LIABILITY OF RECEIVERS, LIQUIDATORS INVESTIGATORS AND INSPECTORS

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A. STATUS

The source of the legal authority of each of the persons with whom this paper is concerned must be appreciated before their various liabilities can be considered. A receiver's [1] duties are primarily to be found in a private contract - the debenture document pursuant to which the appointment is made - and in the common law, but there is some statutory overlay [2]. In contrast, a liquidator and an inspector are entirely creatures of statute.[3]

None of them displaces the company itself nor has the assets of the company vested in him or her.[4] A receiver and a liquidator act on behalf of the company to administer its affairs; an inspector merely examines those affairs with a view to reporting on them. The receiver and the liquidator are the agents of the company, the receiver having that status by virtue of appointment under a document (the debenture) which confers that status upon him and sets out the powers which are exercisable. The status of the liquidator derives from appointment pursuant to the Companies Act 1955, the liquidator's powers being found in the Act.[5]

The liquidator is the only person who can act for the company as its agent when it is in the course of liquidation. Consequently, when a receivership continues or commences after a winding up order or resolution, the receiver cannot act as agent for the company. Although

there is presently some judicial debate concerning his or her status[6], the better view, it is submitted, is that a receiver of a company in liquidation is not the agent of the debenture holder unless the latter interferes in the conduct of the receivership, such as by issuing directions to the receiver, and that the receiver acts as a principal party in all transactions for the company in liquidation.[7]

Neither a receiver [8] nor a liquidator [9] is a trustee for the company or any creditor but both owe at least some of the duties of the trustee or a fiduciary to the company, though in imposing such obligations the Court takes account of the special nature of their roles, which it also does in relation to directors' fiduciary duties.

As agents or fiduciaries both a receiver and a liquidator are entitled to an indemnity from the company in respect of all debts or liabilities for which they may be personally liable and which were properly incurred in the course of administering its assets and to a charge over those assets as security for the indemnity.[10] Section 345(2) of the Companies Act 1955 renders a receiver personally liable in respect of "any contracts entered into by him in the performance of his functions, except in so far as the contract otherwise provides." The section states that the receiver is to have an indemnity out of the assets. The liability of a receiver is akin to that of a del credere agent.

In contrast, a liquidator is not personally liable for the debts which he incurs, such as the fees of his solicitors[11], but those debts have priority in the winding up over the other unsecured obligations of the company.[12]

Neither a receiver nor a liquidator is liable for debts of the company incurred before the receivership or liquidation including those arising out of pre-existing contracts, such as leases and employment contracts.

The receiver is not generally concerned with distributions to unsecured creditors, looking only to recover the moneys owing to the debenture holder and then handing remaining assets back to the control of the directors or a liquidator. The liquidator has no liability to any claimants unless he or she wrongfully rejects or accepts a proof or fails to ensure that debts are paid in the right order.

The receiver's control of the corporate assets is for the purpose of realising the debenture holder's security. He accordingly owes a primary duty to the debenture holder, his duties to the company being secondary only.[13] The liquidator, on the other hand, is acting as agent of the company, whose assets are impressed with a trust for the benefit of all persons interested in the winding up.[14]

B. LIABILITIES OF RECEIVERS

A receiver, like a liquidator, must perform his functions honestly and in good faith, and must act only for the proper purposes of his office.[15] His statutory liability for his debts has already been mentioned. He will also be liable to preferential creditors when, having funds available from cash resources of the company at the date of the receivership or from the proceeds of the sale of assets subject to a floating charge, he fails to apply those funds in or towards their debts.[16]

In common with others who owe fiduciary obligations, receivers must ensure that they do not place themselves in a position of conflict between their duties and their personal interest. A receiver may not profit from his office except by the charging of fees as authorised by the debenture.[17]

A sale of company property to the receiver or to his alter ego[18] is liable to be set aside unless it was done with due regard for the interests of the company and with the fully informed consent of the company - given through the directors, or, if it is in winding up, through the liquidator. Such a transaction is voidable at the instance of the company rather than void. It may be set aside even if the price was a fair one.[19]

A receiver owes a duty of care to the company, its debenture holder and any guarantor of the debenture indebtedness[20] and will accordingly be liable to the injured party for any loss occasioned by negligence. It seems that a degree of incompetence is still permitted to directors provided they act honestly and diligently, bringing to bear whatever knowledge and skills they possess and taking such care in relation to the affairs of the company as can reasonably be expected of persons with their, often limited, capabilities. However, the standard of conduct required of a receiver, descent below which may result in liability, will be higher than that required of ordinary directors, save perhaps professional persons engaged in directorship activities in their field of professional expertise. This is because a person who accepts appointment as a receiver is likely to be regarded by the Court as having held himself or herself out as competent to perform this specialist task. By the taking of the appointment a claim has been laid to all the relevant skills. Therefore the receiver may expect

liability to accrue if he or she proves to be incompetent. Negligence is, after all, a situational concept.

The question of a receiver's liability for negligence is complicated by two matters. The first is the difficult circumstances in which a receiver must work. Usually he will not have been appointed unless the company is insolvent. Credit may not be available, secured creditors may be enforcing their mortgages, ordinary creditors may be in the process of having the company wound up, books and records may be unavailable, directors and secretary may be absent or unco-operative. In this climate an error of judgment, even by a skilled professional, may be forgivable. The dangers of hindsight are only too apparent when a salvage operation is reviewed after the event. A decision to trade on or to close down and sell may be rendered quite inappropriate by factors which were difficult to perceive at the time it was made but which become all too apparent at a later time. The pressures on a receiver dealing with a company teetering on the edge of a cliff and trying to prevent it from falling will usually be greater than on a liquidator concerned with the wreckage at the bottom. Indeed, one of the most worrying sources of concern for the receiver may be the threat of imminent liquidation.

The second complication is that a receiver's primary obligation is to the debenture holder who appointed him. Jenkins L.J. said in Re B. Johnson and Co. (Builders) Ltd[21].

> "... a receiver and manager for debenture holders is a person appointed by the debenture holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of the loan to enable him to preserve and realise the assets comprised in the security for the benefit of the debenture holders.

> The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers. The primary duty of the receiver is to the debenture holders and not to the company. He is receiver and manager of the company for the debenture holders, not manager of the company ... [T]he whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers."

The debenture holder's reason for making the appointment of a receiver is to enable the receiver to take charge of and realise the company's assets and thereby recover the money owing to the debenture holder. Anything which the receiver does which prevents or delays that recovery may lead to a claim against the receiver by the debenture holder. The receiver is not obliged to carry on the company's business at the risk and expense of the debenture holder.[22] Depending upon the circumstances there may be an obligation to sell up assets as quickly as possible and, when money has been obtained for them, to pay over the proceeds to the debenture holder and terminate the receivership.[23] Both the debenture holder and the company may have a claim against a receiver who tries to carry on the business of the company when he is functus officio.

Where the alleged negligence arises out of the sale of corporate assets these complications must be balanced against the common law duty of a person who is enforcing a security by sale of mortgaged property to take reasonable care to obtain the true market value of that property;[24] or, as s.345B now puts it, for a receiver to "exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale." In this connection the Court will ask whether the marketing of the asset was properly handled. Was the method of sale

appropriate to the asset? How extensively and in what manner was it advertised? Was the asset put on the market for a reasonable period? Were potential buyers contacted or circularized? Was the time of the sale chosen with reasonable care for the interests of the company?[25] Did the receiver do anything which discouraged potential buyers? Did he ignore any genuine offer from a buyer with the wherewithall to complete his purchase? Did the receiver take reasonable care of the asset so that it did not deteriorate unnecessarily and was properly presented?[26]

It should be emphasised again that all these factors will be examined in the light of the general circumstances of the receivership including the legitimate requirements of the debenture holder. The Court will be quite slow to penalise a receiver who has merely made an error of judgment. Only if there has been an unnecessary sacrifice of the interests of the company or the debenture holder will the receiver be liable to either of them. Liability will not ordinarily be imposed merely because the result of a particular course of action is an unhappy one, provided that action was properly considered.

A receiver is empowered by s.345(1) of the Companies Act 1955 to apply to the Court for directions in relation to any particular matter arising in connection with the performance of his functions. This provides him with a means of getting approval before he commits himself to a course of action, but, where this opportunity was available to a receiver, it is likely that the Court will look more sternly upon a receiver who failed to obtain approval for an action which has resulted in loss to the company. The Court will, however, be reluctant to give directions on factual matters or on matters of commercial judgment where receivers are required to act in accordance with their own particular skills, for "it is not really

for the Court to act as indemnifier of receivers in the ordinary course of events."[27] In Re Blastclean Services Limited (In Liq)[28] receivers sought approval by way of directions of the sale of certain assets. Barker J. thought that if he were to give such directions he might be pre-empting the right of the liquidator and/or unsecured creditors later to allege that there had been a failure to comply with s.345B. Once a direction is given to a receiver or a liquidator there is an obligation to act upon it. The best that the Court could do for the receivers was to make a declaration that, on the information available to the Court, the prices offered to the receivers appeared to be the best prices reasonably obtainable for the property.

A receiver may be liable not only for his own acts but also for those of his staff or those employed by the company during the receivership. He will be vicariously liable for any contracts made on his behalf by his agents and for their misrepresentations. Company employees acting within the authority given to them or within their ostensible authority may be held to be the agents of the receiver. A receiver will not, however, be liable for the tortious acts of those employees unless he participates in or authorises them. The liability in tort is the same as that of a director.[29]

The proper plaintiff in a claim against the receiver for causing loss to the company is the company itself. It can sue the receiver during the continuance of the receivership [30] either through the decision of the directors or, if it is in winding up, through the liquidator. It should be noted that the receiver's obligations relate only to the company, the debenture holder and any guarantor of the debenture and not directly to individual creditors and members except where they suffer directly a loss not suffered by the company.

Therefore an unsecured creditor or a shareholder cannot sue on his or her own behalf except that a member may sue where a derivative action is permitted under an exception to the Rule in Foss v. Harbottle.[31] When the company is in the course of winding up a derivative action is possible under s.321, which is discussed later in this paper.

C. LIABILITY OF LIQUIDATORS

A liquidator must, of course, act honestly, in good faith and not for any private or collateral purpose.[32] He stands in a fiduciary position towards the company and is therefore accountable for any secret profits.[33] He may take only the remuneration authorised by the Companies (Winding Up) Rules 1956. Rule 139 requires that:

> "... a liquidator shall not under any circumstances whatever make any arrangement for, or accept from any solicitor, auctioneer, or any other person connected with the company of which he is liquidator, or who is employed in or in connection with the winding up of the company, any gift, remuneration or pecuniary or other consideration or benefit whatever beyond the remuneration to which under the Act and the rules he is entitled as liquidator ..."

The rule is strictly enforced, a liquidator being liable to refund any payment he may have received which was unauthorised even if the company has benefited from the matter in question.[34] Any transaction whereby he enters into a contract to purchase assets from the company creates a conflict between his interest and his duty and is forbidden without the consent of the Court.[35]

Because the position of a liquidator is created entirely by the Companies Act his powers are set out in some detail in the statute. They must be strictly observed, bearing

in mind particularly the need to obtain the sanction of the Court, the Committee of Inspection or, in the case of a member's voluntary winding up, the company, before doing certain things.[36] These include the bringing and defending of legal proceedings in the name and on behalf of the company and the carrying on of its business "so far as may be necessary for the beneficial winding up thereof."[37] If the liquidator exceeds his powers or fails to carry out his statutory duties he will be liable to anyone who thereby suffers loss. Usually that will be the company and through it the general body of creditors and shareholders but, occasionally, he may be liable directly to an individual shareholder for a loss which is suffered by that person rather than by the company.[38]

The liquidator's liability for breach of his statutory obligations is not absolute. The liquidator is not an insurer against all the hazards of the liquidation. That could hardly be so in relation to some obligations, such as, for example, the duty to get in the property of the company, some of which may prove to be irrecoverable.[39] But the Court nevertheless imposes a very high standard on liquidators and penalises them quite severely for any lapse. A liquidator is not a mere agent liable only if gross negligence is established. On the other hand, he is not personally liable if, notwithstanding all reasonable care on his part, he is in error, as he would be if he admitted a proof which was ill-founded.[40]

Maugham J. stated the position in Re Home & Colonial Insurance Co. Limited[41] in these words:

> "I do not ... 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 in all circumstances he is liable, if a debt is subsequently shown to have been wrongly admitted. On the other hand, I think there can be no doubt that, in the circumstances of the case, a high

> standard of care and diligence is required from a liquidator in a voluntary winding up. He is, of course, paid for his services; he is able to obtain, wherever it is expedient, the assistance of solicitors and counsel; and, which is a most important consideration, he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the Court and to obtain its guidance."

The requirement of a high standard of care and diligence can be seen as generally applicable to all the statutory duties of a liquidator, though the strictness of its application will vary according to the particular matter which is in issue. A high standard of care and diligence is required because the liquidator is being paid for his services and is able to rely upon guidance from his legal advisors and from the Court. (It is pleasing to see that receivers' and liquidators' applications for directions are amongst those matters which are permitted to be entered on the new Commercial List.)

Legal advisors, unfortunately, are fallible. A liquidator may be liable despite acting on advice if it was casually given or if he does not test it properly before committing himself to a particular course of action.[42] The English Court of Appeal found that a liquidator had acted negligently in Re Windsor Steam Coal Co. (1901) Limited[43] when, faced with a large claim arising out of a long term contract for the distribution of the defunct company's out-put of coal, he asked for the views of a firm of solicitors, one of whose partners, Sir Walter Nicholas, held a substantial shareholding and had already expressed strong views against the validity of the claim by the distributor. The solicitors replied saying only that they had discussed the matter with Sir Walter and had advised him "that 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." With regard to the amount of the claim the solicitors said that

they were "quite prepared to leave the question as to the amount of damages in your hands for settlement."

No reasons for the opinion expressed were given. On the face of the agreement there was an obvious line of defence. The company had not promised to mine and sell any coal, only that any sales would be through the claimant. After receiving the letter from the solicitors, the liquidator, without taking any further advice of any kind or obtaining any sanction, compromised the claim and paid a large sum to the distributors. Lord Hanworth M.R. prefaced his judgment in the Court of Appeal by saying[44] that "the Court ought to be very tender with persons who are placed in the difficult positions of directors or liquidators and should not judge their conduct in the light of subsequent events." He added:

> "One does not wish to attribute to a liquidator the knowledge or experience of the lawyer, but I think that one may reasonably ask from him the exercise of some commonsense and judgment when he is placed in a difficulty."

Here the liquidator had plunged ahead, in good faith, but with "head-strong determination." He had acted on his own responsibility when he need not have done so and was liable for negligently mis-applying the funds of the company.

In Re Home & Colonial Insurance Co. Limited[45] the liquidator of a marine insurance company, who had no practical experience in marine insurance matters, took it upon himself to allow a proof based upon a re-insurance agreement, which, as it sadly happened, was contrary to the provisions of an Act of Parliament and consequently null and void. He could not escape liability by pointing out that persons associated with the company, who were experienced in marine insurance practice, had failed to alert him to the defect in the agreement and to warn him. Maugham J. commented:[46]

> "He 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."

Other examples of liability being imposed on liquidators for neglecting to do their statutory duty include:

- Allowing the company to be dissolved before its debts were paid so that a creditor failed to participate in the distribution.[47]

- Distributing the assets without providing for income tax due to the Crown.[48]

- Failing to take steps to ascertain the creditors and causing the company to be dissolved without making allowance for all who had the right to prove.[49]

- Failing to value and make provision for a contingent liability (the claim of a landlord where the company had assigned the lease before the liquidation).[50]

Mr. McPherson Q.C. (as he then was) has summarised the liquidator's duty by saying that he is "bound to exhibit a degree of skill and care commensurate with the heavy responsibilities which the nature of his office casts on him."[51] Whilst a high standard of care is required, the question of whether there has been a breach of duty will be examined and tested - as in the case of a receiver - in the light of the particular function which the liquidator is performing. Where the function is relatively mechanical, such as identifying those who wish to prove, or where questions of law are involved, such as sometimes arises in the admission of proofs, it is rather more likely that liability will be imposed for a mistake. There are established methods of handling these situations and the liquidator can fall back on guidance from the Court.

However, the Court will be much less inclined to blame and penalise a liquidator where he has a large discretion and is exercising commercial judgment. Courts are understandably reluctant to tread in the "slippery and uncertain field" of pronouncing on the commercial prudence of a transaction.[52] Where the liquidator complies with all statutory requirements and those obligations cast on him by the common law (including his fiduciary duties) the Judges will be slow to interfere in his exercise of commercial judgment.[53] We have already seen, in relation to a receiver, a reluctance to give directions in such a matter.[54] If the Court is cautious about approving in advance it surely must be equally cautious about blaming in arrear. As commercial life becomes more complex this tendency will very likely increase, but there is this caveat: the liquidator must be seen to be relying on competent advice from professional men where that is appropriate to his task. When selling plant and equipment or land he should obtain adequate valuation advice; when the company's activity is in a specialist area he should, if possible, consult those knowledgeable in such arcane matters.

D. LIABILITY OF INSPECTORS

Although the title selected by the seminar organisers for this paper mentions investigators as well as inspectors I take this merely to be intended to encompass inspectors appointed under s.9A of the Companies Act 1955 by the Registrar and under s.166 of that Act by the Court. There is little or no comment in reported cases on their liabilities, which would seem to be quite limited given the restricted nature of their functions. It was the view of Lord Denning M.R. in Re Pergamon Press Limited[55] that the report of an inspector would be absolutely privileged in defamation proceedings, though perhaps liability could be attracted if an inspector circulated the report in a

manner not permitted by the section under which he was appointed. In this connection the secrecy provisions of s.9A may be important.

Perhaps an inspector could be liable, like an auditor, for failing to detect and report on something amiss in the affairs of the company, but this seems rather doubtful since any duty owed would seem to be entirely to his appointor, rather than, as with an auditor, to the company itself. The inspector is not the agent or servant of the company, nor contracted to it. Similar comment may be made on any suggestion of liability for delay in reporting.

E. SECTION 321 OF THE COMPANIES ACT 1955

The section reads as follows:

> "(1) If in the course of winding up a company it appears that any ... liquidator or receiver ... has misapplied or obtained or become liable or accountable for any money or property of the company, or been guilty of any negligence, default, or breach of duty or trust in relation the company, the Court may, on the application of the Official Assignee, the liquidator, or any creditor or contributory, examine into the conduct of the ... liquidator [or] receiver ... and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the mis-application, retainer, negligence, default, or breach of duty or trust as the Court thinks just."

Plainly the section applies both to receivers and liquidators and, as well as dealing with mis-applications of money, extends to negligence, default and breach of duty or trust. It is, however, merely a procedural section imposing no new or increased liability. It only provides a summary means of enforcing rights which must

otherwise have been enforced in the Court's ordinary jurisdiction.[56] "Negligence" refers to those acts which have always been the subject of liability in law or equity to the company - the duty to exercise care and diligence in the performance of duties "albeit to a degree restricted by a consideration of the relationship in the particular case."[57]

The section provides a very helpful procedure because it enables an individual creditor or member to bring an action against (inter alia) a receiver or liquidator without exposing the defendant to the danger of a multiplicity of actions by other creditors or members. The action does not directly enforce any liability to such an applicant since the orders which the Court may make are restricted to requiring the defendant to restore money or property to the company or to contribute a sum to the assets of the company by way of compensation for the defendant's misdeeds. Any gain to the company from a successful application under s.321 is then distributed in the ordinary course of the winding up. The section cannot be used to enforce a claim which is personal to the applicant, the company having suffered no loss.[58]

After dissolution, when the section is no longer available, a creditor has no cause of action against the liquidator for negligence during the period of the winding up[59] and the appropriate procedure is to move the Court to annul the dissolution and thus restore the company to winding up and enable s.321 to be used[60].

F. RELIEF, INDEMNITIES AND EXEMPTIONS

As neither a receiver nor a liquidator is an officer of the company, neither can be relieved from liability under s.468 of the Companies Act 1955. On the other hand, s.204 does not operate to deprive them of any right of indemnity.

However, a liquidator cannot claim the protection of an indemnity or exemption from liability contained in the Articles of Association of the company because the duties which he owes are statutory and cannot be affected by anything in the Articles.[61] Where a receiver's duty arises from statute, for example, the duty to obtain the best price under s.345B, the same principle would seem to be applicable. Certainly a receiver cannot be compensated or indemnified by the company for any liability he may incur as a result of a breach of his duty under s.345B regardless of what may be said in the Articles or any other instrument of the company.[62] However, that would not preclude reliance on an indemnity given by the debenture holder if it were widely enough drawn.

In relation to non-statutory duties a receiver may be able to take advantage of an indemnity or an exemption from liability granted by the borrower company and contained in the Articles or in the debenture under which he or she was appointed. It is not uncommon to find in a debenture a provision along the following lines (taken from Clause 40 of the Auckland District Law Society's debenture form):

> "The lender is not liable, nor is any receiver ... liable ... for any negligence, default or omission <u>for which a mortgagee in possession might be held liable</u>"

A clause of this kind is likely to be read in a manner favourable to the company. If the underlined words qualify "negligence" and "default" as well as "omission" the clause can be read down against the receiver and construed as limiting the exemption to liability which attaches only because of the strict standards applied to a mortgagee in possession. The difficulty with this interpretation is that neither a debenture holder who appoints a receiver nor a receiver acting as agent of the company is a mortgagee in possession. Indeed, the prime reason for the

development of the device of the receivership was to avoid just this form of strict liability. Yet if the words are read disjunctively the company is granting a receiver a waiver of the right to sue him for negligence, which is, to say the least, somewhat unattractive and might attract attention under Part I of the Credit Contracts Act 1981. Perhaps all that is intended is to state the position at common law - that the receiver is not to be liable as a mortgagee in possession.

FOOTNOTES:

1. As Court appointed receivers are rarely encountered in New Zealand all references are to receivers and managers appointed out of Court pursuant to a standard form secured debenture.

2. Section 101 and Part VII, ss.342-352, of the Companies Act 1955. Receivers may also be appointed under the Companies Special Investigations Act 1958, s.13(3) of which says that nothing in Part VII of the Companies Act is to apply to them. s.10(2) of the 1958 Act also states that a receiver of a company to which that Act applies "shall not be liable for any acts done by him in good faith in the exercise of his powers and functions as receiver." He is an officer of the Court: s.10(1).

3. Liquidators are appointed by the Court (s.233) or by the Company (s.276). Inspectors are appointed under s.9A (by the Registrar) or s.168 (by the Court).

4. There is a little used power whereby assets may be vested in a liquidator: s.239.

5. See particularly ss.240 and 294.

6. Compare Mercantile Credits Ltd v. Atkins (1985) 3 ACLC 485 with American Express International Banking Corporation Ltd v. Hurley [1985] 3 All ER 565.

7. See Cork Committee Report, para 459.

8. Visbord v. The Federal Commissioner of Taxation (1943) 68 CLR 354.

9. Knowles v. Scott [1891] 1 Ch 717; Re Windsor Steam Coal Co. (1901) Ltd [1929] 1 Ch 151.

10. The receiver's charge is restricted to the assets over which the debenture extends. The charge is not affected by the liquidation of the company since the receiver's fiduciary position continues despite termination of the agency for the company.

11. Re Anglo-Moravian Hungarian Junction Railway Co. Ltd (1875) 1 Ch D 130, 134: "He is no more personally liable for contracts which he makes on behalf of the company than the directors would be for the contracts they make on behalf of a company": per Mellish L.J.

12. Re Great Eastern Electric Co. Ltd [1941] 1 All ER 409. If the liquidator fails to ensure that this priority is observed in the distribution of the corporate assets amongst creditors he will be liable for any loss thereby suffered by his creditors.

13. Re B. Johnson & Co. (Builders) Ltd [1955] Ch 634.

14. Palmer's Company Law, 23rd Ed. para 85-38.

15. It is assumed that the receiver has been validly appointed. If there is a defect in his appointment he may be liable as a trespasser against the property of the company: R. Jaffe Ltd (In. Liq.) v. Jaffe (No. 2) [1932] NZLR 195; Harold Meggitt Ltd v. Discount & Finance Ltd (1930) 56 WN (NSW) 23. The receiver may be relieved by the Court from such liability: s.345A

16. Section 101(1) and Woods v. Winskill [1913] 1 Ch 303 and Westminster City Council v. Haste [1950] Ch 442.

17. Re Odessa Promotions Pty Ltd (In Liq) (1979) ACLC 40-523. If the debenture does not deal with the question of fees the receiver may make a reasonable charge for his or her services: Prior v. Bagster (1887) 57 LT 760.

18. E.g. a company 90% owned or controlled by the receiver: Re Clark, Clark v. Moore (1920) 150 LT Jo 94.

19. Watts v. Midland Bank plc [1986] BCLC 15.

20. Standard Chartered Bank v. Walker [1982] 3 All ER 938.

21. Re B. Johnson & Co. (Builders) Ltd [1955] Ch 634, 661-2.

22. Re B. Johnson & Co. (Builders) Ltd [1955] Ch 634, 662.

23. Expo International Pty Ltd v. Chant [1979] 2 NSWLR 820, 843.

24. Cuckmere Brick Co. Ltd v. Mutual Finance Ltd [1971] Ch 949 as endorsed by the Privy Council in Tse Kwong Lam v. Wong Chit Sen [1983] 3 All ER 54 and followed by the New Zealand High Court in Clark v. UDC Finance Limited [1985] 2 NZLR 636. See also Nagle Bros. Limited v. Nelson [1940] GLR 507.

25. Standard Chartered Bank Ltd v. Walker [1982] 3 All ER 938.

26. McHugh v. Union Bank of Canada [1913] AC 299.

27. Re Blastclean Services Ltd (In Liq.) (1985) 2 NZCLC 99,282, 99,285.

28. [1985] 2 NZCLC 99,282.

29. For a recent example of the liability in tort of a director see Mancetter Developments Limited v. Garmanson Limited [1986] 1 All ER 449 where the director was held liable for authorising the commission of the tort of waste when he ordered removal of the company's plant from a leased factory and the building was damaged in the course of the removal.

30. Watts v. Midland Bank plc [1986] BCLC 15.

31. (1843) 2 Hare 461; 67 ER 189. The question is discussed in Watts v. Midland Bank plc [1986] BCLC 15.

32. Commissioner for Corporate Affairs v. Harvey (1979) 4 ACLR 259.

33. Silkstone and Haigh Moor Coal Co. v. Edey [1900] 1 Ch 167.

34. Re R. Gertzenstein Ltd [1937] Ch 115; Christie v. Edwards [1939] 1 DLR 158; [1940] 2 DLR 65.

35. Rule 140 Companies (Winding Up) Rules 1956.

36. Sections 240 and 294 Companies Act 1955.

37. Section 240(1) Companies Act 1955.

38. Re Hill's Waterfall Estate and Goldmining Co. [1896] 1 Ch 947.

39. Re Home and Colonial Insurance Co. Ltd [1930] 1 Ch 102, 125.

40. Re Home and Colonial Insurance Co. Ltd [1930] 1 Ch 102, 124.

41. [1930] 1 Ch 102, 125.

42. Austin Securities Ltd v. Northgate and English Stores Ltd [1969] 2 All ER 753.

43. [1929] 1 Ch 151.

44. [1929] 1 Ch 151, 159.

45. [1930] 1 Ch 102.

46. [1930] 1 Ch 102, 126.

47. Argylls Ltd v. Coxeter (1913) 29 TLR 355.

48. In re New Zealand Joint Stock and General Corporation Ltd (1907) 23 TLR 238.

49. Pulsford v. Devenish [1903] 2 Ch 625; Brown v. Cowan (1912) 31 NZLR 1219.

50. James Smith & Sons (Norwood) Limited v. Goodman [1936] 1 Ch 217.

51. Law of Company Liquidations, 2nd Ed. p.191.

52. Re Mineral Securities Australia Ltd [1973] 2 NSWR 207.

53. Leon v. York-O-Matic Ltd [1966] 3 All ER 277.

54. Re Blastclean Services Ltd (1985) 2 NZCLC 99,282.

55. [1971] Ch 388, 400.

56. Walker v. Wimborne (1976) 137 CLR 1.

57. Kimberley Mineral Holdings Ltd (In Liq) v. Triguboff [1978] 1 NSWLR 364. See also Re Claridge House Ltd, Mount v. Tomlinson (1981) ACLC 40-743.

58. Re Hill's Waterfall Estate and Goldmining Co. [1896] 1 Ch 947.

59. Thomas Franklin & Sons Limited v. Cameron (1935) 36 SR (NSW) 286. See also Knowles v. Scott [1891] 1 Ch 717 but cf. Pulsford v. Devenish [1903] 2 Ch 625.

60. As happened in Re Home & Colonial Insurance Co. Ltd [1930] 1 Ch 102.

61. Re Home & Colonial Insurance Co. Ltd [1930] Ch 102, 126-7.

62. Section 345 B (2).

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