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PAPER 1

RECEIVERS

Their Appointment, Their Duties
And Their Liabilities

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Qualification of a Receiver

The Companies Act, 1955 makes no reference to any special qualifications necessary for a person who is to act as receiver. Indeed, the only references are negative ones, referred to in Sections 342 and 343 which state that neither a body corporate nor an undischarged bankrupt may be appointed as a receiver.

From a practical angle a receiver must have sound financial and business experience and the ability to control a company until it is either rehabilitated or its assets realised to the best advantage. The work is both exacting and time consuming and any person approached to act should ensure that he can devote adequate time to the assignment.

APPOINTMENT OF RECEIVERS

There are a number of situations in which receivers may be appointed and the most common is pursuant to a power contained in a debenture.

Debentures usually contain a number of provisions enabling a receiver to be appointed, the most common of which is the power to appoint a receiver immediately after default is made in complying with a demand for the repayment of the advance.

The rights, powers and duties of a receiver are determined by two documents, firstly the debenture itself and secondly the instrument of appointment. The receiver must satisfy himself that both documents have been properly drawn, executed and are valid in all respects and must acquaint himself with the powers and duties contained therein.

If either the deed of appointment or the debenture is unsound, the receiver may be regarded as a trespasser and become personally liable on contracts undertaken in the name of the company or for assets converted into cash.
To avoid this possibility and for advice on other legal matters which will inevitably arise during the course of the receivership the receiver should instruct a capable solicitor to assist him. The solicitor should be a specialist in company and commercial law, preferably independant of the debenture holder and one who is prepared to make himself readily accessible.

**INDEMNITY**

A receiver is personally liable for all contracts into which he enters and for any losses sustained while carrying on the business.

He will of course have a right of indemnity out of the assets but if they are insufficient he could be faced with a personal loss.

Accordingly it is wise, in all cases, to obtain an indemnity from the debenture holder, particularly where the business is to be continued at the request of the debenture holder for whatever reason.

**NOTICE OF APPOINTMENT**

Section 109 (1) of the Companies Act, 1955 requires the person making the appointment to give notice of the appointment to the Registrar of Companies within seven days. While the responsibility for giving notice under Section 109 (1) is placed on the person making the appointment the receiver should satisfy himself that this provision of the Act has been complied with.

Notice to the Company of the receiver's appointment and statement of affairs

Upon his appointment the receiver must forthwith notify the company of his appointment (Section 348 (1) (a)), by presenting formal notice to the head office of the company. Where the company has a number of branches, notice must be given to each branch. Contemporaneously, with the giving of the notice of appointment to the company's officers, their attention should be drawn to the provisions of Section 348 (1) (b) of the Act which requires the directors and secretary to furnish to the receiver within fourteen days or such longer period as the receiver shall allow, a statement in accordance with the provisions of Section 349 of the Act which in the prescribed form, is a statement concerning the affairs of the company. This statement must include full details of all the assets and liabilities of the company. The
preparation of such a statement is not easy as considerable detail is required in all sections and especially those relating to the liabilities. The possibility of a receiver's appointment coinciding with the end of a regular accounting period is remote, and thus the difficulties of the preparation of the statement are greatly increased. Nevertheless the information contained in the statement is vital for it includes details of the assets for which a receiver is required to account, and of the liabilities with which he must deal, including their relative priorities.

Difficulties may arise where the company does not employ its own full-time accounting staff and Section 349 (3) provides for a reasonable payment to be made of the cost of the preparation of the statement, which must be completed as soon as possible.

Section 348 (1) (c) requires the receiver within two months after the receipt of the statement of affairs to deliver a copy to the Registrar, together with any comments he sees fit to make thereon. Copies of the receiver's comments and of the statement of affairs must also be sent to the company, the trustees for the debenture holder, if any, and to all debenture holders.

Frequently assets are listed in the statement at book value which bear no relation to their realisable value. If so the receiver should comment drawing attention to the effect which any loss on realisation will have on the sum available, after payment of preferential creditors, to debenture holders, unsecured creditors and possible shareholders. If there is a genuine reason to believe that the company's position is not as favourable as shown in the statement of affairs, the receiver would be wise to comment accordingly.

In the initial stages of all receiverships there are certain matters which must be attended to without delay and there are often special problems on which the receiver's advice will be sought. It is important to prepare a programme covering matters requiring the receiver's attention to ensure nothing important is missed.

In most instances a receiver will elect to continue trading at least until he has established the company's financial position and has decided whether or not it is in the best interest of all creditors to attempt to trade the company out of its difficulties, or alternatively sell the business as a going concern. Under these circumstances he should at the earliest opportunity
speak to the staff and explain:-

1. That he has been appointed to protect the rights of the debenture holder.
2. That he is now responsible for the management and control of the company and has taken all the powers of management previously held by the directors.
3. That his appointment does not necessarily mean that the company will close down (providing this is the case).
4. That his appointment effectively freezes amounts owing to creditors and provides a breathing space in which to take stock of the position and decide on the company's future, and that this will take some time.
5. That they the staff will be advised of any decision affecting their future as soon as possible, and that in the meantime their help and assistance is essential to the company's future and the future of their employment.

This is a critical step. The staff will probably be upset by the turn of events, uncertain of their future and in a state of indecision.

The receiver must now accept full responsibility for the conduct of the company's affairs. He must take certain basic steps without delay. They are:-

1. Instruct all staff that the words 'in receivership' must be added after the company's name on all letters, invoices, statements and any other documents on which the company's name appears.
2. See that all existing bank accounts are closed and that new accounts are opened in the receiver's name.
3. Arrange for a complete physical stock take as at the date of his appointment.
4. Review all insurance policies to ensure that the assets and third party risks are adequately but not excessively covered.
5. Give formal notice to all creditors of his appointment advising that he will accept liability only for goods and services supplied against his written order.
6. Instruct the staff that goods must not be accepted or commitments undertaken except against his order. Very clear and firm instructions must be given to staff on this particular question. Any commitments which the staff enter into are made on behalf of the receiver and are commitments for which he may become personally liable.
7. Make adequate provision for safe custody of all assets.

8. Give notice to the staff that their contracts of employment are terminated and offer them re-employment on a weekly basis or longer period where necessary. This is perhaps the most difficult task immediately facing the receiver. Obviously, if he is going to carry on the business he will need a willing and loyal staff. He will immediately be involved in making a host of decisions in technical and commercial areas where he may have little or no experience and he will have to rely on the goodwill and advice of senior staff. It is an area requiring tact and understanding where maintenance of goodwill is essential.

9. Advise debtors who are also creditors that while they may be entitled to offset accounts relating to the period prior to receivership no such rights exists in respect of unsatisfied pre-receivership accounts against goods supplied to the receiver.

10. Set up an adequate system of control for the business and establish adequate security including control of keys, cash, stocks, etc.

11. Take possession of the common seal, minute book, certificate of title and other documents relating to the ownership of the company's assets.

12. Where the company is a licensed wholesaler or manufacturing retailer give notice of the appointment to the Comptroller of Customs.

13. Write to the company's customers advising that the company is going to continue to trade in receivership. Remember sales at an adequate profit margin will be of vital importance.

14. Where the company has plant, equipment or vehicles on lease and the receiver wishes to continue to use the items on lease, he should however, advise the lessors in writing that he will accept no other liability whatever under the lease. It is necessary to do so to avoid the risk of incurring cancellation charges which are written into most leases.

15. Advise the Directors that they remain responsible for holding meetings as required by the articles, registration of share transfers and filing of Annual returns.

This list is not exhaustive and each case must be carefully examined to see that nothing of importance is omitted. Once these basic steps have been taken the receiver should review without delay the company's financial position and consider its future. As all pre-receivership creditors accounts are deferred, normally a period of four to six weeks will elapse before the first payments are due to the receiver's creditors. This gives him an opportunity to collect some of the debts due to the company to meet current outgoings. He will have to decide whether or not receipts from cash sales, debtors, cont-
ract payments etc., will be sufficient to pay wages and other immediate out-
goings. Once the short term financial problems have been covered he should consider providing cash funds from sources such as a reduction in stocks and debtors, sales of surplus assets, etc. Of course any cash surplus will be reduced by the amount of any capital commitments such as hire purchase payments and reductions in mortgage principal.

A receiver must consider all existing contracts from a cash angle. He must establish whether or not cash receipts are likely to exceed the cost of completion. If not the receiver should not take up the contract and must ensure that no further costs are incurred.

If the receiver decides that the business cannot be continued indefinitely it may be desirable to carry on for a limited period to either:-

1. Negotiate a more favourable sale on the basis of a going concern.
2. To complete contracts in progress which will yield a cash surplus in excess of the cost of completion.

If however, the business can only be carried on at a loss then obviously the period on continuance must be very limited.

Obviously, making a decision on this point is relatively urgent and while the receiver is making up his mind he must carry on in a cautious manner. He must always bear in mind that the receiver's primary duty is to realise sufficient to satisfy the amount owing to the debenture holder and thereafter to terminate the receivership as quickly as possible. In carrying on the business a prudent receiver having regard to the interests of all creditors will exercise his powers wisely and not recklessly.

**COMPANY TRADING WHILE IN RECEIVERSHIP**

The position relating to the carrying on of a company's business by a receiver appointed out of Court is discussed in 'Palmer's Company Precedents' (16th Edition 1962) Part III page 404 where the following statement appears:-

Prima facie a receiver of the company's property is not entitled to carry on the business of the company but very commonly the debentures or trust deed empower him to carry it on.
Where the power is so conferred he may do whatever is reasonably necessary for carrying on the business, including the buying and selling of goods, the employment of labour and the incurring of debts and liabilities; and even though in the result loss is sustained, he will be entitled to indemnity, and the mortgages for whom he acts will be entitled to bring the expenses of receivership into account as against subsequent encumbrances and the company. (Bompas v. King (1996) 33 Ch.D279).

Usually the powers conferred on a receiver by a debenture include an authority to carry on the business of the company. Although the receiver is less likely to incur personal liabilities by closing the business down and selling the assets piecemeal the assets may not be realised to the best advantage. In recent times it has become more widely accepted that the appointment of a receiver need not necessarily mean the death knell of the company.

A survey of the company's trading position may indicate clearly that there are sound reasons for carrying on the business in the interest of all creditors, both secured and unsecured. However, before such a decision is acted upon, approval thereof should be obtained from, firstly, the debenture holder and secondly, the unsecured creditors who are the group most likely to benefit from a successful receivership.

Apart from a general consideration of trading conditions, the demand for the products, the company's ability to produce profitably at competitive prices, and the availability of raw materials and labour, particular attention should be directed to the current financial position. That is, whether or not receipts from cash sales, debtors, contract payments etc., will be sufficient to pay wages and other cash outgoings.

So far we have considered only the position where sufficient funds are available to the receiver from the company's own resources to meet normal outgoings. This will not always be the case, and it may be necessary, if the business is to continue, to raise a loan probably by way of bank overdraft to finance the company's trading. The consequences and responsibilities associated with the borrowing of funds are very complex. Before taking such a decision the receiver, must obtain an opinion from his legal advisers.

SALE OF REAL PROPERTY

Where it is proposed to realise the assets forming the security and such assets
include land or an interest in land, the debenture holder is required, pursuant to Section 92 of the Property Law Act, 1952, to give one month’s notice to the owner of intention to sell. The Land Transfer Office will not register the transfer unless satisfied that the required notice has been given.

THE RECEIVER IN RELATION TO THIRD PARTIES

1. Directors

The receiver is responsible for the management and general control of the company’s affairs from the date of his appointment, and is given all the powers of management previously held by the directors. There are, however, certain matters for which the directors are still responsible, which include the holding of meetings are required by the Articles, registration of share transfers and filing of annual returns.

2. Execution Creditors

When a floating charge has crystallised into a fixed charge, a receiver, who has been appointed pursuant to powers contained in a debenture, is entitled to take possession of all the property comprised therein. Prior to crystallisation the mere existence of a floating charge does not prevent a judgment creditor from issuing execution against the property of the company subject to the charge. However, once a receiver has been appointed, a judgment creditor cannot prevail as against the receiver unless his execution has been completed at that date. In these circumstances the bailiff would be required to account to the receiver for the proceeds of the sale of any property seized prior to or after the date of the receivership unless settlement had been made with the judgment creditor prior to the date of the appointment.

3. Landlord

Arrears of rent as such are not preferential claims; however when rent is in arrears the landlord may have the right to terminate the lease and the receiver may be compelled to pay the arrears to protect the lease.

If a landlord obtains judgment for rent due and issues execution under this judgment, he is in the same position as any other execution creditor. Where, however, he proceeds under the Distress and Replevin Act, 1908, he has higher rights. For example, if he enters into possession under his distress before a receiver is appointed or the charge otherwise attaches, the distress takes priority as against the debenture holders, even though
4. **Hire Purchase Agreements**

The ownership under hire purchase agreements does not pass to the hirer until such time as the final instalment has been paid, and accordingly, unless the receiver pays the instalments as they fall due, the owner of the chattels held under hire purchase agreements can generally resume possession.

**CREDITORS**

1. **Preferential payments**

Section 101 of the Companies Act states, inter alia, that where a receiver has been appointed on behalf of the holders of any debentures of a company secured by a floating charge, and the company is at the time of such appointment not in the course of being wound up, the debts which in every winding up are, under provisions of Part IV of the Act relating to preferential payments, to be paid in priority to all other debts, shall be paid out of any assets coming into the hands of the receiver or other person taking possession of such assets, and such payments shall be made in priority to any claim for principal or interest in respect of the debentures.

This section refers to floating charge debentures. In the case of fixed charge debentures no such preferential rights apply.

The preferential payments are set out in Section 308 of the Act, and are the same both for receiverships and liquidations.

Preference is given to salaries, wages and holiday pay due to any servant or worker up to a maximum amount of $400 to any one claimant and for a period not exceeding four months prior to the appointment of a receiver. This provision does not extend to directors' fees which are not entitled to any preference.

2. **CLAIMS ON WHICH PREFERENCE IS CONFERRED BY OTHER ACTS**

(a) **Sales Tax**
Section 6 of the Sales Tax Amendment Act, 1933 requires a receiver of a licensed wholesaler or manufacturing retailer to send notice of his appointment to the Comptroller within fourteen days of his appointment. Under this section the receiver is required to set aside a sum sufficient to provide for sales tax payable or becoming payable and he become personally liable if he fails to do so.

(b) **P.A.Y.E.**

Section 31 (1) of the Income Tax Assessment Act 1957 provides that P.A.Y.E. deductions shall be held in trust for the Crown and shall form no part of the estate in liquidation. Section 31 (2) provides that the amount of tax deduction for the time being unpaid to the commissioner shall upon liquidation or upon the appointment of a receiver rank immediately after the debts referred to in Sub-section (1) of Section 308 of the Companies Act, 1955.

(c) **Motor Vehicle Dealers Act 1975**

Where a payment is made out of the Motor Vehicle Dealers Fidelity Guarantee Fund in settlement of a claim against a Motor Vehicle dealer the Motor Vehicle Dealer Institute Inc. shall be subrogated to the extent of the payment to all the rights and remedies of the claimant against the dealer. The amount that the Institute is entitled to recover from the defaulting licensee company shall be paid in priority to all other debts in accordance with para (d) of subsection (1) of Section 308.

(d) **Land Tax**

Section 220 of the Land and Income Tax Act, 1954 provides that land tax which has been assessed and has become due and payable shall be a charge on the land in respect of which it is payable. In a statement of affairs unpaid land tax should be shown as secured against the land in respect of which it is payable.

(e) **Rates**

Rates when struck constitute a charge upon the land. Unpaid rates should be treated in the statement of affairs in the same manner as land tax.

**ORDER OF PREFERENTIAL PAYMENTS**

The order in which preferential payments rank is:
1. The costs of realisation
2. Sales tax. Section 27 of the Sales Tax Act gives sales tax priority to the costs of the receiver.
3. The costs, including remuneration, of the receiver.
4. Salaries, wages, and holiday pay due to employees up to $400 to any one person and covering a period not exceeding four months together with all other sums required by any other Act to be included among debts which are to be paid in priority to all other debts in a winding up.
6. Amounts secured by debenture including, where debenture so provides, costs, charges and expenses of the debenture and, if applicable, a debenture trust deed together with trustees remuneration.

Section 11 of the Layby Sales Act and Section 31 (2) of the Income Tax Assessment Act, 1957 appear to be in conflict in that both provide for a preference second to the debts having priority under Section 308 (1). It has yet to be authoritatively determined which section has priority over the other.

When the company is also in liquidation, it is advisable for the receiver to obtain the liquidator's approval for any payments which he intends to treat as preferential.

UNSECURED CREDITORS

Although the receiver is not legally required to concern himself with unsecured creditors, they are the group of people, who in most cases, stand to gain or lose the most by carrying on the business. If it is intended that the business should be continued for the benefit of all parties, the receiver should call a meeting of all unsecured creditors to acquaint them with the situation and to obtain their approval to the course which he intends to follow.

Unsecured creditors may exhibit resentment when their accounts are deferred, particularly if there is a strong possibility that all or a major part of the amounts outstanding appear to be irrecoverable. Some may go to considerable lengths to persuade the receiver that, for various reasons their accounts should be given preferential treatment. All such claims must be carefully scrutinised and only those with a legal priority should be given preference. It is important to remember when considering creditor's accounts that time is on the side of the
receiver and hasty decisions should not be given. When it doubt seek a legal opinion. Even where creditors resort to legal action the matter is usually protracted giving the receiver and his legal adviser ample time for a full consideration of the claim.

**UNCALLED CAPITAL**

The power of a receiver to get in uncalled capital will depend whether or not the company is in liquidation.

If the uncalled capital is part of the security for the debenture the directors may be instructed by the Court to make a call and pay the proceeds to the receiver, or the Court may authorise the receiver to make the call.

However, when the company is also in liquidation the directors' powers to make calls are terminated and the liquidator is the only person empowered to act. The Court may either instruct the liquidator to make the call or authorise the receiver, on giving suitable indemnity to the liquidator, to make the call in the name of the Liquidator.

**LIABILITIES OF THE RECEIVER**

Section 345 (2) of the Companies Act, 1955 states that a receiver, appointed under powers contained in an instrument, shall be personally liable, to the same extent as if he had been appointed by order of a Court, for any contracts entered into by him in the performance of his duties except in so far as the contract provides otherwise and he is entitled in respect of that liability to an indemnity out of the assets. However, nothing in this sub-section limits either the right of indemnity which he had apart from the provisions of the sub-section, or his personal liability on contracts entered into without authority.

If a receiver appointed under a floating charge debenture, neglects to discharge the preferential creditors, he becomes liable. Likewise if appointed by the Court, he becomes personally liable if he does not carry our precisely the terms of Court Order.

The Receiver who is agent of a company may also render himself personally liable under the general law of agency. Firstly where he signs a contract,
as for example, a bill of exchange other than in his representative capacity and secondly for liability in tort.

THE LIQUIDATOR AND THE RECEIVER

It is not uncommon for a liquidator to be appointed while the receiver is still in office. In these circumstances the receiver must immediately cease trading as the liquidation automatically cancels his right of agency and he becomes personally liable as from that date in respect of any contract into which he enters.

On occasions where a company is in receivership and is going into liquidation it is suggested that the receiver should also act as the liquidator. Such a suggestion requires careful consideration, as there may be occasions where a conflict of interest will arise and a receiver should clearly resort to his solicitor for advice.

For example, where the debenture appointing the receiver was issued within twelve months of the date of winding up and was given for the purpose of securing a past debt, Section 311 of the Companies Act states clearly that except in so far as the debenture secures the value of the goods or advances made after the date of issue, the debenture, unless it is possible to show that the company was solvent at the date of the taking of the debenture, shall be invalid as against the liquidator. Clearly in such circumstances there could be a conflict of interests.

The appointment of a liquidator does not displace the receiver and while he can no longer carry on the business his powers to realise the assets continue, subject of course to the debenture being enforceable against the liquidator.

RECEIVER'S ABSTRACT OF RECEIPTS AND PAYMENTS

The requirements of the Companies Act, relating to the filing of receiver's abstract of receipts and payments with the Registrar of Companies are.

1. Appointments under floating charge debentures. Section 348 (2) provides that the first statement must cover the period of the first twelve months from the date of appointment, and subsequent statements each succeeding
period of twelve months or to the date of termination. The statement must be filed within two months from the end of the relevant period or such longer period as the Registrar shall allow.

2. Appointments in all other cases. Section 350 provides that the first statement must cover the period of six months from the date of the appointment and each subsequent period of six months or to the date of termination. The statement must be filed within thirty days of the end of each period or such longer period as the Registrar shall allow.

TERMINATION OF RECEIVERSHIP

As soon as the receiver is in a position to pay off the debenture holder he should do so and terminate his appointment as soon as possible. He must satisfy himself that all claims and liabilities outstanding against him have been satisfied and if he has been trading he should advise all parties with whom he has had transactions that he is terminating the receivership and ask for a final statement of account. As a precaution he should obtain, if he has not already done so, a suitable indemnity from the debenture holder against outstanding liabilities.

If the company is also in liquidation the receiver must transfer and surplus assets he holds to the liquidator. He should arrange for the liquidator to accept any claims which may arise relating to the receivership, for say, a period of twelve months or, alternatively with the consent the liquidator hold a sum of money for a reasonable period to meet any claims arising within that period.

As soon as the amount owing under the debenture has been satisfied and any outstanding claims provided for or alternatively, all the assets have been realised and the proceeds paid to the debenture holder, the receiver must obtain a discharge from the debenture holder. He must file with the Registrar of Companies a notice of his ceasing to act within seven days and a final abstract of receipts and payments within two months.

A receiver of a company carrying on the business of a licensed wholesaler or manufacturing retailer, and licensed under the Sales Tax Act, must notify the Comptroller of Customs that he has ceased to act and pay any outstanding sales tax.
The foregoing is an introduction to some of the practical aspects which arise in most receiverships.

A receiver holds a position of trust and must have a basic understanding of the law which will enable him to recognise legal problems as they arise. It is of even greater importance to have the assistance and guidance of a solicitor well versed in the statutes and caselaw governing companies.

A receiver's work is exacting and demanding, it requires common sense and tact. But is interesting and rewarding.
PAPER 2

RECEIVERS

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

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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.

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. 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 different 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\(^{(8)}\) 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.\(^{(9)}\) 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 is 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. (10) The landlord's claim for rent has no priority but the landlord's right of distraint may be exercised notwithstanding the receivership. (11)

(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. (12) 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

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(13)

(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 Hutchings (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. 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. (17) 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
PAPER 3

RECEIVERS

The Receiver on the Run

P.D. LANE

Partner - Barr Burgess & Stewart
THE RECEIVER ON THE RUN

In the early stages of any receivership the receiver is rather like a house surgeon in the casualty department of a busy city hospital. The patient is placed before him on a moment's notice. His diagnosis must be swift and accurate.

The patient may be bleeding from a multitude of wounds; his bones may be broken; his brain is possibly damaged; and he will unquestionably be in a state of shock.

Both the receiver and the house surgeon must make immediate endeavours to stabilise the patient's condition. To begin the long march towards either remission or death!

In considering the concept of corporate death, it has not been unusual in commercial circles for the receiver to be thought of as a corporate undertaker, although this role fits more closely over the shoulders of liquidators.

In reflecting on the negative role given to receivers, I am reminded of a story told by a former president of the Australian Society of Accountants, Mr Jim Jamison who became known internationally as a result of the Mineral Securities Limited, Mainline Corporation Limited and Patrick Partners disasters.

He was a partner of a leading firm of auditors and like most of us, was fairly flexible in his professional life. He was in fact the review partner on the audit of a major Australian company. As part of this function he had arranged with the partner in charge of that job to visit the client to discuss the completion of the current year's audit. It was a time of economic recession in Australia and the audit client was suffering more than its share of solvency problems.

The financial director of the client when he heard that Jim Jamison was going to visit said: "For God's sake bring him in the back door. If any of our creditors see him coming here, they will think we have failed."

The appointment of a receiver will be the final link in a long chain of disasters, broken promises and ill considered decisions. It will not eliminate the underlying causes that have given rise to the receivership.
Underlying Causes

Why does a company go into receivership? We all know the legal reason - the enforcement by a debenture holder of his security. But the underlying reason is generally mismanagement of financial and other resources.

The receiver is likely to find all the effects of over-trading and under-capitalisation; of inexperienced or incompetent management; and in rare cases, of simple misappropriation of the company's funds. In present economic conditions, there may have been no more than excessive optimism and a refusal to face economic reality.

In almost every case the receiver can expect to find poor financial records, no system of effective budgetary and financial control and inadequate costing systems.

And it is likely not only that the goodwill of every supplier to the company has been exhausted but also that problems of supply and manufacture have alienated every customer.

Why Trade?

With this background of inadequate records, insolvency and outright hostility why then will a receiver make the decision to continue to trade?

In the initial days following his appointment, the receiver must establish a clear identity of interest with the objectives of the debenture holder. The debenture holder will expect the receiver to exercise his judgement as to the course of action to be taken in realising the security. It is possible that this may involve carrying on the business in order to maximise the realisation values.

The resources of a trading company include not only plant, equipment, stocks and so on, but also the specialised skills of management and staff. All these resources can be dissipated and lost in a forced sale situation.

The receiver is working with a very delicate balance. On the one hand he is endeavouring to obtain a sale on a going concern basis and is therefore obliged to carry on business, on the other hand he is operating a business which is unlikely to be trading profitably in the initial stages of his receivership.
He must balance the additional cash he obtains from a going concern sale against the money he may dissipate in unprofitable trading. His unit of measurement is the net cash recovered.

It follows that he will be operating within a limited time scale unless he can achieve profitable trading. It should be noted that it is very rare for a company to be "traded out" of receivership.

In this whole context of carrying on business, I would like to quote from an article by Mr Rupert Nicholson, who was the receiver of Rolls-Royce Limited. In this article he said:

"A receiver is not concerned, until the latter stages, with the trading and profit and loss account, as his primary duty is to ensure that he gets value for all his expenditure. This means that propositions have to be judged on a cash-flow basis.

"If by utilising materials and finishing off work in progress in existence at the time of his appointment, he can recover in the selling price a sum which exceeds his wages, out of pockets costs and the scrap value of the raw materials used, he has shown a cash surplus and he is not concerned with the book values.

"In pursuing this concept, a receiver must be quite sure of his facts. He must not drift into a contract which he could have refused to carry out, only to find that his expenditure exceeds his income which may become blocked in some way. A question which a receiver and his staff must continually be asking themselves is: Do we get the money back?"

The concepts discussed by Mr Nicholson are of particular relevance in contracting companies. The effect of the operation of the Wages Protection and Contractors Liens Act is such that the receiver is generally defeated by the Liens before he can even begin.
If he chooses to attempt to carry on a particular contract then the receiver must:

- reach an accommodation with sub-contractors arranging for them to set aside their liens so that the contract can be continued

- obtain an accurate assessment of the current position of the contract, of the likely costs of completion, and the expected final profitability. To do this the receiver requires the services of a skilled, swift and accurate quantity surveyor

- negotiate with the owner or the principal contractor on the completion of the contract

- be certain that the resources available are such that the contract can be completed efficiently and economically.

In practice unless the contract is close to completion the organisational and liens problems are so great that the receiver can be little more than a passive observer. In such cases his interest in the contract is restricted to any balance remaining after the liens and the costs of completion by either the owner or the principal contractor are charged against any balance due.

Management Steps

Once a decision is made to continue to operate a business in receivership the receiver must take not only the debenture holder into his confidence but also the major unsecured creditors. This can best be achieved by arranging a special meeting with the major unsecured creditors and by asking them to nominate a three or four man advisory committee.

The decision to continue will have been reached after a rapid organisational and financial review.

The appointment of a receiver does not eliminate the underlying causes of the problems of the company, although it does sometimes create a breathing space.
If management was inadequate before receivership it will still be inadequate after receivership, although the receiver who is effectively the chief executive of the company, can sometimes assist in strengthening the skills available. In general terms it is often necessary to replace the upper level of management and this can cause problems because of the receiver's inability to offer any security to any new employee.

As part of the initial organisational review specific short term trading objectives must be set and these objectives will be converted into short term financial targets.

The appointment of a receiver has the effect of freezing the debts due to unsecured creditors and therefore funds arising from the conversion of stock and debtors into cash, are sometimes available to provide initial working capital.

In the very short term it will be necessary for the receiver to arrange for some standby funds either by way of overdraft or specific loan from the debenture holder. And in arranging these funds the receiver must be sure that he is covered by the assets of the company and does not place his personal liability at risk.

**Personal Liability**

The whole question of personal liability is one of the most onerous aspects of receiverships. A receiver does have personal liability on all his contracts and on all orders placed with suppliers for goods and services even if they are entered into in the name of the company.

In the case of orders for goods and services, it is impossible for the receiver to contract out of or limit his personal liability. He must therefore, be quite sure when placing orders that his indemnity against the assets of the receivership in terms of Section 345(2) of the Companies Act 1955 is completely effective - ie that those assets will cover the orders being placed.

Where the receiver enters into specific contracts of a longer term nature, he must ensure that he contracts with the other party on the basis that his liability is limited to the assets in his hands. If this is not possible, then either he does not enter into the contract or he ensures that his liability is covered by an indemnity from the debenture holder.
If it is the wish of the debenture holder that the receiver continues to operate the company, or even if the debenture holder accepts the receiver's recommendation to continue the business, then the debenture holder must be prepared to provide a fair and reasonable indemnity for his receiver. If the debenture holder is prepared to rely on the judgement of the receiver, then the debenture holder must also be prepared to back that judgement with an indemnity.

Day-to-Day Control

Once the decision is taken to continue trading with a specific objective in view, then it is equally important for adequate control to be exercised. It will be achieved by the receiver through his own staff and through the operating staff of the company in receivership and to exercise this control, it will be necessary to:

- prepare detailed operating and cash budgets. Because of the time factors, these budgets must be prepared, in my opinion, in weekly segments

- obtain timely reports against those budgets to monitor the performance of the company against the targets which have been set

- hold regular meetings with the operating staff of the company to review performance and to plan future decisions.

In the initial stages of the receivership, objectives will be set on a short term basis but once the affairs of the company are brought under control, longer term planning can be implemented. One effect of the monitoring process may be to indicate that the effect of continuing the company will be to produce a negative cash effect and therefore, the objective of the company may rapidly become its early demise.

The receiver in a trading situation must be flexible, must be informed and must be prepared to act quickly to safeguard the assets. The receiver in a trading situation can only operate if he has the complete goodwill, not only of his debenture holder but also of the unsecured creditors.

If he loses the goodwill of creditors then he risks the issue of a notice in terms of Section 218 of the Companies Act 1955 and the eventual presentation of a winding-up petition to the Supreme Court.
Without the support of the unsecured creditors he has little
defence to prevent the Court making a winding-up order and
effecting the cancellation of his agency.

Methods of Sale

The receiver has a duty to take reasonable care to obtain a
proper price for the assets under his control. He must endeavour
to realise those assets to the best advantage and this may imply
some selectivity as to the method of sale adopted.

He can endeavour to obtain a sale on a going concern basis
but this will not stop him identifying redundant assets and selling
them off on a piecemeal basis. To achieve a going concern basis of
sale, he must reach the widest possible public and this may involve
newspaper and trade journal advertising; placing the business with
the widest possible range of land agents and other specialists;
and also circularising members of related trade associations.

A going concern basis of sale does not necessarily imply
a competitive tendering situation but may in fact, involve the sale
by private treaty - the negotiation on a horse trading basis of a
satisfactory price with the prospective purchaser. If the going
concern basis of sale fails then the receiver has no other option
but to auction the assets or to sell them by tender. A good
auctioneer can often achieve much more satisfactory realisations
than a sale by tender approach, although the nature of the assets
will often determine the approach to be adopted.

It of course, does not follow that the receiver will accept
the best price tendered, as in many cases the advertisement of a
sale by tender seems to be the signal for the bargain hunters to
attack.

If the tender offer is unsuccessful, and the auction approach
is not available, then the only other alternative available is to
place the plant and equipment with specialist dealers for sale on
a commission basis.

In presenting this paper I have endeavoured to give some
idea of the approach a receiver should take to a continuing
receivership and of the problems he is likely to experience.
A receiver in a continuing situation is always at risk. He has chosen to exercise his judgment in terms of the best facts available to him. But he may find that the facts he was given were incorrect and therefore he must be flexible and react quickly to the day to day situation.

If he is successful he will have the satisfaction of achieving the best recovery possible both for his debenture holder and for the unsecured creditors but if he is unsuccessful he places his own professional reputation at risk.
PAPER 4

LIQUIDATORS

The Powers and Duties of Liquidators

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THE POWERS AND DUTIES OF LIQUIDATORS

A Liquidator is a creature of statute whose task it is to put to rest the body of another creature of statute. The statute concerned, namely the Companies Act 1955, does not give any definition of the office but, rather deals in considerable length with the mode of his appointment, his powers and duties.

A company may either be wound up by the Court if any of the circumstances specified in Section 217 of the Companies Act 1955 (the Act) apply or it may be wound up if any of the circumstances specified in Section 268 of the Act apply. The latter type of winding up is known as a voluntary winding up and generally arises through a special resolution that the company be wound up voluntarily or, alternatively, "by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up". In a Court winding up an application on whatever grounds may be applicable, generally an inability to pay its debts, is made by petition to the Supreme Court and the winding up commences from the date upon which the petition is filed if an order is made on that petition. In a voluntary winding up the winding up commences on the date on which the appropriate resolution is passed.

In the case of a voluntary winding up, the company, from the date on which the Resolution is passed, is to cease to carry on its business "except so far as may be required for the beneficial winding up thereof" Section 271. This section provides that the corporate state and powers of the company continue until it is dissolved i.e. the winding up is completed, unless, the winding up is stayed pursuant to the powers of the Court under Section 250 of the Act. Although Section 271 of the Act applies to a voluntary winding up, in the case of a Court winding up the Liquidator's powers to carry on the business of the company are limited to those which "may be necessary for the beneficial winding up thereof" Section 240 (1)(b).
In a Court winding up the Liquidator is an officer of the Court. As such, his masters are the Court and the Minister of Justice (Section 245). As an officer of the Court the Liquidator must act in a "high minded" manner and must deal fairly.

In Re Tyler 1907 1 KB 865 it was held that the rule established some years earlier in Ex Parte James to the effect that a Court of Chancery will not allow its officer, the trustee in bankruptcy, to retain moneys for distribution amongst the creditors, where it would be contrary to fair dealing to do so was not confined to the case of money paid under a mistake of law, but was of general application.

In this case Vaughan Williams L.J. said, "I know it is said that it opens the door dangerously wide when you allow the Court or its officer to order money to be repaid in a case where there is no legal right of recovery; but it must be remembered that ... the discretion must be acted on on judicial principles." This decision has been applied in New Zealand in In Re Horton 1925 NZLR 739.

This principle, the principle of fair dealing, is one essential difference between the position of a Liquidator in a Court winding up and that of a Liquidator in a voluntary winding up.

A Court Appointed Liquidator is not personally liable on his contracts as is the case with a Receiver appointed by the Court. Stead Hazel & Co. v. Cooper [1933] 1 KB 840. Here it was held that the Liquidator was an agent of the Company to act in the interests of the Company whilst a Court Appointed Receiver was to act in the interests of the Debenture Holder.

The position of a Liquidator in a voluntary winding up is somewhat uncertain. This question is of relevance when considering whether or not a Liquidator is liable to suffer
the penalties imposed upon officers of the company by various sections in the Companies Act and whether he is entitled to the relief afforded by Section 468 of the Act pursuant to which the Court is entitled to grant relief in certain cases to officers or auditors of companies.

The editors of Anderson and Dalgleish suggest in their notes to Section 32 of the Act, that is the section dealing with the power of the Court to assess damages against delinquent directors, managers, liquidators or officers of the company, that a liquidator is not entitled to the benefit of the Court's discretion under Section 468 and in support of that contention reference is made to Windsor Steam Coal Co. (1901) Limited [1928] Ch.609 and [1929] 1 Ch. 151. It should be noted that whereas section 32, the penal section, specifically refers to liquidators as well as officers of the company Section 468 merely refers to officers and auditors.

However, in Re X Company Limited [1902] 2 Ch. 92 Parker J. was prepared to hold that a liquidator was an officer of the company and therefore might be liable to penalties for failing to pay stamp duty. The Editor of Buckley also considered that on the strength of that case and on the strength also of the same case cited by the Editors of Anderson and Dalgleish that a Liquidator would be entitled to the benefit of the English equivalent of our Section 468.

The question of whether the Liquidator is an officer of the company and, accordingly, entitled to relief, must remain unsettled.

A succinct general statement of the powers and duties of liquidators is contained in Palmers Company Law Vol. 22nd Ed. 8] - 34. "The Liquidator's principal duties - speaking generally - are to take possession of and protect the assets, to make out the requisite lists of contributors and of creditors, to have disputed cases adjudicated upon,
to realise the assets subject to the control of the committee of inspection (if any) in certain matter, and to apply the proceeds in payment of the company's debts and liabilities, in due course of administration, and, having done that, to divide the surplus amongst the contributories and to adjust their rights."

A recent judicial pronouncement as to the general powers and duties of a liquidator is contained in Lord Diplock's judgment in *Ayerrot v. C. & K. (Construction) Limited* [1975 3 WLR 166] House of Lords Lord Diplock P.20. "Upon the making of a Winding Up Order:

1. The custody and control of all the property and choses in action of the company are transferred from those persons who were entitled under the Memorandum and Articles of Association to manage its affairs on its behalf, to a Liquidator charged with the statutory duty of dealing with the company's assets in accordance with the company's assets in accordance with the statutory scheme. Any disposition of the property of the company otherwise than by the Liquidator is void.

2. The statutory duty of the Liquidator is to collect the assets of the company and apply them in discharge of its liabilities ... 

3. All powers of dealing with the company's assets, ... are exercisable by the Liquidator for the benefit of those persons only who are entitled to share in the proceeds of realization of the assets under the statutory scheme the company itself as a legal person, distinct from its members, can never be entitled to any part of the proceeds ..."

Does the Liquidator have the powers of the Directors prior to liquidation?

In *Farrow's Bank Limited* [92] 2 Ch. 164 Lord Sterndale M.R. stated that the Liquidator, "is put there to do the act which the directors of the company did before their powers ceased: with this restriction, of course, that is all that he does he must have regard to the interests
of the creditors of the company."

In Re Country Traders Distributors Limited [1974] 2 NSWLR 135 Mahoney J. considered whether a Liquidator in a Court winding up had the power to sign a statement required in connection with a takeover offer which was being made for the shares of the company in liquidation. It was argued that the Liquidator's powers were limited to those specified in the Companies Act. His Honour without citing authority for the proposition came to the conclusion that "where a liquidator is appointed by the Court to wind up a company and the statute imposes an obligation ... and having the public purpose which is obvious from the nature of that obligation and that obligation is imposed on the company, then, whatever be otherwise the limits of his power in a particular case, the power of the liquidator extends, in my view, to do whatever is necessary to cause a company to carry out its statutory obligations".

The Liquidator does not have, in administering the 'statutory scheme' any powers other than those specifically conferred upon him by the Companies Act with, perhaps, the duty to ensure that after liquidation, the company carries out its statutory obligations.

Except to the extent that the liquidator enjoys the powers of the directors in carrying on the business of the company to the extent that it may be necessary to do so for the beneficial winding up of the company and except also to the extent that Section 240 (2)(h) which empowers the Liquidator "to do all such other things as may be necessary for winding up the affairs of the company" extends the statutory powers it is suggested that Lord Sterndale's statement is not sustainable. Mahoney J. although citing the statement appears to have placed little reliance on it.

In considering the power of the liquidator to carry on business the attitude of the Courts, over the years has been consistent.
In Re Wreck Recovery and Salvage Company 15 Ch. D 353 Jessel M.R. stated that "necessary meant more than beneficial. The business must be continued for the purposes of its winding up and not its continuance. Here the liquidator was seeking to continue the business of the company in an attempt to resuscitate it. However, His Honour expressly did not limit the power of the liquidator to carry on the business of the company with a view to its sale as a going concern. In the same case Thesiger L. J. said, "We are not to take 'necessary' as importing an absolutely compelling force, but what might be called a mercantile necessity, something which would be highly expedient under all the circumstances of the case for the beneficial winding up."

In Re Great Eastern Electric Co. Ltd [1941] Ch. 241 in a Members Voluntary Liquidation the Liquidator traded with such lack of success that he was unable to pay his own creditors. However his problems arose in part from the outbreak of the Second World War which he had not forseen. The Liquidator's decision to carry on the business was only "vaguely challenged". It was held that no objective standard could be set up after the event to test the liquidator's decision. It was sufficient if the liquidator bona fide and reasonably formed the opinion that the carrying on of the business was necessary for the beneficial winding up of the company. This was necessary for the beneficial winding up of the company. This case marks the high water mark of the liquidator's powers. It is probably relevant that this was a Members Voluntary winding up.

In Willis v Association of Universities of the British Commonwealth [1965] 1 QB 140 (CA) there is some qualification placed on the freedom of the liquidator. Salmon L.J. endorsed, the suggestion that "the only legitimate benefit that carrying on a business can confer upon a winding up is a financial benefit; ie. unless the carrying on of the business is requisite in order to collect a debt or realise an asset, it is prohibited."
It should be noted that before the liquidator carries on the business of the company he must obtain the sanction of either the Court or Committee of Inspection in the case of the Court winding up but that he may exercise that power without any sanction in the case of a voluntary winding up. In a winding up by the Court see Rule J52 Companies (Winding Up) Rules J956.

Costs incurred by the liquidator in carrying on the business of the company are costs of the liquidation and should be paid ahead of preliquidation creditors. Accordingly, where a liquidator retains possession of leasehold premises, "for the purpose of carrying on the business so as to gain benefit for the estate"

The rent accruing after the commencement of the liquidation will be a cost in the liquidation. As Lindley L.J. said in Oaks Pit Colliery Case (1882) 21 Ch. D322:

"... as to rent accruing after the commencement of the winding up. If the liquidator has retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the Landlord will be allowed to distrain for rent which has become due since the winding up ... but if he has kept possession by arrangement with the Landlord and for his own benefit as well for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the Landlord is not allowed to distrain." The situation will often arise where a company in liquidation has leasehold premises, alas they are not often owners, and the liquidator requires possession of the premises in order to dispose of the stock and plant. In such circumstances, the liquidator should immediately contact the landlord with a view to making the best bargain he can bearing in mind, of course, the power of the liquidator to disclaim the lease when he has no further use for the premises. If the liquidator does enter into possession of the premises then it is important that he terminates his liability for rent by some overt act either by disclaimer or by yielding up possession to the lessor.
In Re Levy and Co. Limited (1919) 1 Ch. 416 it was held that when a liquidator retained possession of premises leased to a company which was being wound up, either voluntarily or compulsorily, he could only do so on the terms of the lease. He was bound, out of the assets he got in, to pay the full rent to the lessor and, also the full sum required to comply with any repairing covenants in the lease.

The question of the liability of the liquidator most often falls to be determined when he has either omitted to pay a claim which ought to have been paid or has met a liability of the company which was not in fact due. There has been disagreement over the years as to the basis of and nature of the liquidator's liability. The cases are explicable upon the basis that the Liquidator has statutory duty to distribute the assets of the company to creditors in accordance with their entitlement. This, of course, he does not do by omitting a creditor or by paying a creditor he ought not to have paid. However, the Court's have applied a gentler test when determining the extent of the duty of the liquidator otherwise i.e. in the administration of the affairs of the company.

In Knowles v. Scott [1891] 1 Ch. 717 Romer J. held that a voluntary liquidator was not strictly speaking a trustee either for the creditors of the contributories of a company in liquidation. He was an agent of the company. Accordingly in the absence of fraud, mala fides, or personal misconduct, an action for damages would not lie against a liquidator at the suit of either a contributory or creditor for delay in paying the creditor's debt or handing over to the contributory his proportion of the surplus assets of the company. Romer J. suggested that a liquidator could not be, as an agent, sued by a third party for negligence apart from misfeasance or personal misconduct.
This case and the standards which it sets have been criticised by Gore-Browne on the Companies Act 43rd edition 32/7 where it is suggested that the case overlooked the fact that the person injured by a failure to perform duties imposed by a statute may recover damages for the default. However, the case was cited with approval by the House of Lords in Averrot v. C. & K. Construction Limited (1975) 3 WLR 16.

The lenient cases continue with Competitive Insurance Co. Limited v. Davis Investments Limited and Another 1975 1WLR 1240 where a liquidator was held not liable for failure to recognise the existence of "an alleged constructive trust". The head note to this case states "a liquidator's bona fide failure to enquire or realise there might be trust, coupled with his own admitted honesty and good faith in selling "the trust property) could not involve him in any personal liability."

In Leon v. York - O - Matic Limited 1966 3 All ER 277 which supported Knowles v. Scott, the Court held that it would interfere with the sale by a liquidator only if it was shown that a liquidator was acting in a manner no reasonable Liquidator could act. This case was followed by Street C.J. in Re Minerals Securities Australia Limited 1973 2NSW Rep 207 where His Honour categorised the position as "ultimately every challenge must come back to some more broadly stated question, such as whether the liquidator's action has such importance, and can be seen to have such defects, as to justify the Court in exercising its discretion.

If however, these cases can be said to support the reasonable man test then the cases dealing with the question of admission of proofs cannot. These cases, often expressly distinguishing Knowles v. Scott, have imposed a very strict standard on the liquidator and one which indicates that, unlike the directors of the company, (In Re Claridges Patent Asphalte Co. Limited 1921 1 Ch 543) the liquidator cannot "hide"behind the advice of his solicitors. If it is correct that there is an
increasing reluctance on the part of liquidators to have disputes determined by the Courts because of the delays arising and the effect that this has on the value of the money to be distributed, it is suggested that consideration should be given to the standards which have been set by the Courts over the years in the following cases.

In Re Windor Steam Coal Co. 1929 1 Ch. 151, which was the case previously cited as supporting and opposing the view that a liquidator was an officer of the company and entitled to the benefit of the Court's discretion under Section 468, a claim for damages for a breach of contract was settled at £15,000 by the liquidator after consulting the solicitors for a large shareholder of the company. The liquidator wrote asking the Solicitors, "I should like to have your views firstly as to whether the selling agents have a claim at all and secondly, as to how that claim should be assessed." The reply, in part, was "there is no doubt that the selling agents have a claim in the winding up of the company in respect of the cancellation of their agreement." The Court held that this advice, in the event, was incorrect. The Liquidator claimed that he was a trustee and entitled to the benefit of an indemnity under the appropriate section of the United Kingdom Trustee Act.

Lord Hanworth MR commenced promisingly with the statement "now it is quite true that the Court ought to be very tender with persons who are placed in the difficult position of directors or liquidators and should not judge their conduct in the light of subsequent events". He then quoted with approval Romer J's dicta in the City Equitable case dealing with the liabilities of Directors. However His Honour held that "a Liquidator is a person who is charged with a number of statutory duties under the Companies Act. At the same time, those acts afford him the opportunity of going to the Court to obtain protection in any difficult circumstances in which he may be placed." Accordingly, the Liquidator was held to be personally liable for having made the settlement.
In the same case Lawrence L. J. stated "in the present case the payment was one made by a trustee on the assumption that he was a trustee to a person who was not his cestui que trust although in the belief that the payee was a cestui que trust. In these circumstances, even if the appellant had taken the best possible advice and had made the payment acting on such advice, I am of the opinion that that would not have been sufficient to excuse him, regard being had to the fact that he was a trustee employed because of his professional skill and paid for his services in performing his duties". In these case Knowles v. Scott was cited in argument but not referred to in the judgments.

In Re Home and Colonial Insurance Co. Limited 1931 Ch. 102 without legal advice the liquidator wrongly admitted a proof. It was claimed that the liquidator was personally liable in that (a) it was a breach of statutory duty to pay the creditors equally or, alternatively, (b) the liquidator had been negligent in not getting legal advice and court approval. In this case Maughan J. considered that Windsor Steam Coal case had been a case where negligence was found but in this case it was held that there had been no negligence. Once again His Honour started promisingly by stating "I do not therefore accept the view that the liquidator in the matter of admitting proofs is practically in the same position as an insurer so that, in any event, and under all circumstances he is liable if a debt is subsequently shown to have been wrongly admitted." His Honour referred to the fact that the liquidator was getting paid and was able to seek directions of the Court as being relevant in determining the extent of the liquidator's liability. He concluded by stating "I have come to the conclusion that having regard to the magnitude of the claim ... it was the duty of the liquidator to investigate the validity of the proof ... " The claim related to a policy of marine insurance. His Honour went on to state "(the liquidator) chose to navigate in these narrow seas, to him unaccustomed and unknown without either chart or pilot; and for this temerarious conduct he must bear the responsibility."
In *Windsor Steam Coal Co.* the liquidator had acted on the advice of a Solicitor. So also had the liquidator in the case of *Austin Securities Limited v Northgate and English Stores Limited* 1969 1WLR 529 in which Edmund Davies L.J. held that a Liquidator could not shield himself behind the mistake of his Solicitors. In this case, a claim had been commenced against the company in liquidation in February 1966. The Solicitor acting for the Plaintiff fell ill and later died. No action was taken on the claim until May 1968 and during the intervening period the assets of the company had been distributed by a liquidator. The company had on its file an account from its Solicitor which indicated that the claim was not being perused. Denning L.J. as he then was, stated "it is the duty of a liquidator to enquire into all claims, to see whether they are well founded or not, to pay good claims, to reject the bad, to settle the doubtful, or, if need be, to contest them." Turning then to consider the duty of a liquidator to call for proofs of debt His Honour relied on *Pulsford v. Devenish*.

*Pulsford v. Devenish* 1903 2CH 625 is the case most commonly cited in those decisions which cast doubt on the correctness of *Knowles v. Scott*. In this case the Liquidator was held personally liable for failing to pay the creditor who did not file a proof of debt. The Liquidator advertised for proofs of debt in six London newspapers and did nothing else. The decision of Farwell J. was no doubt coloured by the fact that it was a members voluntary liquidation and all the assets had been sold to another company and, in terms of the Agreement for Sale, the purchasing company had covenanted to pay the debts of the Vendor. In the event the purchasing company failed to pay the particular debt. Farwell J. cast doubts upon the correctness of *Knowles v. Scott* and His Honour when considering the duty of the liquidator to pay debts stated "it is an absolute statutory duty without limit in point of time ... it is not necessary to resort to trusteeship or equitable doctrines." The
difficulty facing the Court in this case was that the company had been dissolved i.e. had ceased to exist as a legal entity. However, because the liquidator had been in breach of a statutory duty the fact that the company had been dissolved did not bar a creditor, disadvantaged by failure of the statutory duty, from claiming. This decision has been applied in New Zealand, see Brown v. Cowan 1912 31 NZLR 1219.

Pulsford v. Devenish was followed in James Smith & Sons (Norwood) Limited v. Goodman 1936 1 Ch. 216 where Lord Hanworth M.R. stated "the cases that we have looked at show that if a creditor has been injured by the failure of the liquidator to take the steps that he ought to have taken, and has suffered damage he can 'succeed in an action on the case', as Farwell J. put it in (Pulsford v. Devenish) in establishing a liability against the liquidator." In this case the company had been dissolved and the Court held that in order to establish a liability on the part of the liquidator it was unnecessary to declare that dissolution was void.

Rule 85 of the Companies (Winding Up) Rules 1956 provides that the Liquidator may fix a time within which debts must be proved. In re Armstrong Witworth's Securities Co. Limited 1947 1 Ch. 673 the Liquidator relied on the English equivalent of this rule to exclude himself from liability for not having paid certain creditors of the company who had failed to prove. In this case the company had been its own insurer in respect of its liability under Workmen's Compensation Acts. Complete records of accidents had been kept by the company and these records were comprised in some 16 - 17,000 individual folders. It was held by the Court that the liquidator "must be deemed to have known of the existence and general nature of the information contained in the 16,000 or 17,000 individual folders comprised in the company's accident records ...". Jenkins L.J. went on "in such circumstances, it seems to me that his duty as liquidator was to take all steps reasonably open to him on the information in his possession to ascertain whether any of the former employees concerned did make any such claim."
The obvious step open to the deceased liquidator on the information in his possession was to send a notice to each such employee at the address shown in the folder relating to his case, informing him of the liquidation and asking him whether he made any claim. I decline to accept the suggestion that the number of cases involved rendered this course impracticable."

The liquidator cannot rest behind a direction of his Committee of Inspection. In _Ex P. Brown_ 1886 17 QBE 188 the Trustee in Bankruptcy had been directed by a Committee of Inspection to reject a proof. The proof was lodged in respect of a judgment which was defective. It was held per Bowen L.J. that the Committee's Act in rejecting the proof was "monstrous". Accordingly, the trustee was ordered to pay the cost of the action having taken an utterly frivolous point". Fry L.J. went on to state the duty of the trustee "was to look into the merits of the claim. Instead of doing that he has thought fit to raise a technical objection in order to shut the claimants entirely. In so doing I think he has been guilty of misconduct which it is competent to the Court to visit by making him pay costs personally." Lord Esher M.R. stated that the liquidator would not be relieved from responsibility because he had been acting "merely because a stupid committee of inspection" had directed a certain course of action.

In many ways the liquidator cannot win. If in carrying out his statutory duties he makes a mistake he may well be personally liable notwithstanding the fact that he may have received advice thereon from his Solicitors. The only insurance policy available to a liquidator, a liquidator in a Court winding up or voluntary winding up is to seek directions from the Court.

The liquidator at his peril pays a debt of the company which is not properly payable. However, should he fail to meet payment of a debt which could be payable but to which he takes some frivolous objection he may be personally liable in respect of costs in the action.
He cannot shield himself behind a protection of the Winding Up Rules in calling for proofs of debts. He must consider, in the light of all the information available from the records of the company, the areas from which claims may come and must seek out creditors. However, in making decisions in connection with the disposition of the company's assets, the carrying on of the company's business the liquidator will be looked on by the Court tolerantly. His decisions will be upset only if he has not obtained the proper sanctions e.g. from the Court if applicable or Committee of Inspection or members of the company and if he has acted in a manner in which no reasonable person could have acted.

The breach of a statutory duty will render the liquidator liable even after the dissolution of the company and there will be no assets against which he may claim an indemnity. It is not open for liquidators in fulfilling their statutory duties to take what they may regard as a reasonable commercial approach. Whatever may be the inconvenience the cost and the time involved they must ensure that they pay no creditor who should not be paid and pay any creditor who should have been paid. In fulfilling these duties the Liquidator must not take 'technical objections' to the claims of creditors and the liquidator in a winding up by the Court must act in a 'high-minded' manner not taking unconscionable legal points.

The magnitude of the liquidator's problem is highlighted by the recent decision of British Eagle International Airlines Limited v. Compagnie Nationale Air France 1975 2 All E.R. 390 where the House of Lords by a majority of three to two reversed both the Court of Appeal and the original judgment. This case related to the Clearing House arrangements entered into by I.A.T.A. It was held that the Court may refuse to give effect to provisions of a contract which achieved a distribution of an insolvent's property which ran counter to the principles of insolvency legislation. The dominant purpose to evade the operation of such legislation is not required to enforce this new doctrine.
With respect to the majority it is suggested that the judgment of Lord Morris which, of course, upheld the trial judge and the Court of Appeal is more soundly based.

Lord Morris must be correct when he states, "It is a general rule that a trustee or liquidator takes no better title to property than that which was possessed by a bankrupt or a company. In my view the Liquidator in the present case cannot remould contracts which were validly made."

Lord Simon in support said, "Since this was a bona fide commercial transaction, and not a 'deliberate device' to give a preference on liquidation ... the liquidator has no higher claim than the company had before liquidation."

If this new doctrine, that is striking down commercial transactions, bona fide in all respects, but which have the effect of benefitting one creditor at the expense of others other than by taking security which is registered, is adopted in New Zealand the task of liquidators and their advisors will become very much harder.

Palmer's Company Precedents 7th Ed. Part 11 page 184 puts it thus: "The Liquidator should for his own protection, apply to the Court in every case of doubt, and should do so where large sums are involved, even if his advisors express no doubt upon the matter".

In conclusion I would like to suggest that in the light of increasingly complex legal situations facing liquidators, and one has merely to look at the Securitibank liquidation as an example, the standards imposed by the Court have been unreasonably high. The Courts have not recognised the need for the costs of the liquidation to be minimized or the desirability of a prompt distribution to creditors. It would be a rash man who placed reliance on these worthy aims. Rather the liquidator should if there is any doubt seek the guidance of the Court. Failure to do so in a proper case may render the liquidator liable. On the
other hand the liquidator should not take frivolous points of law. Where the boundaries are to be drawn is uncertain. What can be stated is that acting reasonably and bona fide is not enough if the liquidator has failed in his statutory duty.
LIQUIDATORS

Some Polite Observations on the Commercial Affairs Division of the Justice Department

D.F. DUGDALE

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SOME POLITE OBSERVATIONS ON THE COMMERCIAL AFFAIRS DIVISION OF THE JUSTICE DEPARTMENT

In an interim report presented by the Macarthur Committee to the then Minister of Justice in August 1971 an examination was made of the administration and policing of the Companies Act. The Committee recommended the establishment of an enlarged and strengthened Companies Office divorced from the Lands and Deeds Division, such office to have control of the functions then performed by official assignees and in addition to perform a positive role in the policing of the provisions of the Act.

These proposals were generally welcomed (by myself among others - see (1972) 7 Recent Law 190) and were accepted by the government of the day which approved the establishment within the Justice Department of a Commercial Affairs Division. The Companies Amendment Act 1973 formally charged the Registrar of Companies with responsibility for the administration of the Companies Act. In his report for the year ending 31 March 1974 (page 23) the Secretary of Justice was able to report substantial progress in establishing the new division. It is not too soon, I suggest, to take a look at the division and try and come to a conclusion as to whether or not the experiment proposed by the Macarthur Committee has succeeded.

I propose to consider the operation of the division under three heads; first in relation to registration and the filing of documents generally, secondly the functions of official assignees and thirdly the general supervisory and investigatory functions of the division.

As to registration and filing there must first be acknowledged one success. The effect of the provision of penalties for late filing contained in the 1973 report coupled with the more vigorous enforcement steps taken by the division has been entirely beneficial. Where by statute limitation of liability is conferred in return for certain obligations as to disclosure, no one can seriously quarrel at positive steps being taken to enforce those obligations. In his 1975 report (page 5) the Secretary for Justice describes the effect of the new provisions as "dramatic". This adjective is entirely justified.
But with this exception the service provided in relation to registration and filing is, I regret to say, no better, and in some respects rather worse than under the former regime. The topic is a tedious one, and I will confine myself to citing by way of example two instances only. There was a time when if the exigencies of the case required it one could obtain approval of a company name by reply paid telegram. This is no longer permitted; and while it may be that the new requirement of the completion of the two forms and the payment of a fee in some way adds to the sum of human happiness, it is a little difficult to see just how this can be so.

Secondly, salutary though the crackdown on late filing has undoubtedly been, it is also possible to discern the emergence of pettifogging attitudes. Consider the requirement under S.102 of registration of particulars of a mortgage granted by a company and registered under the Land Transfer Act. It is clear law that failure to register such particulars does not affect the validity of the mortgage. Under S.108 an order can be made by the Supreme Court extending the time for filing. Now no one can quarrel with the refusal of a district registrar to accept for registration out of time without a S.108 order the copy of an instrument, the validity of which is affected by the late filing. Nor in the case of particulars of Land Transfer mortgages can one quarrel with the imposition of a penalty for late filing. But for a district registrar to insist on a S.108 order before accepting for filing particulars of a Land Transfer mortgage is simply absurd. It wastes the time of the Supreme Court. It casts an unnecessary expense on the practitioner whose carelessness has brought about the situation. Silliest of all, it postpones the time when those searching the file of the company in question are made aware of the existence of the charge, and to that extent defeats the whole purpose of the exercise.

Enough of that. A far more serious failure of the division is in relation to the functions of the official assignees. It would be paltering with the truth to describe the administration of bankrupt estates and the winding up of companies of which the official assignee is appointed liquidator as other than disgracefully inadequate.

This worried the Macarthur Committee, which reported the statement of the Secretary for Justice "that lack of skilled staff and an almost
intolerable caseload have resulted in somewhat superficial examina-
tions of the affairs of companies and bankrupts alike. There is
little investigation in depth for possible frauds and offences."

At that time there were full-time official assignees in Auckland,
Hamilton, Wellington and Christchurch, with the position of official
assignee in other centres being filled by court registrars. It may
be that outside the centres named some improvement has resulted from
the concentration of work in the district offices of the Division.
But I defy anyone seriously to assert that in Auckland at least there
has been any improvement on the superficial examination and the lack
of in-depth investigation that existed under the old regime.

This perhaps sounds like an attack on the Auckland officers of the
division. It is not meant as such. Undoubtedly the economic miracle
has imposed its stresses, and successive annual reports by the
Secretary for Justice make clear the difficulties the division has
had in attracting sufficient suitably qualified staff to do this
work.

To my mind the establishment of an adequately functioning official
assignees office is far more important than, for example, soothing
the outraged cries of investors whose fingers have been burnt in one
or other of the more spectacular company crashes of recent years.
The official assignees must be given the staff to enable a proper
probing of the affairs of bankrupts and of liquidated companies.
The certainty that on bankruptcy or liquidation such a thorough
investigation will in every case be carried out would do far more to
improve commercial morality in New Zealand than any of the other
measures proposed or enacted in recent years. It must be remembered
that New Zealand is a country in which small businesses abound. In
the circles in which small traders move, the sort of thing that is
noted is that following the bankruptcy of Mr Bun the baker, or the
liquidation of Bun's Bakeries Limited, Mr Bun seems to suffer no
alteration in his life-style, Mrs Bun seems mysteriously to have
acquired title to all the available assets, and no one does anything
about it. It is futile to have, as we do in the Insolvency Act and
the Companies Act, elaborate rules to enable justice to be done in
these circumstances if in most cases official assignees cannot or will
not set the machinery moving.
I have suggested that some of the trouble may result from the inadequate manning of the division. This is simply an impression from the outside looking in, and the malaise may have other causes. But there seems good reason to suggest that such resources as do exist have not always been wisely deployed. Following the collapse of the Circuit Group the Registrar of Companies caused the officers of the various companies of the group to be prosecuted for a large number of technical offences relating to the omission to file documents in the Companies Office. This sort of straining at gnats is just childish; one would have thought that in all the bankrupt estates and liquidations being administered by official assignees in New Zealand there were matters crying out for attention far more loudly.

The detection of offences is the less important aspect of the matter. What is essential is that proper steps should be taken to recover all monies that should be available for distribution among creditors. Simple justice requires nothing less. Unless the official assignee has the facilities and the will to probe beneath the surface of the situation presented to him by the bankrupt or by the directors of the liquidated company, to turn over a few stones and see what wriggles beneath, then justice is simply not being done to creditors. And the plain fact is that precious little probing is at present done by official assignees.

Summing up then, one is left I fear with this conclusion. The establishment of the Commercial Affairs Division with the one exception of the strikingly increased compliance by companies in relation to their disclosure obligations has not led to any improvement in the service provided to the public in relation to registration and filing, and in some respects the service has worsened. The improvement in the performance of their functions by official assignees, which the Macarthur Committee regarded as so important, has not taken place. In relation to both the filing and official assignee functions there are clear signs of obsession with petty technicalities getting in the way of the performance of obligations of far greater substance. In relation to general matters there has been a deal of sound and fury but little solid achievement. No one can be criticised for trying the experiment of a commercial affairs division. It seemed like a good idea. But there is no use proceeding on a trial and error basis if you are not prepared to recognise
errors when they occur. I submit with confidence that it is now perfectly plain that the establishment of a commercial affairs division was a disastrous mistake.

What is to be done? There is a clear case for dismemberment. The registration and filing function should be restored to the Lands and Deeds Division where it logically belongs. The official assignee function, which is to my mind the most important of the activities of the present division, requires special treatment. It has always seemed to me that the logical solution to the problem is to combine the functions of the official assignee with those of that well-known corporation sole, the Public Trustee. There is a clear analogy between the administration of deceased estates and the winding up of the affairs of bankrupts and liquidated companies. The Public Trustee has an extensive system of offices throughout New Zealand. He does not seem to have the same difficulties in attracting qualified staff as does the present Commercial Affairs Division. He is always advertising for more work. I am aware that the Public Trustee is content with his present empire and has resisted suggestions of this sort in the past. But he must do as he is told.

For the rest, the preparation of new legislation will be more efficiently performed by the Law Reform Division of the department. The Commission now proposed in the transmogrified Securities Advertising Bill will no doubt play the required supervisory role. Of the functions of the present Commercial Affairs Division this leaves only the function of making speeches about white collar crime. But perhaps if we all try really hard we can manage to get along without those.

D.F. Dugdale
PAPER 6

LIQUIDATORS

Practical Aspects of Company Liquidations

K.S. CRAWSHAW

Creditmen Duns; Liquidator of Securitibank
The duties, obligations and responsibilities of liquidators in all types of liquidation are fully set out in the Companies Act 1955 as are those regarding Receivers although to a somewhat lesser degree. I have no doubt that you have studied in detail and are fully conversant with the Companies Act 1955, and I don't intend, unless it is necessary, to refer to the Act in any great detail. Although a student may achieve considerable success as far as examination marks are concerned there is no doubt a considerable difference between passing an examination and being asked for the first time to act as Liquidator as distinct from having to answer an examination question on a subject. As with so many things these days, the job of acting as Liquidator is the job of a specialist and it is surprising the number of chartered accountants who have not had the necessary experience for this type of work. I do not say this disparagingly but it is a fact that with the ever increasing complexity of their ordinary accounting duties there is just not sufficient time for many practitioners to cover all aspects of their profession.

What are the causes of liquidations? In my experience they can be classified under three headings:

1. Mismanagement
2. The system
3. Lack of capital.

Perhaps in communist countries there are no liquidations or business failures so that their existence could be held to be a reflection on democracy as a system but what is the alternative? We have a good system here where everyone has equal opportunity and where many successful businesses have grown from very small beginnings. There are bound to be some failures and although the amount involved in losses to creditors is quite considerable, it is comparatively small in relation to the overall situation and I suppose is a comparatively small price to pay for the way of life we enjoy. I can't say that
I am completely in favour of the action that has been taken by the Government in recent years in propping up some large companies which have suffered financial crises. Although in these cases a large amount of money and a large number of people were involved both as creditors, shareholders and employees I can really see no difference between those companies and the situation of the private company which fails and has no support from the government. Because virtually anyone can set up business in New Zealand in many cases without the necessary qualifications and experience, it follows that there must be some failures. The Year Book, under the heading "Bankruptcy", states and I quote "personal extravagance or business incompetence are probably much more important factors (than the type of activity in which the bankrupt was engaged) in the majority of cases". This comment probably applies equally to liquidations. When I mention "the system" as a cause of failures I mean not only that the chief shareholder in the Company is responsible, but also those with whom he deals who on many occasions have assisted the Company on the road to liquidation by the unwise extension of credit. I think most firms have learnt the lesson by now that increased turnover does not necessarily mean increased profits and that no sale is complete until it is paid for. We have had experience of an individual's company going into liquidation, of a second company being formed and of that failing as well with the same firms appearing as creditors in both companies. They have of course only themselves to blame. The third cause, lack of capital, is perhaps the least important. As I mentioned previously many firms which commenced as back-yard operations are to-day among the leaders of their particular field and providing the proprietor of the company, because after all a company is only as good as those who run it, has the necessary ability and drive to make a success of his activity a lack of capital is really no great bar. However on occasions firms have become involved far in excess of their capital resources and because of any one of a number of factors, some of which are beyond their control, have been unable to meet creditors and have ultimately failed. Let us accept the fact then that there are going to be liquidations and according to the circumstances when the time comes a company or its creditors must decide what action to take.
To fully understand a liquidation it is necessary to understand in general terms what a company is. It must be realised that a company is a separate legal entity entirely distinct from its shareholders. Almost all companies in New Zealand are limited liability companies which means that a shareholder is liable to contribute to company funds only the amount of his share capital. This is important when dealing with a company because although the shareholder may be a man of considerable means in his own personal right, the company may have a very small and sometimes totally inadequate capital to which creditors can look in the event of a failure of the company.

It is pleasing to note that one of the recommendations of the MacArthur Committee on the Companies Act was that there should be a minimum capital for all companies of $3,000. In my own opinion this is still too low and there should be a minimum of at least $5,000. By far the majority of liquidations are private companies and in many cases creditors find it difficult to understand why the shareholder remains in possession of such things as his house, his car, his boat, etc., which, of course, are personal assets, while creditors of the company remain unpaid.

There are four types of liquidation:

1. A winding up subject to the supervision of the Court, which is a form of voluntary winding up on which certain restrictions have been placed at the request of the shareholders or creditors on the liquidator. This type of liquidation is seldom encountered.

2. Members voluntary winding up. In this case the members decide to wind the company up voluntarily and file a Declaration of Solvency which states that according to the best information available to members at the time the company is able to pay all its accounts in full within a period of up to 12 months from the winding up. If, for example, a company had been formed for the purpose of building the harbour bridge and this was completed successfully the Company could wind up by a members' voluntary winding up. If the debts are not paid within the prescribed time, the liquidator must call a meeting of the creditors of the company to decide whether or not it should be wound up by the Court.
This type of liquidation too is comparatively unusual.

3. A creditors' voluntary winding up. My experience has been mainly with this type of liquidation which is the most common one and which inevitably results from the unsatisfactory financial situation of the company. The members, that is the shareholders, realise that because of its inability to pay its debts the Company should be wound up and take the necessary action to put this into effect. I shall mention more of this later. It should be remembered that liquidation to all intents and purposes represents the end of the Company. The liquidator has not the power to continue trading in an attempt to rehabilitate the Company but is there to realise the assets and distribute the proceeds to those entitled to them. After that is completed the Company is ultimately struck off.

4. A winding up by Order of the Court. In this case the most common procedure is for the creditors or members of the Company to petition the Court for the winding up of the Company. Section 217 sets out other circumstances which may result in this type of liquidation. The result is similar to that of a creditors' voluntary winding up, the liquidator in this case being an officer of the Court and subject to certain requirements of the Court; the end result is however the same.

The types of liquidation mentioned under the last two headings are the most common.

Apart from certain statutory obligations particularly regarding the audit of the liquidator's accounts the procedure under a creditors' voluntary winding up and a winding up by Order of the Court are more or less the same and I do not intend to comment in detail on the action necessary in both types of liquidation but my comments will be aimed more towards the procedures and the forms used in a creditors' voluntary winding up. The provision regarding liquidations generally are set out in Part VI in the Companies Act.

Let us assume that you as a practising accountant are asked for the first time to act as liquidator in the winding up of a
private company. First I think it is necessary for you to consider two points:—

1. Can I act as liquidator?
2. What are my powers as liquidator?

As far as the first question is concerned, virtually anybody other than a corporate body can be liquidator of a company (s. 323) but obviously a liquidator should be a responsible person with the necessary experience to carry out the job satisfactorily and in my experience creditors are not particularly happy if a shareholder of the Company, if the secretary of the Company or the Company's Accountant or Solicitor or someone directly concerned with the Company is appointed liquidator. As far as the powers and duties of the liquidator are concerned I would refer you to sections 238, 240 and 294 of the Companies Act which set these out in detail and which in summarised form are "to take into his custody all the property and things in action to which the company is or appears to be entitled and to do all such things as may be necessary for winding the affairs of the company and distributing its assets". That statement is very broad, obviously, and the liquidator must be familiar with the requirements of the Companies Act and any other Acts, in particular the Income Tax Legislation and the Acts relating to Sales Tax which set out certain preferential payments etc. of which I shall mention more later.

You have decided then that you will take on the job as liquidator and you are faced across your desk with a distressed shareholder clutching a bundle of papers which in many cases constitute the financial records of a private company and seeking your advice. What are the first steps to take? The winding up can be effected in two ways, first by the Procedure under s. 284 which requires that the Company shall cause a meeting of the creditors of the Company to be summoned on the day or the day next following the day on which there is to be held a meeting at which the resolution for voluntary winding up is to be proposed. This is a rather cumbersome procedure and in my opinion the liquidation is far better effected by the second method which is to pass the necessary resolution by entry in the Minute Book of the Company, as permitted under s. 362 of the Companies Act.
This is very simple and is completed by the resolution being signed by at least 75% of the shareholders in number and in value.

As we are dealing with private companies the shareholders in most cases, number not more than three or four, and we always find it better to have the resolution signed by all shareholders. It should be remembered that the Company you are dealing with is, to put it mildly, in a mess and assuming there is no alternative to liquidation the sooner it is commenced the better. Rather than say to the shareholder "go and have prepared a resolution to wind the company up" we always find it much better to prepare the resolution there and then, give it to the shareholder and ask him to return it signed but undated as soon as possible. It is better in my opinion for the proposed liquidator to virtually take over the administration of the Company's affairs as from the time the resolution is signed because he can then satisfy himself that the requirements of the Act as to advertising etc. as detailed in s. 362 (8), and in s. 284 of the Act are complied with. I mentioned leaving the resolution undated. The purpose of this is simply to ensure that the provisions of the Act under the sections previously mentioned are complied with, these requiring a meeting of the creditors to be called not later than the 10th day after the day that the resolution is passed and for 7 days notice to be given to the creditors of the meeting and for the meeting to be advertised in two local papers and also in the Government Gazette (s. 284). It is sometimes necessary to do a bit of juggling to ensure that the notices are dated so that the last day for the meeting does not fall on a weekend etc. Having decided upon the date of the meeting and arranged the necessary advertising it is now necessary for a statement of affairs together with a list of creditors of the Company as at the date of the resolution to be prepared for presentation at the meeting. Once again we have found that it is better for the proposed liquidator to assist in the preparation of this information rather than to leave it to the Company. The form of the statement to be presented in a creditors' voluntary winding up is not set out in the Act but should, in my opinion, be as simple as possible. Form 21 in the Companies Winding Up Rules which with its lists and schedules must be prepared when a Company is wound up by the Court is, in my opinion, too
complicated and confusing for presentation to a meeting which will be attended in many cases by sub-contractors, small businessmen and the like who have little knowledge of interpretation of a detailed financial statement. It is better in my opinion to make it as simple as possible and for it to show as clearly as possible the estimated ultimate result for creditors. That is what they are interested in and that is what they want to know. It is sufficient to show a list of the assets with their realisable values from which total is deducted the costs of the liquidation and the liquidator, the preferred creditors, the secured creditors and which should finish with an estimated amount available for unsecured creditors. It should also be pointed out on the statement that the figures in the statement have been prepared from information available at the time (it will be remembered that you have had only 10 days to prepare it) and that it has not been possible to confirm the accuracy of either the value of the assets or the total of the liabilities. It is always prudent we have found to add a contingency to the total of unsecured creditors as these always increase from the figure given by the Company. A Deficiency Account is seldom prepared. What is its value? It is historical only and of interest to and probably only understood by the professional people present at the meeting.

As far as the procedure at the meeting is concerned, you will note that s. 284 (3) requires that the Directors shall appoint one of their number to preside at the said meeting. As can well be imagined this is not a happy experience for the average shareholder who considers in many cases that the experience he is about to undergo would be just about the worst thing that could happen to anyone. A sympathetic liquidator can help in many ways by attempting to put the proposed chairman at his ease and by assisting him in every way possible. In most cases we provide the chairman with a short summary of what it is suggested he says to the meeting. This simply states that the meeting has been called as required by the Companies Act, that notice was sent to all known creditors and that a statement of the affairs of the Company and a list of creditors is presented for the information of creditors present. If the statement has been prepared in conjunction with the proposed liquidator it is better in my opinion, for the liquidator to comment on the
statement, as briefly as possible, for the benefit of those present. He can detail any particular circumstances regarding the assets and their estimated realisable values, he can point out that the statement contains a number of estimates, he can stress the point that such matters as final P.A.Y.E. reconciliation has not been completed, final insurance claims have not been settled, etc., etc. We have found in our experience that it is better to comment on the pertinent points as briefly as possible rather than to go into long explanations regarding matters which in many cases at this stage, are only conjecture. After the statement has been commented upon opportunity should be given for those present to ask any questions they may have either of the chairman or the proposed liquidator or any other company representative present. Once again the proposed liquidator can assist considerably at this stage by answering any questions that may be asked of him and by, on occasions, answering for the chairman when perhaps questions of a personal nature which are really no concern of the meeting are asked. We always suggest to the chairman when answering questions that he attempts to answer them honestly, fairly but briefly. After the statement has been received and discussed there are two matters remaining as far as the meeting is concerned. One is the confirmation of the liquidator. It will be noted that the original resolution nominated a certain person as liquidator. The creditors have the power either to confirm this nomination or to appoint someone else. In most cases the Company's appointee is confirmed as liquidator (see s. 285). It should also be noted at this stage that s. 362 (9) provides that the Company may appoint the Official Assignee to be provisional liquidator until he or some other person becomes liquidator. In practice this is seldom done, reasons being that the Official Assignee in Auckland over the last few years has indicated that he is unable to accept the position of liquidator in a creditors' voluntary winding up and it has also been felt that in the ten days between the passing of the resolution and the calling of the meeting, the Official Assignee if appointed provisional liquidator could accomplish little and that it is better for the independent party nominated as liquidator by the Company to assume the role as provisional liquidator by safeguarding the assets of the company during
that interim period. This is probably contrary to the Companies Act but it is considered to be more practical. On the appointment of the proposed liquidator as liquidator he takes the chair of the meeting and attends to the final matter which is the appointment of a Committee of Inspection. This is covered by s. 286 of the Act and provides that a committee of up to 3 persons can be appointed for the purpose of assisting the liquidator. Depending on the particular circumstances of the liquidation the committee may or may not be necessary but I have found that in most cases a committee can be of considerable assistance. For example, one of the assets of the Company may be a vehicle on which a certain value has been placed. An offer is received which is rather below the valuation but is worthy of consideration. The liquidator can refer this through the committee and obtain their approval as to whatever action he intends to take.

After his confirmation as liquidator there are certain statutory requirements that must be observed these being that as required by s. 269 Notice of the Resolution of the winding up must be published in the Gazette and in one or more newspapers circulating in the locality in which the registered office of the Company is situated within 15 days and secondly, under s. 296 the liquidator shall within 7 days after his appointment deliver to the Registrar for registration a notice of his appointment. It is important to observe these requirements because under the Companies Amendment Act 1973, penalties are imposed for any lateness in lodging these documents.

You have now been appointed as liquidator, the formalities have been observed and the affairs of the Company are in your hands. While it is not possible to lay down hard and fast rules regarding the administration of all liquidations there are certain things that have to be done, some of which we have already discussed, in every liquidation but each liquidation presents its own set of problems which have to be faced and solved independently. The job of the liquidator really begins at this stage and I intend to mention some of the situations which may arise but obviously it is not possible to cover them all.

As soon as possible after his appointment the liquidator should
attend to the following matters:-

1. Change the registered office of the Company and advise the Post Office that all correspondence should be sent to the liquidator's address. It is important to change the registered office as soon as possible so that any documents being served on the Company, for example, Writs, Summons, etc., come to the right place and to the knowledge of the liquidator. The same reasoning applies to the change of the postal address, as on a number of occasions further liabilities and in fact the existence of extra assets have become known to the liquidator as a result of correspondence coming through the post. Should the company being liquidated be a large one it may be of course that staff will be retained for a period in which case the liquidator will be in close contact with the Company's office and could perhaps defer the changing of the above matters.

2. Advertise for proofs of debt from creditors. This is effected by publishing the required notice in the Government Gazette and in any number of papers circulating throughout the district in which the company operated. Although a list of creditors was presented to the meeting, in many cases it is found that the list was incomplete, that creditors' claims differed from those shown on the list, that creditors' claims were disputed either wholly or in part and in some cases that creditors were claiming without any justification at all. The effect of the advertisement for proof of debt also serves as proof that all creditors have been given the opportunity to claim. When the proofs have been assembled these should all be checked by the chief shareholder of the Company or the person responsible and any variations settled between the creditor and the liquidator. It is important, to protect the liquidator, that creditors' claims are certified correct by the Company before being admitted. The liquidator after checking the claims can reject either wholly or in part a creditor's claim after which the matter can be settled by the claim being satisfactorily confirmed or otherwise.

3. All books and records of the Company should be passed over to the liquidator. Once again the means of doing this
depends on the size of the Company but it is important to gather all the records in one place particularly if some are held by the Company's accountant or solicitor or any other party. The liquidator should remember at this stage that the Company's advisers, namely the accountant and the solicitor, can be of assistance to him if necessary in such matters as the preparation of tax returns to the date of liquidation, the provision of P.A.Y.E. reconciliations, the continuation of any legal action that may be under way etc. The liquidator must also remember that the accountant or solicitor may have a lien on any of the Company's records held by him to satisfy unpaid fees at the date of liquidation and it may be that the liquidator will have to pay this account or at least undertake to pay it when funds accrue before the books and records can be obtained. It should be borne in mind that the liquidator is at liberty to use the services of anyone he feels can assist and this applies particularly to the provision of tax returns to the date of liquidation. In many cases the accountant is familiar with the workings of the company, having done the books before and it is often an economic proposition for the liquidator to have this work done by the accountant concerned. Before making such an arrangement the liquidator should however obtain from the accountant the details of any claim that he may have up to the date of liquidation so that the extent of the liquidator's liability to pay for further accounting work can be established.

4. Depending on the type of fixed assets that the liquidator has to deal with it is important for him to check as soon as possible that the assets are adequately insured. In the case of vehicles, for example, it is advisable to advise the insurance company of the liquidation and to re-insure the vehicles in the name of the Company in liquidation, the liquidator being responsible for all premiums after the date of liquidation. In our own case we make an arrangement with the Insurance Company for a temporary cover, say for 3 months, pending the disposal of the vehicle rather than having to pay a full year's premiums in advance. Most Insurance Companies co-operate in this respect but if not the liquidator can no doubt make arrangements through his own insurance facilities. The liquidator must also bear in mind that certain insurance premiums or levies for example
public liability and accident compensation are based on wages paid so that it is necessary to advise the insurance company as soon as the necessary information is available so that the liability can be established.

5. The liquidator should advise the Tax Department as soon as possible. This Department is almost invariably involved as a creditor in a liquidation, either for P.A.Y.E. or Income Tax and if not for either of these they will require a tax return to the date of liquidation. We have found that the Department is only too willing to co-operate providing the liquidator does likewise and they can be of great assistance, particularly in reconciling wages records which in many cases are submitted in a form which leaves much to be desired.

6. In addition to obtaining the financial records of the Company, as mentioned previously, such things as insurance policies, vehicle registration papers, bank pass books, cheque books, invoices, building society share certificates, etc. should be obtained from the Company and held by the liquidator. I have been asked in many cases by the Company representatives "What records do you want?" and my answer is invariably the same "We want the lot". It is best to take everything and sort it out with the surplus documents being stored pending destruction rather than to ask for certain information and run the risk of having a vital part omitted.

7. The liquidator should sight the assets as soon as possible preferably before the meeting. In a number of cases assets have been listed as having been owned by the Company but when they come to be inspected they are not to be found. This particularly applies to portable assets such as small machine tools, office equipment and the like. Stock of course should have been taken prior to the meeting and this should be done, if not by the liquidator, certainly in the presence of the liquidator's representative.

8. As soon as all records of the Company have been obtained the liquidator should examine all invoices, whether current or not, to check for evidence as to the purchase of any fixed assets for example, an invoice shows a saw bench is not listed among the Company's assets. We have had
experience of the Company purchasing items such as food mixers, washing machines etc. for personal use of the shareholders but these are not listed as Company assets at the date of liquidation. There may of course be a satisfactory explanation the goods having been charged through to the shareholder's current account.

9. The Bank should be advised as soon as possible. If the company account is in overdraft the possibility of their appointing a Receiver should be investigated. In many cases it is unnecessary for the Bank to appoint a Receiver providing the liquidator gives them the necessary undertaking to protect their rights should they have a valid debenture. It may be too that through the company account certain regular payments are made perhaps on an insurance policy on the shareholder's life, perhaps a regular transfer to his own personal account etc. Full details of all transactions through the bank account should be obtained, checked and, where necessary, cancelled.

10. The Shareholders' or Directors' current accounts should be checked thoroughly. Many private companies are, of course, very personal affairs and are really an individual trading under the protection of the Companies Act legislation. In such cases it is difficult sometimes for the shareholder to divorce his personal financial transactions from those of the Company and in many cases the Company's bank account is used virtually as the individual's bank account. This is all very well providing the affairs of the Company continue satisfactorily and the Company does not fail. On the failure of the Company, however, a day of reckoning has arrived and in many cases the liquidator is faced with a long and difficult investigation to clarify the situation as between the shareholder and the Company. Unfortunately it is not unknown for a shareholder who shows as a creditor of the Company at the date of liquidation to be in actual fact a debtor for a considerable amount.

11. Payment of capital should be confirmed by the liquidator. As you will be aware it is possible for the capital in the private company to be paid up by various means such as in cash, by the taking over by the Company of various assets of a previous business conducted by the shareholder or by
the taking over of both assets and liabilities of a previous business or by a combination of cash and takeover of nett assets. It is usually possible to trace these activities through the books of the Company as in many cases the transactions are evidenced by an exchange of cheques. In some cases however, capital has not been paid up and if this is the case, it will be necessary for the liquidator to obtain payment from the shareholders concerned. If it is necessary for him to make a call the procedure is fairly prolonged but not very difficult. It should also be noted that while the right of set off is available to any shareholder, as it is to any other person, regarding claims due to and due from the Company there is case law to support the fact that set off cannot be applied regarding unpaid capital so that while a shareholder may have a claim against the Company, if he owes the Company for unpaid capital he must pay that amount.

12. A check should be made to ensure that the provisions of s. 309 regarding voidable (previously fraudulent) preference have not been infringed. These are now linked to the Insolvency Act 1967, which introduced significant changes in particular that the voidable preference period is increased from six months to two years, and that payments made within one month before liquidation are voidable absolutely without the need to prove that they do in fact prefer.

13. The liquidator should set up as required by the Act adequate records both regarding financial and other matters to record the affairs of the liquidation. As far as I am concerned, we prepare what we call, for want of a better name, a red book for each liquidation. This is a large multi-column analysis book which has separate areas for receipts and payments account, list of unsecured creditors and dividends paid, list of fixed assets showing estimated realisable values and actual realisations, list of secured creditors with details and amounts of securities, minutes of creditors' meetings and meetings of the Committee of Inspection, a section for liquidators' returns etc. In fact the book tells the complete story of the liquidation and is filed away after the liquidation is completed as a permanent record. In a liquidation by order of the Court,
it is advisable to open a separate bank account in the name of the Company in liquidation to facilitate the audit requirements but in a creditors' voluntary winding up this is not necessary and we use our trust account for all financial transactions. In addition to this of course the usual files must be set up to record correspondence that is bound to accumulate during any liquidation.

14. The liquidator should make arrangements to record the time spent by him and his staff in administering the affairs of the liquidation. This is important because in most cases the liquidator's remuneration is based on the time involved, charged out on the scale set down by the Society of Accountants.

15. We always make it a practice of preparing a work sheet. It is usually a two man effort with the liquidator and whoever else may be concerned with the administration of the Company going through the statement and listing all things that it appears will have to be done during the course of the liquidation. This is very useful when the progress of the liquidation is being reviewed at a later date as it is easy to mark off the work sheet as each individual matter is settled.

While he is attending to the matters I have just mentioned the liquidator is, of course, getting on with his main task and that is realising on the assets of the Company and assembling creditors' claims. There are as many types of assets as there are types of Companies and it is not possible in a talk of this nature to cover them all. There are however, certain principles which the liquidator should bear in mind when he is realising any type of asset. Among these are:

1. The liquidator acts for all creditors and not for any particular class of creditor as does a Receiver. This means that he must do his best to realise the assets at a reasonable price so that the best results are achieved. He should always call upon any expert advice that is available to him when realising a particular asset. For example, if the asset being realised is printing machinery and among the creditors is the supplier of that machinery the liquidator could perhaps call upon the supplier who may be able to advise the best means of disposing of it. Even
though the supplier may not be on the Committee it is in his interests as well as every other creditors to give the liquidator his specialised advice.

2. When a particular asset is secured to a creditor for example, a vehicle secured by hire purchase, the liquidator should keep the secured creditor advised of the position particularly where there is the possibility that the asset will realise insufficient to pay off the secured debt.

3. Although the liquidator acts for the creditors of the Company, he should bear in mind the shareholders of the Company, particularly where a shareholder may have personally guaranteed a creditor's account. It is obviously in the shareholder's interest for the asset to be realised at the best possible price and the liquidator should keep him in touch with the situation.

4. While the liquidator has wide powers enabling him to dispose of assets it is important that he does not act in a reckless fashion and sell the assets below their real value as if he did so he could possibly be held responsible. On the other hand the liquidator must realise that the proceeds of the assets are to be divided among all the creditors after satisfying secured and preferred creditors and he should realise that if the total unsecured creditors are $10,000 every extra $100 realised represents 1c in the dollar.

5. He should also bear in mind that the longer an asset remains unsold the more expenses accrue regarding that asset, for example, insurance, storage, depreciation, change of model, advertising and so on, so that a liquidator has to use his judgment regarding whether or not to accept a price that may be offered for a particular asset.

Let us look at some of the more common current assets that a liquidator is faced with. First, cash in hand and cash at bank. These present no real problem. As mentioned previously the Bank should be notified as soon as possible of the liquidation of the Company then advised that the account should be stopped pending the official appointment of the liquidator. As soon as this is done a copy of the notice of appointment of the liquidator can be forwarded to the Bank and a cheque drawn to
close the account. Have a look at the number of unused cheques and if worthwhile, obtain a refund of stamp duty.

Debtors:
In many cases this represents the main asset on the statement of affairs and also unfortunately represents in many cases the most troublesome asset. It is not uncommon for part of the cause of the failure of the business to be unsatisfactory workmanship or uncompleted work or if a manufacturing organisation, work of sub-standard quality. If these circumstances exist obviously the debtors are not going to pay and the liquidator is often faced with a situation of a long list of debtors who dispute the amounts claimed as owing and which require work to complete or errors to be rectified by the liquidator or if this is not possible, require a cash allowance from the amount claimed. Where debtors dispute the accounts the experience of the liquidator comes to the fore. Is it a try on or is there a justifiable complaint? If the former appears to be the case the liquidator should set about collecting the account without delay. Unfortunately human nature being what it is, the failure of a Company sometimes brings out the worst in people and it is not unknown for a debtor to dispute a perfectly legitimate account simply because he knows the Company is in difficulty. If there is a genuine complaint, this must be investigated by the liquidator but before involving himself in rectifying shoddy work or completing unfinished work he must satisfy himself that the cost of taking such action does not exceed the balance due on the claim. For example, there is no point spending $50:00 to recover a debt outstanding of $30:00. In such a case the liquidator would have no option but to advise the debtor that he is abandoning the claim. This is particularly important in building contracts.

Work in Progress:
This asset too in many cases presents problems for the liquidator. Particularly in the building trade where contracts are half completed, creditors have claimed under the Liens Act, the owner is dissatisfied with the job, the time for completing the contract is running out and possibly other complications have arisen the liquidator is sometimes faced with a difficult decision. Is the job to be completed or abandoned?
Before making such a decision he must investigate such matters as the balance of contract monies, any possible penalties or liquidated damages for late completion, the quality of the work done to date, the estimated costs to complete, the possible Lien claims and if a Government or Local Body contract, possible charges. Only after obtaining a clear picture of the contract and assuring himself as far as possible that it is not classified as an onerous asset, only then should the liquidator commit himself to completing it. If it appears that there is money in the contract but all will go to Lien claimants, the liquidator then may have to deal with the Lien claimants separately either completing the contract on their behalf with an indemnity or abandoning the contract and leaving them to complete it themselves. Time is all important in such a situation and with workmen standing idle, materials requiring ordering and so on, any delay can be vital.

Stock is very often an important item; In some cases over-stocking has played a part in the Company's failure and it is not uncommon for a large amount of obsolete stock to be held. The liquidator once again has to make up his mind what is the best way to dispose of this. Can he approach the supplier and attempt to sell it back to him, remembering of course that if the supplier is a creditor any purchase of stock from a liquidator must be on a payment basis and not a set off. Depending on the fixed assets involved in the liquidation it may be that the stock may be sold at the same time they are disposed of. It is difficult to generalise about the sale of stock as the course to be adopted depends on the particular material.

Fixed assets in most cases do not present as much difficulty as current assets. The means of disposal depends on a number of facts: -

What is the type of asset, is it readily saleable, is it specialised for use in one industry only, is it in short supply, are the items generally in good condition, how many items are there, should the main items be sold by tender or is there a multitude of small items that can be sold by auction, in other liquidations are there sufficient goods that if combined with this one would warrant an auction. Such items as plant and machinery, office
furniture and equipment, motor vehicles, realty, generally speaking are not too difficult to dispose of, although at this particular time, prices are not generally good. As mentioned previously the liquidator should examine invoices to check on the purchase of fixed assets and should note any records that disclose the possibility of any secured creditors over motor vehicles or plant for example. In that case the proceeds of the asset must go to the secured creditor and the wise liquidator will always keep the secured creditor advised and if the security is a hire purchase agreement should ensure that the provisions of the Hire Purchase Act are observed. In the sale of realty this will in many cases be mortgaged and the liquidator should keep the mortgagee advised of the situation. Here too the proceeds of the sale of the realty will be used first to satisfy the mortgagee with any surplus going to unsecured creditors, or if the converse should occur, the total proceeds will be paid to the mortgagee who can then claim as an unsecured creditor for the balance of his claim. The liquidator should always remember to cancel insurances when assets are disposed of, to request the account for the premium to be forwarded and to pay it. Over a period contacts are established, and can be of great assistance to a liquidator. Storage in particular can be a problem and sometimes creditors can help in this regard.

Having disposed of the assets, or started to do so, the liquidator will no doubt accumulate some funds and he must then decide on the distribution of such funds. Assuming he has satisfied the claims of secured creditors under hire purchase and mortgage, he now must decide who is entitled to any further funds he has in hand. First he will reserve sufficient to cover all the costs involved in the liquidation as he is liable for these; these include legal costs, advertising, postages, stationery, commission, accountancy, repairs and maintenance to assets prior to sale, costs of completing unfinished work, costs of rectifying faulty work, if the liquidation is by order of the Court audit fees, and last but not least, liquidator's remuneration. It is only experience which will tell the liquidator the amount required to cover such contingencies. Commission on the sale of vehicles plant, realty, etc. can be calculated but experience has shown that a liberal allowance should be made where there is the possibility of extensive litigation.
After allowing sufficient for such costs the next payments to be made are to those that fall under s. 308 of the Companies Act, under the heading of Preferential Payments. The main item here is wages and holiday pay for any employee for the four months prior to liquidation up to an amount not exceeding $400:00 for any one employee. Wages records give the clue as to the amount involved and of course, in most cases the workers themselves will be quick to make a claim. Fortunately experience shows that it is very seldom that any worker goes unpaid in a liquidation. Hot on the heels of these preferential payments run P.A.Y.E., which is of course a deduction from workers' wages, and Sales Tax. It should be noted that while P.A.Y.E. is a preferred claim penalty for late payment on P.A.Y.E. is not. Under the Sales Tax Act (s. 27) where there is a possible liability for this, the liquidator must advise the Comptroller of Customs within 14 days of his appointment and must set aside sufficient funds to pay the tax otherwise he is personally liable.

Next on the list come creditors who have a security under any type of floating charge or general charge over the assets of the Company. After the liquidator has satisfied himself that the security, in most cases a debenture, is valid particularly as far as s. 311 is concerned, funds can be distributed to debenture holders the priority of debentures often being established by the date of their registration or by the particular terms in each debenture. Each security should be submitted by the liquidator to his solicitor for his opinion as to its validity before being accepted. Section 311, which I mentioned a moment ago, states that where a Company is being wound up a floating charge on the undertaking or property of the company created within 12 months of the commencement of the winding up shall, unless it is proved that the Company immediately after the creation of the charge was solvent, be invalid except as to money actually advanced or paid to the Company at the time of or subsequently to the creation of the charge so that if a company takes a debenture over the assets of another company to secure a loan already made and at the time of taking the debenture the Company giving it was not solvent and went into liquidation within 12 months the debenture is invalid.

Certain other types of securities should be mentioned at this stage, such as a landlord's distraint for rent. In this case
if the distraint has been effected properly the liquidator will probably have to pay the arrears of rent to release the items distrained on, in many cases plant and equipment. A workman's Lien for repairs to a motor vehicle, this will have to be paid before the vehicle is released, the liquidator once again, ascertaining that before he pays the costs of the repairs he stands a good chance of obtaining more than that for the vehicle. An accountant or solicitor's Lien on books or records of the Company - the value of the asset here cannot be really ascertained but sometimes the records must be obtained to facilitate the completion of the liquidation. Claims on contracts under the Liens Act, each contract must be taken as a separate case and I mentioned previously, the liquidator must assure himself that if acting for the Lien claimants he obtains the necessary indemnity or if acting for creditors generally, there is enough in the contract after paying the claimant to produce a satisfactory surplus. The general rule in such securities is that they relate to a certain asset and each individual situation must be treated separately.

At the end of the list are the unsecured creditors who after liquidator's costs, preferred creditors, secured creditors are paid are entitled to share pro rata in the balance of the funds realised by the liquidator. I have mentioned previously the necessity for confirming creditors' claims and having them fully documented and having them fully certified by the representative of the Company before they are admitted for dividends.

Although the liquidator is only required to call a meeting of the creditors once a year in a creditors' voluntary winding up, it is wise for him to report to creditors as soon as possible. This keeps them advised and also serves the liquidators answering innumerable 'phone calls as time goes on and creditors become impatient. A good time to give the creditors an up to date report is when the first dividend is payable, if this is not too long after the commencement of the liquidation, or as soon as the liquidator has a reasonably clear picture of what the ultimate result for creditors is likely to be. We always make it a point of reporting fully with a comparative statement of assets and liabilities which compares the figures presented at
extent that these are qualified or supplemented by law. A prudent receiver must ensure that both the debenture and his instrument of appointment are valid as, if either are defective, the receiver will be a trespasser against the assets of the company with personal liability for his actions. (6) As well as ensuring that the documents are valid the receiver must only exercise the powers referred to in the debenture which are conferred upon him by his document of appointment. If he acts outside these powers, he will be personally liable and will not be entitled to be indemnified out of the assets of the company.

Although there appears to be no judicial authority on the point it would appear that the receiver would have no wider rights than the company so that he could only act within the objects and powers conferred upon the company by its Memorandum of Association. He would be personally liable if he acted ultra vires and he would not be entitled to indemnification by the company.

Where the granting of the debenture is authorised by the directors of the company the conferring upon the receiver of the powers specified in the debenture probably constitutes a delegation by the directors of those powers. This delegation is implicitly authorised by the provision in the Articles of Association authorising the directors to borrow and grant security. If this view is correct the receiver could not obtain greater powers then those conferred upon the directors by the Articles of Association. The receiver could not, for example, affix the common seal of the company as this would be inconsistent with the seal provision under the Articles of Association.

It is becoming common practice for receivers to obtain an indemnity from the debenture holder as a condition of

(6) R. Jaffe Limited (In Liquidation) v. Jaffe (1932) N.Z.L.R. 195
cases it has been known for a liquidation to continue for several years pending the settlement of such a claim.

Finally the happy day arrives when all assets have been realised, all matters settled and the liquidator can terminate the liquidation. In a creditors' voluntary winding up this requires the liquidator to call a meeting of the members and creditors of the company under s. 291 of the Companies Act, at which a statement in a form set down by the Act is presented. Once again if the liquidator has anticipated the creditors and reported fully to them prior to calling the final meeting it is unusual for anybody to attend. After the meeting the liquidator lodges a copy of his final account and a statement to the effect that the meeting was called together with a list of dividends paid to unsecured creditors during the period, with the Companies Office. Should the liquidation be by order of the Court the procedure is a little more complicated requiring the audit of the liquidator's accounts by the Government Audit Office before the matter can be completed. After the necessary accounts have been lodged the company is ultimately struck off the register.

As mentioned previously it has not been possible in the available time to cover all aspects of company liquidations but I hope that what I have said has been of some benefit to you and should there be any questions I shall do my best to answer them.

In conclusion I feel I should say that while in some cases a liquidator is faced with some unpleasant situations e.g. taking possession of the company car which is in effect the family car, or advising the chief shareholder that the amount he owes the company must now be paid in hard cash, a liquidator can in many cases complete his job with a feeling of satisfaction. Fortunately the people concerned realise that a liquidator has a job to perform and providing he carries out that job fairly, sympathetically, objectively and efficiently there is little in the way of criticism that can be levelled at him. In many cases it is not an easy job and as I said previously it is a job which calls for tact and experience and one not to be undertaken lightly. I can assure you however, that as long as
there are democracies there will be business failures and there will be a place for qualified liquidators. I feel sure that if you are called upon to carry out this task you will do so with credit to your chosen profession.

K.S. CRAWSHAW

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