should bear in mind that his actions could come under close scrutiny from a court. Accordingly, valuation advice should be obtained in writing from a firm other than any firm with which the receiver is associated. Similarly, if the property is to be auctioned, a reserve price reflecting such a valuation should be agreed and the auctioneers should be independent of the receiver. If the receiver is in any doubt as to his position, he should seek appropriate advice and seek guidance from the Guidance Notes published by NARA or speak to his own professional body.

Once the receiver has completed the receivership, for example, once the mortgaged property he should seek a formal written release from his Appointor confirming the receivership has been completed (please see below regarding the procedures to be complied upon completion of the receivership). Upon discharge of the mortgage pursuant to which the receiver has been appointed then the receivership will automatically determine but a letter confirming the receivership has been completed should be obtained.

81. Public Interest

As mentioned above an LPA Receiver does have duty of care to third parties. This duty extends to any party who may suffer as a result of maintenance by the Receiver and therefore would extend to other mortgagees, guarantors of the borrower's debt as well as, of course, a duty to the mortgagor and the appointing mortgagee. Precisely what information needs to be supplied to other interested parties depends on the circumstances. There is a duty of confidentiality to the mortgagor and therefore details, for example, of the mortgagor's tax situation must not be revealed to third parties without the consent of the mortgagor. However, it is permissible for a Receiver and indeed his appointing mortgagee to notify third parties of the amount required to discharge the debt secured by the mortgage. It is not entirely clear whether the Receiver's duty would extend to unsecured creditors. There is an argument of course that if a secured creditor suffers as a result of the actions of a Receiver and receives insufficient funds to repay his debt then he can claim as an unsecured creditor for that part of the debt not covered by the sale of the mortgage property. The amount claimed by unsecured creditors would include the shortfall and therefore arguably the Receiver's duty could extend to unsecured creditors. In general, however, the Receiver should be aware that his duty of care is extensive and every step should be taken to ensure that upon the sale or other disposition of the mortgage property appropriate valuation advice is obtained.

If a Receiver receives a complaint, then he should deal with this promptly and in accordance with the requirements of his professional body. A Receiver should also be mindful of the need to comply with anti-money laundering regulatory requirements and should be aware of the requirements of the Money Laundering Regulations and the requirements of his own professional body.

82. Resources

A Receiver should appoint his own professional advisors which would include lawyers. A Receiver may be asked to appoint as his lawyers a firm which has been acting for the mortgagee. Whilst there may not be a conflict between the requirements of the Receiver and the mortgagee as far as the appointment of advisors is concerned, the Receiver should be mindful of his independent status and if he feels uncomfortable with the choice suggested by the mortgagor then he should make his position clear.

A Receiver should be aware of the fact that, particularly at the initial stage of the receivership, a substantial amount of work may be required to be done and he should ensure that he has sufficient staff to deal with the work. If the Receiver is concerned that he and his firm have insufficient resources then he should consider whether to accept the appointment in the first place.

The potential for conflict of interest should be carefully taken into

account when appointing a Receiver's own firm's agent and advisors and generally speaking it is more advisable for the Receiver to appoint totally independent firms to provide advice.

83. Receiverships Accounting

Receivers should ensure that they have sufficient resources to comply with basic financial accounting procedures. In the case of a company mortgagor, the Receiver needs to file receipts and payments at Companies House pursuant to Section 38 of Insolvency Act 1986. The accounts need to be delivered within one month after the expiration of 12 months from the date of appointment and every subsequent period of 6 months and also within one month after he ceases to act as a Receiver. There is no similar requirement for an individual mortgagor but a Receiver should maintain accounts entirely separate from his firm's account relating to a receivership in all cases.

A Receiver should maintain a cash book showing payments out and receipts in.

As far as VAT is concerned, the Receiver should ascertain whether the mortgagor is registered for VAT. He can contact HMRC (optiontotaxnationalunit@hmrc.gsi.gov.uk). The VAT and other tax affairs of the mortgagor may well be unclear but a Receiver is not liable for any tax liability of the mortgagor. If an option to tax has been exercised and VAT is payable on sale of the property or on rent received the VAT element does need to be paid to HMRC by the Receiver on form VAT833 needs to be completed. However, a Receiver should undertake Bank reconciliations on a regular basis. He needs to open a bank account in his name as Receiver. If the appointed mortgagor is a bank which operates current accounts then it clearly makes sense for the Receiver to open account with such bank.

84. HM Revenue & Customs

As mentioned above, a Receiver should ascertain as soon as possible the current VAT position relating to the borrower. It should be appreciated that even though there may be a shortfall in the sale of the property, VAT still needs to be paid to HMRC assuming of course that election to charge VAT has been made.

85. Remuneration

A Receiver should agree the terms of his remuneration at an early stage with his Appointor. It is sometimes difficult for a Receiver to accurately calculate his fees at the early stage of his receivership as clearly he will not be aware of the complexity or otherwise of the receivership. Whilst costs assessed on an hourly rate can sometimes be agreed with an Appointor, some indication of the actual amount of the fees is usually required so that the Appointor mortgagor can make

appropriate provisions.

In the absence of an agreement, Section 109 of the Law of Property Act 1925 states that a Receiver shall be entitled to retain out of monies received by him his remuneration and costs at such rate, not exceeding 5% on the gross amount of all money received. It is unusual for this Section to be relied upon - it is very much a default position in the absence of alternative agreement. A Receiver is also entitled to be reimbursed disbursements and any potential outgoings are to be incurred then the Receiver should seek funding from his Appointor mortgagor.

86. Sale

The Receiver is under a duty to obtain a true market value on the sale of the mortgage property. It would be fully advisable to be fully acquainted with the decision in *Silven Property v The Royal Bank of Scotland* [2003] which examined the duties of a Receiver and confirmed that the Receiver in that case did not need to pursue a planning application. In general, a Receiver can accept the property as it currently stands and not incur additional expenses which may result in further delay of sale of the property.

In any sale contract, the Receiver shall ensure that his personal liabilities are excluded and it is made clear that he is entering into the contract purely as a Receiver and agent of the mortgagor. In the event of the agency having been terminated (for example, if the mortgagor becomes bankrupt or is in liquidation) and the Receiver enters into the contract that they act for the mortgagee or it may be advisable for the mortgagee to actually sign the contract.

A sale by a Receiver can be distinguished from a sale by a mortgagee in that a Receiver is acting as an agent for the mortgagor (subject to the caveat mentioned above) and therefore it is in the same position as the borrower/mortgagor. This means that any subsequent mortgages will have to be redeemed upon completion and the Receiver would need to agree with such mortgagees that they will agree to discharge their mortgage upon completion. If sold by a mortgagee, all subsequent mortgages will be overreached upon the sale by the prior mortgagee. This means that the subsequent mortgages will be automatically discharged and a transfer by the prior mortgagee is submitted to the Land Registry for registration.

87. Ceasing to act

Upon repayment of the debts owed by the mortgage, the charge will need to be discharged and the appointment of the LPA Receiver would automatically be terminated. A mortgagee can remove a Receiver by notice and any new appointment would need to follow the same procedures as the original appointment. A Receiver can of course resign but there is no statutory obligation on the Appointor mortgagee

to accept such resignation. It should be noted that if the Receiver is concerned about his own position and particularly if he feels that he is being required to take action which compromises his position then he should feel free to resign but if the resignation is not accepted a Receiver can apply to the Court for directions (Section 35 Insolvency Act 1986).

Upon the sale of the property over which a Receiver has been appointed the mortgage would be discharged and, as mentioned above, the Receivership would come to an end. Accounts will need to be filed at Companies House as mentioned above and notice of termination of the Receivership will need to be filed if the mortgagor is a company. The relevant form is a Form LQ02 (Section 871(2) Companies Act 2006).