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RECEIVERS

Aspects of Law Relating to Receivers  
and Managers of Limited Liability Companies

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LEGAL RESEARCH FOUNDATIONASPECTS OF LAW RELATING TO RECEIVERS AND MANAGERS  
OF LIMITED LIABILITY COMPANIESB.J. Mc Williams

The aim of this paper is to provide an introduction to the legal principles applicable to receivers and managers appointed by holders of debentures over the assets of limited liability companies. The status, rights and responsibilities of receivers are analysed and consideration is given to the rights of the receiver in relation to certain creditors as the relative priorities between the debenture holder and other claimants is a receiver's most frequent source of legal problems.

Status

The receiver is appointed pursuant to and derives his powers from the terms of the debenture and, accordingly, his position and powers are contractual in origin although he is not a party to that contract. The debenture constitutes an irrevocable authorisation to the debenture holder to appoint a receiver in certain circumstances and specifies the powers which the debenture holder may confer upon the receiver. It is almost invariable practice for debentures to provide that the receiver will be the agent of the company. If this is not stated the receiver will be the agent of the debenture holder and the debenture holder will be responsible for his acts and remuneration. The instrument of appointment of the receiver should incorporate by reference the powers specified in the debenture which the receiver may exercise as this is the source of his authority.

The function of the receiver is to manage the affairs of the company and to realise its assets to enable the company to repay the moneys secured by the debenture. The term "receiver" is used in this paper refers to a receiver who is both a receiver in a strict sense (i.e. one who realises assets and receives the proceeds) and a manager who is entitled to carry on the company's business.

The receiver's role is somewhat unusual in that he is the agent of the company to realise its assets and to carry on its business although the company has no control over him (1) and the debenture holder by whom he is appointed and who gives him directions is not responsible for his actions. This unusual position can be explained by reference to the historical background.(2) A mortgagee was only entitled to income from property if he entered into possession. Due to the liability of a mortgagee in possession to account, the consequences of entering into possession became so hazardous, especially in relation to business assets, that mortgagees came to require the mortgagor to appoint an agent to receive the income from the property for their benefit. As the receiver was the mortgagor's agent the mortgagee was not regarded as taking possession. This concept developed with the receiver obtaining wide powers of management. Eventually mortgagees insisted that they would make the appointment of the receiver although the receiver would still be the mortgagor's agent. The concept came to be accepted by the Courts of Equity and later received legislative recognition both in relation to land and other types of property.(3)

(1) R. v. Board of Trade (1965) 1 Q.B.603

(2) A classical statement as to the history of the office of receiver is found in the judgment of Rigby L.J. in Gaskell v. Gosling (1896) 1 Q.B. 669, 691.

(3) Lord Cransworths Act 23 and 24 Vict. C. 145, Conveyancing and Law of Property Act 1881.

A parallel development was the concept of the floating charge over assets of a company. This enabled debenture holders to obtain a charge over both fixed and current assets including future assets. As the debenture holder had a charge over all the assets of the company the receiver which he appointed could assume control of these and carry on the business of the company.

The receiver being constituted agent for the company has the advantage not only of protecting the debenture holder from liability, but of enabling the company to continue to carry on its business after the receiver is appointed. The company derives the proceeds from the realisation of its assets and from the carrying on of its business although these are applied by the receiver on behalf of the company to repay the debenture holder. Although there are numerous judicial statements referring to the receiver as being a custodian or supervisor of the company's business and affairs for the benefit of the debenture holder it is suggested that these appellations are inaccurate where the receiver is the company's agent. These descriptions are appropriate to a receiver appointed by the Court who, by his appointment, is an officer of the Court. Although a receiver has personal liability under contracts into which he enters this liability does not make him a principal. The receiver's position as agent of the company is, like all other agencies, revoked by liquidation. The effect of liquidation is referred to later.

A receiver although an agent of the company and managing its business is not an "officer" of the company for the purposes of the misfeasance or other provisions of the Companies Act, 1955. (4)

(4) Re B. Johnson and Co. (Builders) Limited (1955) 1 Ch.635

However the receiver's actions still constitute the "affairs" of the Company for the purpose of enabling an inspector to be appointed pursuant to Section 165 of the Act.<sup>(5)</sup> A receiver even after retirement could be summoned before the Court by a liquidator of the company pursuant to Section 262 of the Act as he would be a person capable of giving information as to the affairs of the company.

Although the receiver is not a trustee he has a fiduciary duty to the debenture holder. Because of this fiduciary duty the receiver would not be entitled to purchase the company's assets for his own benefit and he would be liable should he do so.

#### Effect of Appointment on Directors

It had generally been regarded on the basis of the decision in Moss Steamship Company v. Whinney (1912) A.C.254 that the appointment of a receiver resulted in the directors' powers being suspended or paralysed for all practical purposes. The directors and the secretary of the company retain their statutory responsibilities in respect of matters such as keeping registers and filing returns and they must deliver to the receiver a statement of the affairs of the company within fourteen days of receiving notice of his appointment. The decision of the English Court of Appeal late last year in Newhart Limited v. Co-operative Commercial Bank Limited (1978) W.L.R. 636 shows that the directors' powers are not entirely suspended and indicates that the directors may in some circumstances have a duty to exercise their powers. The case concerned an action for damages by the company against a subsidiary of the debenture holder. The action was initiated by the directors of the company without the approval of the receiver. The Judge at first instance set the writ side on the basis that it was inherent in the power conferred upon the

(5) R. v. Board of Trade (1965) 1 Q.B. 603

receiver to bring proceedings that no action could be brought without his consent and, further, that an action by the company which would stultify or frustrate the receiver's activities must be contrary to the terms of the debenture. The Court of Appeal held that the company could proceed on the writ without the consent of the receiver as the Court considered that the debenture holder would not be prejudiced. The directors had agreed to indemnify the company against any costs incurred in the action. The Court accepted that the appointment of the receiver paralysed many of the powers of the directors but considered that the directors' powers were only suspended to the extent that the exercise of the powers interfered with the proper discharge of the receiver's function or would prejudice the debenture holders. It is clear from the decision that the directors cannot dispose of assets subject to the charge created by the debenture. The decision of the Court may have been influenced by the special circumstances of the case as the receiver would not have wished to have brought the action himself. The decision could give rise to considerable difficulties for receivers if directors attempt to exercise powers upon the basis of their view that their actions are not prejudicial to the debenture holders.

#### Effect of Appointment on Employees

The general principles concerning the continuation of contracts of employment were recently stated in Griffiths v. Secretary of State for Social Services (1973) 3 All E.R. 1184. The case concerned the employment of a managing director and it was held that in the circumstances his contract of employment had not been terminated by the receivership. It was stated that where the receiver is the agent of the company his appointment does not terminate existing contracts of employment of staff unless (a) the appointment was accompanied by a sale of the business by the company; or (b) the receiver enters into a new agreement with the employee

which is inconsistent with the continuation of the previous contract; or (c) the continuation of the particular employee's employment was inconsistent with the role and functions of the receiver.

This case followed earlier decisions such as Re Mack Trucks (Britain) Limited (1967) 1 All E.R. 977 where the principle was accepted that the appointment of a receiver as agent of the company did not automatically terminate contracts of employment as occurred when the receiver was appointed by the Court. That case concerned a receiver who dismissed all the employees of the company and re-engaged them on the same terms. He subsequently terminated one contract of employment. The Court held the receiver personally liable for damages for breaching the contract of employment by giving the employee insufficient notice of termination. The Court considered that the length of service of the employee for the purpose of the Contracts of Employment Act had not been affected by the dismissal and re-employment by the receiver.

If the receiver does not enter into a new contract the contract of employment continues to be between the company and the employee and the receiver is not personally liable. It is usual practice for receivers to enter into new contracts of employment to assure the employees of receiving payment and to make the receiver aware of the terms of the contract of employment. A receiver should be careful when re-engaging employees that he does not become personally liable for severance pay and other claims.

Employees are entitled as preferential creditors to wages and holiday pay accruing up to the date of receivership subject to certain limits.

#### Powers of the Receiver

The receiver's powers are derived from the instrument by which he is appointed and the terms of the debenture except to the

the meeting with actual figures as they are known to the liquidator at the date of the report and which, where possible, concludes with an estimate of the final result for creditors. This is after all, what they are interested in and once they know this they do tend to figuratively shrug their shoulders and get on with the job and leave the liquidator to it. They are in business to make a profit, sometimes they miss out and providing they are told about it they usually accept with a reasonable degree of good grace. A full report is essential in my opinion as soon as possible after the liquidation and if it can be sent at the same time as the first dividend, this certainly sweetens the pill.

We are therefore making some progress, we have been appointed, we have investigated the situation of the company, we have realised on the assets, we have confirmed creditors' claims, we have paid secured creditors, we have reserved for liquidator's costs and remuneration and we have reported fully to creditors at the time of paying a first dividend.

What then are our remaining responsibilities ? They are fairly simple :-

1. To complete the realisation of assets as soon as possible and distribute the remaining funds.
2. If the liquidation continues for over a year, to report to creditors as required by s. 290 of the Companies Act at the end of each year.

Experience has shown us that if a report is sent to creditors at the time of the notice, it is very rare for anyone to turn up at the meeting. It is also necessary to lodge a Return at the Companies Office at this time, the form of the Return being simply a receipts and payments account, covering the period and answering a series of very brief questions as to the progress of the liquidation. After the end of the first year, similar returns must be forwarded every six months until the completion of the liquidation (s. 329) and the liquidator must ensure that the due dates of these are diaried to avoid penalties. In many cases there is only one matter, very often the collection of a debtor's account or the settlement of some legal matter which prevents the liquidation being terminated and in some



accepting appointment. This is extremely valuable both during his period of office and, perhaps more importantly, after retirement when there may be claims brought against the receiver when he is not in a position to be indemnified out of the assets of the company.

The office of receiver is voluntary and if the receiver wishes to refuse appointment he should do so immediately and should inform the Registrar of Companies if notice of his appointment has been filed by the debenture holder.

A receiver may exercise his powers only in relation to assets subject to the charge created by the debenture. The receiver should therefore carefully consider the charging clause under the debenture, the statement of affairs supplied to him and other records of the company to ascertain the assets over which he has control. He should obtain a search of the company's file with the Registrar of Companies to determine whether there are any prior charges and obtain a search of the Supreme Court Chattels Registry to determine whether there are instruments of bailment registered. It is important for the receiver to be aware that there are certain charges created by companies which do not require to be registered because they are outside the categories specified in Section 102 of the Companies Act, 1955 and that a lessor's or hire purchase vendor's rights of ownership still apply even if the instrument of bailment is not registered. If the receiver takes possession of or sells assets to which he has no right he can be liable to the owner for conversion.

#### Liability of receiver

The receiver has a statutory duty under Section 101 of the Companies Act, 1955 to pay all preferential creditors of which he is aware or should be aware before he may distribute funds to the debenture holder. If he breaches this statutory duty he is liable in tort to the preferential creditors. This

principle was affirmed in the case of Inland Revenue Commissioner v. Goldblatt (1923) 1 Ch. 498 where the Court also held that the receipt by the debenture holder of moneys when it was aware that the receiver was under a statutory duty to apply those moneys in meeting a prior claim resulted in the debenture holder being directly liable to the preferential creditors as a constructive trustee. Section 101 of the Companies Act, 1955 relating to preferential payments refers only to the funds received from the assets subject to the floating charge and would not prevent a receiver from distributing the proceeds recovered from the sale of assets subject to the fixed charge under the debenture. (7)

There has been some uncertainty as to the liability of a receiver to the company for his actions as there have been conflicting decisions and dicta as to the duty of care owed by a receiver. The English Court of Appeal in Re B. Johnson and Co. (Builders) Limited (1955) 1 C.A. 635 considered in some detail the duties owed by a receiver. The Court expressed the view that the receiver was concerned for the benefit of the debenture holder and not for the company as the purpose of his appointment was the realisation of the assets subject to the security. The notion that the receiver owes a duty to carry on the business of the company and to preserve the company's goodwill was rejected. Evershed M.R. considered it elementary that a mortgagee in realising his security, either directly or through a receiver, had no duty or care to see that there was as much as possible left over for those with subsequent rights against the property. The Court's view is probably best expressed by the following extract from the judgment of Jenkins L.J.;

"The duties of a receiver and manager for debenture holders are widely difference from those of a manager of the company. He is under no obligation to carry on the

(7) Re Lewis Merthyr Consolidated Colliers Limited (1929) 1 Ch. 498

company's business at the expense of the debenture holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture holders, the terms might be regarded as disadvantageous.

In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realized."

In R.v. Board of Trade (1965) 1 Q.B. 603 it was accepted by at least two Judges of the Court of Appeal that the receiver owed no duty to the company except an obligation to act in good faith upon the basis that if a mortgagee in realising his

security acts in good faith then the mortgagor has no redress. The Australian Courts have also adopted the view that in the absence of any evidence of dishonest or reckless conduct the Court will not interfere even if the unsecured creditors and shareholders are prejudiced<sup>(8)</sup> and that the Court will not control a receiver even if his acts show an absence of prudence and wisdom unless there is bad faith or his actions involve a significant error in law or principle.<sup>(9)</sup> The mainstream approach of the Courts was based upon the principle that a receiver, like a mortgagee, was only obliged to act honestly and owed no duty of care except to the extent that the absence of care constituted a lack of good faith.

In the New Zealand case of Nelson Bros. Limited v. Nagle (1940) G.L.R. 507 the action of a receiver in selling at wholesale rather than at retail was challenged and the Court, although it considered that the receiver had acted unwisely, refused to award damages against him for a breach of duty. Myers C.J. expressed the view that the receiver owes a duty to the company to exercise due care, skill and judgment in selling goods and getting the best results reasonably possible in the circumstances. He considered that if a receiver failed to use reasonable diligence he would be liable to the company in negligence for the loss which it sustained.

The dual test of good faith and reasonableness expounded in this case is at variance with the principles enunciated by the English Court of Appeal in the R.B. Johnson and R. v. Board of Trade decisions. The approach of Myers C.J. now appears to be correct. The English Court of Appeal in Cuckmere Brick Company Limited v. Mutual Finance Limited (1971) Ch. 949 has held that a mortgagee exercising a power of

(8) Re Neon Signs (Australasia) Limited (1965) V.R. 123

(9) Duffy v. Super Centre Development Corporation Limited (1967) 1 N.S.W.R. 382

sale owes both a duty to act in good faith and a duty to take reasonable care to obtain a proper price. The statement in the R.B. Johnson case, being based on the earlier view that a mortgagee merely owes a duty to act in good faith, must now be regarded as being too narrow a statement of the receiver's duty to the company.

The position concerning the sale by the receiver of the company's assets is not too difficult as it is clear that the receiver must use proper care to obtain the best price in the circumstances. Although it can be stated with reasonable confidence that a receiver has no duty to carry on the business of the company and may merely realise its assets the question of potential liability for carrying on the business of the company is more difficult. If the receiver were to trade at a loss for a short period to provide him with the opportunity to investigate the viability of the company and to dispose of the business as a going concern his actions could not be challenged but if he were to incur losses for a substantial period without proper justification he might become liable for the losses sustained. Each case would need to be considered in the light of its own circumstances but there is the risk that a receiver's actions while appearing reasonable at the time may seem unjustifiable in retrospect when a negligence claim is heard some considerable time later.

The receiver, by virtue of Section 345 of the Companies Act, 1955 is personally liable under contracts into which he enters unless he excludes this personal liability. It is important to remember that this liability applies not only in respect of the purchase price which may become payable for goods purchased by the receiver but also in relation to any conditions or warranties which may be implied in contracts where the receiver sells goods or other assets. It applies to all types of contracts. The receiver is entitled under the section, and also under the usual form of debenture,

to be indemnified in respect of this personal liability under contracts. This indemnity is generally only effective while the receiver continues in office as upon or after his retirement the assets of the company may be dissipated.

The receiver is not personally liable in respect of pre-receivership contracts even if he obtains the benefit of those contracts unless there is a novation or the receiver assumes personal responsibility under the contract. It is inequitable that the receiver can obtain goods and services under a contract formed prior to the receivership but not be responsible for payment. The contracting party would have no claim against the receiver in these circumstances and it is difficult to find a legal basis for a refusal by that party to continue to supply in accordance with its contractual obligation. It is possible that if the receiver refused to accept liability the other parties could treat this refusal as being an anticipatory breach entitling it to refuse to perform.

A receiver, under the usual powers contained in debentures, would be entitled to repudiate any of the company's contracts either at the time of his appointment or subsequently. The contracting party would have no claim against the receiver for breach of contract or for the tort of interference in contractual relations and would merely be an unsecured creditor of the company for damages for breach of the contract. In Airlines Airspace Limited v. Handley Page Limited (1970) 2 W.L.R. 163 it was recognised that the receiver was in a better position than the company to repudiate contracts. Graham J. suggested that there were the following limits on the receiver's powers, namely;

- (a) The receiver has to make it clear that he is not going to adopt the contract;
- (b) The repudiation of a contract should not adversely affect the realisation of the assets; and

- (c) The repudiation should not seriously affect the trading position of the company if it is able to trade in the future.

These limitations are not supported by any authority and, in the writer's view, are too widely stated. It is suggested that the correct position is that the receiver owes no liability to the other party but he may breach his duty to the company if he fails to act reasonably in repudiating contracts so that the company becomes liable for damages to the third parties. Whether or not the receiver's actions are reasonable will depend on the circumstances of the receivership.

#### Relationship to Other Claimants

The receiver is exercising the security rights of the debenture holder and the ranking of the debenture vis a vis other securities will depend upon general principles of securities law which are beyond the scope of this paper. There are certain unsecured creditors who may enjoy prior rights to the receiver.

##### (i) Preferential Creditors

The preferential debts (as referred to in Section 101 and 308 of the Companies Act 1955) are payable out of the proceeds of assets subject to the floating charge in priority to principal and interest under the debenture. These claims rank subsequent to the receiver's indemnity and his costs, expenses and remuneration and the costs of liquidation if the company is in liquidation. As referred to above, the receiver is personally liable if he fails to pay the preferential creditors before making a distribution to the debenture holder.

##### (ii) The Crown

The Crown's common law right to priority over other

debts does not apply in relation to company liquidations by virtue of Section 334 of the Companies Act, 1955 and, accordingly, the Crown is not a preferential creditor except for particular payments which are made preferential by specific enactments such as sales tax and P.A.Y.E. payments. Normal income tax has no priority.

(iii) Landlord

If the receiver is the agent of the company his appointment does not constitute an assignment of the lease or parting with possession. Unless the lease provides that receivership is a ground for termination or there is some other breach the lease will continue and the receiver will not be personally liable for rental.<sup>(10)</sup> The landlord's claim for rent has no priority but the landlord's right of distraint may be exercised notwithstanding the receivership.<sup>(11)</sup>

(iv) Utility Supplies and Rates:

If the receiver is the agent of the company there is no change of possession and the company continues to be the occupier of the premises. The claims for electricity supplies and for rates are unsecured claims although the electrical supply authority is entitled to terminate the supply of electricity if payment of arrears is not made.<sup>(12)</sup> If the debenture is secured by a first charge on the land, whether or not a collateral mortgage is registered, the debenture holder may be

(10) Consolidated Entertainment Limited v. Taylor (1937) 4 All E.R. 482

(11) Purcell v. Public Curator of Queensland (1922) 31 C.L.R. 220

(12) Waitemata Electric Power Board v. Mills (1971) N.Z.L.R.



liable for payment of the rates as a mortgagee. Under the Rating Act rates constitute a charge on the land which ranks in priority to registered encumbrances without the need for registration.

(v) Execution Creditors

Execution to be effective against a debenture holder must be completed prior to the crystallisation of the floating charge. If goods are seized and the floating charge crystallises between seizure and sale the goods may only be dealt with subject to the charge<sup>(13)</sup>

(vi) Lien Claimants

A creditor who is entitled to a lien on land under the Wages Protection and Contractors Liens Act, 1939 would have priority in respect of his lien over the debenture holder unless the debenture holder had a collateral mortgage registered against the land. The equitable charge created over land by most debentures would not, in the writer's view, constitute a "mortgage" for the purpose of Section 25 of the Act which would confer priority on the debenture holder.

Where money is payable to the company under a contract to which the Wages Protection Contractors Liens Act relates the claim of the debenture holder in respect of these moneys would rank subsequent to the lien or charge of any sub-contractor or worker as Section 24 of the Act provides that no assignment or charge of such moneys shall have any force or effect at law or in equity as against the lien or charge of any sub-contractor or worker. It is immaterial whether the charge under the

(13) In Re Standard Manufacturing Company Limited (1891) 1 Ch. 627

debenture on those moneys is a fixed or floating charge and that the sub-contractor or worker may have constructive notice of the charge where the moneys payable under the contract constitute book debts.

Under Section 46 of the Wages Protection and Contractors Liens Act a person who has done work on a chattel in his possession becomes entitled to a lien and may cause the chattel to be sold if the debt is not paid within two months. This right of enforcement of the common law possessory lien prevails over the rights of the debenture holder notwithstanding that the lien claimant has constructive notice of the debenture holder's charge on the chattel. It is suggested that this right only extends to a common law possessory lien and cannot give rights to a creditor who makes arrangements with the company for a "lien" which is in the nature of a charge on the company's property. This charge would rank subsequent to the debenture if the debenture prohibited the creation of prior charges.

In the case of George Barker (Transport) Limited and Eynom (1974) 1 All E.R. 900 the company had prior to receivership entered into a contract with a firm of transport operators under terms which provided that the carrier would be entitled to a general lien against the owner of any goods for all moneys due to the carrier. The carrier obtained possession of certain goods after the date of receivership while it was in the course of performing its contract with the company. The carrier claimed a lien on these goods for all moneys which were owed to it not merely the transport charges in respect of those goods. The Court held that the lien was valid against the receiver for all moneys upon the basis that the contract between the company and the carrier giving rise to the lien had been entered into in the normal course of business. The Court considered that it was

immaterial that the carrier did not obtain possession of the goods until after receivership as the right to the lien came into existence at the time the contract was made and this right existed at the time of crystallisation of the charge on appointment of the receiver. The position would be different if the lien was created other than in the normal course of business or if the terms of the debenture of which a lien claimant would have constructive notice in relation to chattels, specifically prohibited the creation of liens.

(vii) Set-off

A creditor which owes money to and is owed money by the company may in certain cases exercise a set-off in respect of these debts. It is necessary that both debts be incurred before crystallisation of the charge under the debenture as this operates as an equitable assignment to the debenture holder of the debt owed to the company subject only to existing equities. Any equities that arise subsequent to crystallisation rank in priority after the debenture holder. The rights set-off and counterclaim can be quite complex and the following cases illustrate what debts may be off-set.

In Rendell v. Doors and Doors Limited (1975) 2 N.Z.L.R. 191 the creditor was not entitled to set-off a debt incurred prior to receivership against the value of goods supplied to the receiver as there was not the necessary mutuality once the charge had crystallised on the appointment of the receiver. In Felt and Textiles of New Zealand Limited v. R. Ubrich Limited (In Receivership) (1968) N.Z.L.R. 716 it was held that the price payable to a receiver for goods purchased could not be off-set against a pre-receivership debt as crystallisation of the charge prevented the necessary mutuality. In Sun Candies Pty. Ltd. v. Polites (1939) V.L.R.132 it was held that an unliquidated claim for

breach of warranty could be set-off against a liquidated claim for the balance of purchase moneys notwithstanding the subsequent appointment of the receiver as when the charge crystallised it was subject to the existing equity. In Business Computers Limited v. African Leasing Limited (1977) 2 All E.R.741 the company had prior to receivership entered into a contract to sell certain equipment and a hire purchase agreement with the same party to purchase other equipment. The debt for the goods sold by the company was due prior to the receivership and subsequent to the receivership the other party became entitled to a substantial liquidated debt arising from the receiver's repudiation of the hire purchase agreement. The Court held that these debts could not be set-off as the claim had neither accrued before the other party received notice of the assignment (i.e. the crystallisation of the charge) nor had the claim arisen out of or been connected closely with the same contract as had given rise to the assigned debt.

#### Effect of Liquidation

Although the receiver cannot be the agent of a company in liquidation the winding up of the company will not affect the receiver's powers to hold and dispose of the company's property charged by the debenture. This is clear from the recent case of Sowman v. David Samuel Trust Limited (1978) 1 W.L.R. 22 where the Court held that the receiver could sell property of the company under the powers conferred upon him by the debenture although he could not make the sale as the agent of the company. The Court considered but did not find it necessary to decide upon the status of a receiver in the situation where the debenture provided that he would be the agent but this was not possible because of liquidation. The Court recognised that the "law seems logically untidy" and approved a statement in a prior case that the receiver's contemplated position as agent of the company must be regarded as not of the essence of his position and status as receiver.

This case follows the line of authority established by Gosling v. Gaskell and Grocott (1897) A.C. 574 and Gough's Garages Limited v. Pugsley (1930) 1 K.B. 615 that the receiver is entitled to continue to exercise his powers of realisation of the company's assets even after liquidation. However, the receiver is not entitled to carry on the business of the company after liquidation as he is not the agent of the company and he is not entitled to create debts which would be provable in the liquidation. (14)

If the company has been wound up by the Court the debenture holder is not entitled to appoint a receiver without the leave of the Court as the appointment of a receiver in these circumstances would interfere with the functions of the liquidator who is an officer of the Court. Leave would generally be given to a debenture holder to appoint a receiver. No leave is necessary in the case of a voluntary winding up.

The practice of the Courts had been to make the Court appointed receiver also the liquidator if liquidation ensued to avoid a duplication of effort and cost. However the Courts would not remove a receiver appointed by a debenture holder and replace him with a liquidator or require him to also act as liquidator. (15)

The situation where there is both a liquidator and receiver is unsatisfactory. The receiver can continue to realise assets notwithstanding the appointment of the liquidator. The liquidator is unable to take steps to carry out the liquidation because of the fact of the receivership and this can considerably delay the completion of the liquidation and add to the expenses involved. The receiver owes limited

(14) Gaskell v. Gosling and Grocott and Re Henry Pound, Son and Hutchins (1889) 42 Ch. D.402

(15) Re Joshua Stubbs Limited (1891) 1 Ch. 475

duties to the company whereas the liquidator has a responsibility to the unsecured creditors. Also, the liquidator has far more extensive powers than the receiver as he can for example call up capital, take proceedings in the company's name, carry on the company's business and bring proceedings against delinquent officers of the company. It is suggested that it would be preferable that the liquidator be given the right to control the affairs of the company on the basis that he would be under a duty to realise the assets of the company promptly to enable early payment to the debenture holder. The adoption of this approach would mark a substantial departure from present practice and would probably only be justified if the rights of mortgagees to realise the security after liquidation were similarly affected. The liquidator's position in liquidation is more comparable to the receiver's position prior to liquidation than the receiver's position subsequent to liquidation. The ability of the receiver to continue in liquidation frustrates the purpose of the complex liquidation provisions of the Companies Act possibly to the considerable detriment of the unsecured creditors of the company and with little benefit to the debenture holder.

If liquidation occurs there may be an attempt to have the debenture set aside pursuant to Section 311 of the Companies Act, 1935 or Section 56 of the Insolvency Act 1967 which is imported by Section 309 of the Companies Act 1955.<sup>(16)</sup> A conflict of interest would arise if the person who is liquidator had previously been appointed receiver pursuant to that debenture and accordingly, the receiver should not accept appointment as liquidator if a challenge to the debenture should properly be made by a liquidator. Section 311 of the Companies Act merely invalidates the charge in relation to what may be termed 'past advances', it does not affect the charge in relation to other moneys secured by the debenture and

(16) Re Eskay Metalware Limited (1975) N.Z.L.R. 145

the covenants under the debenture. If moneys are repaid by the receiver to the debenture holder prior to liquidation these need not be refunded unless the payment comes within Section 56 of the Insolvency Act.<sup>(17)</sup> Under Section 311 the charge is invalid in relation to past advances apparently from the outset and not merely from the date of the Court's order. If the debenture secured only past advances it is an open question whether a receiver who had acted pursuant to the charge which did not validly secure any money may be liable.

Problems also arise where the receiver is acting after a winding up petition has been filed as under Section 224 (2) of the Companies Act, 1955 the winding up is retrospective to the date of presentation of the petition. There does not appear to be any authority on the questions whether the agency exercised by the receiver during this period is avoided and the effect thereof and whether the consent of the Court is necessary pursuant to Section 222 of the Act to validate every sale by the receiver of property of company during this period.

### Conclusion

The office of receiver is contractual but has received legislative recognition. The receiver's rights and powers are derived from the debenture pursuant to which he is appointed except to the extent that these are limited or supplemented by law. The Courts have been slow to develop and clarify the principles concerning the status powers and responsibilities of receivers. Fortunately there have been a considerable number of decisions over the last decade which have helped in resolving some of the problems. There are still a number of areas of uncertainty. This is unsatisfactory for those accepting the role of receiver and their advisers. It is to be hoped that in view of the current prevalence of receiverships the Courts will be provided with the opportunity to resolve a number of these issues.

(17) Re Parkes Garage (1929) 1 Ch. 139