



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

Governance and Regulation of Receivers

**Opening presentation by Helen Curley, Principal Officer,
Department of Business, Enterprise and Innovation**

Introduction

I am Helen Curley, a Principal Officer in the Company Law Unit of the Department of Business, Enterprise and Innovation. I am accompanied by Tara Coogan, a Principal Officer in the Department and, until very recently, also in the Company Law Unit. I wish to thank the Committee for this opportunity to address issues concerning the governance and regulation of receivers in the context of the Companies Act 2014.

The Department previously provided the Committee with a Briefing Note dated 4 July 2018 on the Governance and Regulation of Receivers under the Companies Act 2014. My presentation will touch on certain aspects of that Note.

Role of receiver

At the outset, it is important to state that the principal source of law relating to receivership is contract law. Receivership is a long-standing legal mechanism for the enforcement of security. By far the most common method of appointment of a receiver is under the power contained in a debenture. A receiver is an appointed person whose duty is to receive a debtor's assets and property for and on behalf of a creditor who is entitled to take them in satisfaction of the debtor's obligations, pursuant a written agreement.

Parties to the contract e.g. a company and a lending institution agree that one of the terms on which the company borrows money is that in the circumstances specified in the agreement, the lending institution can appoint a receiver over its assets. The parties have freedom to contract and agree contractual terms, including in relation to the appointment of a receiver.

While the terms on which a receiver can be appointed may vary from one debenture to the next, they generally include the following events:

- Whenever the principal sum due under the agreement becomes payable
- Whenever the company fails to pay any instalment, or the principal sum or the interest due under the agreement
- Whenever the company contravenes covenants in the security instrument
- Whenever the company ceases or threatens to cease its business
- Whenever a resolution is passed, a petition presented or an order is made to wind up the company
- Whenever the company acts in such a way as to jeopardise the security created by the debenture
- Whenever any prior debenture becomes enforceable against the company¹.

There are advantages to a contractual receivership as it avoids the need for the debenture holder to go to court to enforce the security and therefore saves costs, costs which the debtor would have to pay.

Receivers may also be appointed under specific statutory powers such as that contained in the Land and Conveyancing Law Reform Act 2009; or by the High Court under its equitable jurisdiction under the Supreme Court of Judicature Act (Ireland) 1877. Where a receiver is appointed by the High Court, his or her powers will be dependent on the Court order of appointment.

Receivers' duties (functions)

A receiver's primary duty is towards the debenture holder who has appointed him or her. Receivers will generally have the power to sell the secured assets with a view to paying off the debt owed to the debenture holder. A receiver manager will often have the power to carry on

¹ Forde, Kennedy, Simms *The Law of Company Insolvency* (3rd ed.) Round Hall 2015

the business of the company, to borrow money, to employ or dismiss employees, to compromise debts of the company and to insure and repair property.

Section 437 of the Companies Act 2014 (I will refer to it subsequently as “the Act”) confers statutory powers on receivers of the property of a company to do certain things and is intended to alleviate many of the problems which may arise from poorly drafted debentures. Examples of these things include the power:

- (a) to enter possession and take control of property of the company;
- (b) to lease, let on hire or dispose of property of the company;
- (c) to grant options over property of the company on such conditions as the receiver thinks fit;
- (d) to borrow money on the security of property of the company;
- (e) to repair, renew or enlarge property of the company.

It is important to point out that these powers are subject to any provision in the instrument under which the receiver was appointed which limits the receiver’s powers in any way, again underlying the essentially contractual nature of receivership. For example, if the agreement provided that the receiver was not to borrow money, the Act would not prevail over that restriction.

A receiver is very different from a liquidator or an examiner. A liquidator has the task of winding up a company, realising its assets and distributing those assets in accordance with the law. An examiner is appointed under the Act for the purpose of examining the ‘state of the company’s affairs’ and, secondly, to put together some compromise or scheme of arrangement which may facilitate the survival of the company (at least in part), and then reporting to the court. A receiver, appointed on foot of a debenture, has a much narrower function i.e. the principal task is to secure the assets of a company which have been mortgaged or charged in favour of the debenture holder which appointed him or her and realise those assets so that the secured creditor’s debt is repaid as quickly and efficiently as possible.

The Act sets out a number of duties that a receiver must comply with, of these duties, one of the most often cited is that of a receiver, in selling the property of a company, must exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time

of sale². This statutory duty makes it imperative that the receiver obtains expert legal and valuation advice in relation to the sale of property, consistent with the duty “to obtain the best price reasonably obtainable”. In addition, he or she must give notice to the company’s creditors if he intends to sell by private contract a non-cash asset of requisite value to an officer of the company.

The Governance and Regulation of Receivers in the Companies Act 2014

There are provisions relating to the regulation and governance of receivers of the property of a company in the Act. The following are illustrative examples and not an exhaustive list:

(i) Notice of the Appointment of a Receiver

Section 436 of the Act provides that the Registrar of Companies must be notified of appointments of receivers within seven days after appointment and must also be notified when a receiver ceases to act. In addition, every business letter, order for goods or invoices issued by or for the company or the receiver, must state that a receiver has been appointed. Failure to comply with the various requirements is a category 4 offence (the most minor) within the fourfold classification of company law offences set out in section 871 of the Act.

(ii) Provision of information

The Act provides that the receiver must make certain information available to the company and to the Registrar of Companies³. In addition, there is an obligation on receivers to send periodic accounts to the Registrar of Companies.⁴ Breach of the requirements is a category 4 offence. A receiver must also report to the Director of Public Prosecutions and to the Director of Corporate Enforcement if it appears to him or her that a past or present officer or member of the company has been guilty of an offence in relation to the company.⁵

(iii) Disqualified Persons

² Section 439

³ Section 430

⁴ Section 441

⁵ Section 447

Section 433 sets out the categories of persons who are disqualified to act as the receiver of a company e.g. an undischarged bankrupt; an employee or an officer of the company concerned or a person who was such within the period of 12 months before the date of the commencement of the receivership; certain specified family members of an officer of the company concerned. A body corporate cannot be a receiver of the property of a company.

(iv) Receivers' fees

Section 444 of the Act allows a liquidator, a creditor or a member of a company to apply to the High Court for an order to fix the amount to be paid to a receiver, notwithstanding that his or her remuneration has been fixed by the instrument appointing the receiver.

(v) Production of Documents

Section 446 of the Act provides that the Director of Corporate Enforcement may, where he or she considers it necessary or appropriate, request that the receiver produce to the Director the receiver's books for examination, either in regard to a particular receivership or to all receiverships undertaken by the receiver. Failure to do so is a category 3 offence.

(vi) Removal of Receivers

The court may, on cause shown, remove a receiver and appoint another⁶ and may end or limit a receivership on the application of a liquidator.⁷

Conclusion

Thank you for your attention. We will be pleased to address any questions in relation to the governance and regulation of receivers in the context of the Companies Act 2014.

Department of Business, Enterprise and Innovation

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⁶ Section 435

⁷ Section 445