

# **Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach**

## **Governance and Regulation of Receivers**

### **Opening presentation by Conan McKenna, Assistant Secretary, Department of Justice and Equality, on 18 October 2018**

#### **Background**

1. Mortgages provide lending institutions with security for their loans. In the event of financial difficulties resulting in default by the borrower, the lending institution's claim on the secured property takes precedence over the claims of other creditors.
2. The appointment of a receiver is one of the principal remedies available to lending institutions in cases of mortgage default. Where the lender does not wish to take possession of the mortgaged property in such cases, the alternative remedy of appointing a receiver to ensure more efficient management of a business such as a shop or hotel, or to receive rents where housing or accommodation and has been leased or let to tenants may be a more effective option. In the latter case, the receiver's main task will be to repay the mortgage from the proceeds of the rental income.
3. The appointment of a receiver does not normally arise in the case of a borrower's principal private residence but rather in the case of commercial property, including buy-to-let premises. Where a borrower has mortgages over several properties, appointment of a receiver facilitates a more orderly approach to the management or disposal of the premises.
4. As Professor Wylie points out in "Irish Land Law"<sup>1</sup>, there are several sources of appointment of receivers to land and the position of the receiver, particularly in terms of his or her duties and powers, will vary according to that source. Provision for the appointment of a receiver in the case of default is normally contained in the mortgage contract, especially in the case of commercial property.
5. Professor Wylie identifies the following categories of receiver:
  - a. A "fixed charge" receiver who is appointed over a specific mortgaged property; such a receiver is entitled to collect any rental income;

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<sup>1</sup> Irish Land Law (5<sup>th</sup> Edition) JCW Wylie; paragraph 14.57.

- b. A receiver may be appointed to manage the mortgaged property where the objective is to rescue the business if possible;
- c. Another form of receivership arises where court assistance is sought by a creditor who has been unable to execute a judgment obtained against the debtor by other legal means.

Arising from the fact that receivers are generally appointed under the terms of the mortgage contract, rather than on application to court, detailed information on the number of receivers appointed, and the properties to which they have been appointed, is not available.

### **Conveyancing Act 1881 and Land and Conveyancing and Law Reform Act 2009**

- 6. Apart from the express power to appoint a receiver that is normally reserved in the mortgage contract itself, lending institutions have had a statutory power to appoint a receiver to land since entry into force of the Conveyancing Act 1881. Section 19(1) of the 1881 Act contains a statutory power which permits a mortgagee to appoint a receiver over the mortgaged land and this power has been carried over into section 108 of the Land and Conveyancing Law Reform Act 2009.
- 7. The power to appoint a receiver under section 19 of the 1881 Act and section 108 of the 2009 Act applies generally to legal mortgages and registered charges. Under the 1881 Act, which applies still to pre-1 December 2009 mortgages, the power to appoint a receiver arises when the mortgage money became due but it is not exercisable until default occurs; under the 2009 Act the power vests when the mortgage is created but, again, can only be exercised in the event of default.
- 8. The main function of a receiver in these cases is to manage the mortgaged property and to use rental income to repay the mortgage. Section 24(3) of the 1881 Act provides that a receiver shall have the power to demand and recover all the income of the property and this power is carried over in section 108(3) of the 2009 Act.

### **Regulation of receivers**

- 9. Receivers appointed to corporate entities are subject to regulatory provisions set out in the Companies Act 2014. Part 8 of that Act sets out requirements governing the appointment of receivers, their powers and duties, the regulation of receivers as well as the enforcement of their duties. These statutory provisions do not apply in the case of receivers appointed to mortgaged property held by non-corporate entities. While neither the 1881 nor the 2009 Acts contain provisions in respect of the regulation of receivers, the provisions of the 2016 Act will apply where the mortgagor is a corporate entity.

### **Obligations on receivers**

10. Under existing law, including relevant case law, a receiver appointed to mortgaged property is subject to a number of important obligations:
  - a. A lending institution must act in good faith, and fairly, when appointing a receiver; the lender must not act in a manner that unfairly prejudices the borrower;
  - b. On his or her appointment, the receiver is also obliged to act in good faith both to the lending institution and the borrower in his or her management of the mortgaged property;
  - c. Where a receiver chooses, for whatever reason, to exercise a power of sale, he or she is obliged to obtain the best price reasonable obtainable for the mortgaged property for the benefit of both the lender and borrower; the receiver must act as a reasonable person would act in selling the property.
  
11. The receiver, and any agents employed by him or her for the purposes of exercising his or her functions as receiver, will be held liable for the commission by them of any offences, whether against an individual under the Non-Fatal Offences against the Person Act 1997 or otherwise under the Criminal Justice (Public Order) Acts. Enforcement of these statutory provisions is a matter for the Gardaí and the DPP.

### **Possible licensing reform**

12. During a Topical Issues Debate on 19 September last, which concerned events outside premises on North Frederick Street in Dublin, the Minister for Justice and Equality referred to possible future changes to licensing requirements for those involved in the execution of court orders. He stated that while matters concerning the enforcement of a court order are a matter for the courts, consideration was been given in his Department to the matter of oversight. This could include the introduction of a licensing regime for personnel directly involved in enforcement actions. One possible option would be to extend the licensing remit of the Private Security Authority, which operates a licensing system for the private security sector, to such persons. This examination is currently underway in the Department and recommendations will be submitted to the Minister in due course.

### **Working Group on Receivers**

13. The Department of Housing, Planning and Local Government has established a Working Group to examine the scope for amending legislation to provide for greater protection of tenants' rights during the receivership process under Action 5 of the Strategy for the Rental Sector. The appointment of a receiver to a buy-to-let property can create great

confusion and concern for the tenants of such properties, and it is important that their interests and rights be protected during the receivership process.

14. The Department of Justice and Equality, together with the Department of Finance, the Department of Business, Enterprise and Innovation and the Office of the Attorney General, has participated in the Working Group.
15. The objective of this initiative is to improve protection of the rights of tenants during the receivership process, in particular in relation to the discharge of landlord obligations by receivers. To inform its work, the Working Group sought legal opinion on the feasibility of amending legislation to provide for greater protection of tenants' rights during the receivership process. The final report of the Working Group is being prepared at present and will be presented to the Minister for Housing, Planning and Local Government in the near future.

**Concluding remarks**

16. Thank you Chair and Committee Members for your attention. My colleagues and I will be happy to deal with any questions that you may have on the matters that I have mentioned.

18 October 2018