

RECEIVERSHIP:



DRACONIAN OR NOW VERSATILE?

Authored by: Marcia McFarlane - Harneys

Introduction

Receivership; a draconian remedy of last resort. However, today, receivers are appointed to address a wide range of legal circumstances. This article summarises some features of the court appointed receiver. No attention is therefore given to the receiver who is appointed in the commercial context to enforce the security given over an asset by way of a mortgage or charge over shares.

A receiver is traditionally appointed to get in and hold or secure funds or other property for the benefit of those with an interest in the property. Receivership is primarily an enforcement procedure. It contrasts with liquidation in that it is not a collective insolvency procedure for the benefit of the general body of creditors or the company.

The primary sources of law regarding receiverships in the BVI are: (i) the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80, s24; (ii) Part IV of the Insolvency Act 2003 (**the 2003 Act**), (iii) Part VI of the Insolvency Rules 2005 (**the 2005 Rules**); and (iv) common law and equitable principles derived from English law.



Process and court considerations for appointment

The process for the appointment of a receiver commences with a notice of application to the court supported by affidavit evidence. To exercise its discretion, the court needs to be satisfied from the supporting evidence that it is just and convenient for a receiver to be appointed. The court will determine whether to attach conditions to an appointment. On a case-by-case basis, the court will determine whether the applicant is required to provide a cross undertaking in damages.

The law has evolved to accommodate a wide range of circumstances in which the court will exercise its discretion to appoint a receiver. Following decisions like *Parker v the London Borough Council of Camden* [1986] CH 162 and *Masri v Consolidated Contractors International (UK) Ltd No 2* [2009] QB 450, the BVI court has appointed receivers by way of equitable execution,

to secure assets subject to a freezing injunction, or to protect and preserve assets pending litigation. The BVI Court will follow English law to appoint receivers in the context of a joint venture, where there has been a misappropriation of assets, fraud or bribes.

The types of assets over which a receiver may be appointed are as follows:

- Shares
- Bank accounts
- Reserved rights under a trust
- LLP interests
- Contractual rights
- Beneficiary entitlement



Effect of appointment

The appointment of a receiver over the assets of a company does not affect its corporate existence but it places in

abeyance, the company's powers to conduct its business. This therefore means that the company, acting by its directors, have no power to enter into business contracts, sell, pledge or otherwise dispose of any property that is in the receiver's possession or under his control. Otherwise, directors remain in office and their powers remain exercisable so far as they are not incompatible with the right of the receiver to exercise the powers conferred on him.



Duties

A court appointed receiver is an officer of the court who is to be nothing more than the hand of the court with only the power and authority given to him by the court.

The receiver's primary duty according to the 2003 Act, is to exercise his powers in good faith and for a proper purpose and in a manner he believes, on reasonable grounds, to be in the best interests of the person in whose interest he was appointed. To the extent consistent with his primary duty, the receiver is to have reasonable regard to the interests of: (i) the company; (ii) its creditors; (iii) sureties who may need to fulfil obligations to the company; and (iv) persons, claiming through the company, to having an interest in assets over which the receiver is appointed. The persons listed at (i) - (iv) are collectively referred to as **Interested Parties**.

On appointment, the receiver is required "forthwith" to notify the company and the Registrar of Corporate Affairs of his appointment.



Powers

The receiver's powers come from the order appointing him. His express powers include the implied authority to do acts that are incidental to, or consequential upon the express power. Where the receiver needs to take steps to preserve an asset, but he does not have express or implied power to

undertake the task, he will need to seek the court's permission.

Additionally, the 2003 Act gives the receiver statutory powers that will apply unless expressly dis-applied by the court's order. The receiver has power to: (i) demand and recover income generated by the secured asset, whether by action or otherwise; (ii) issue receipts for income recovered; (iii) manage, insure, repair and maintain the secured assets and (iv) exercise on the company's behalf, the right to inspect books or documents relating to the secured asset, which is held by someone other than the company.



Vesting of assets

The appointment of a receiver over a company does not automatically vest the assets of the company in the receiver. He is entitled to possession of the assets over which he is appointed and the parties hold the assets for him as custodians. Under BVI law, if a receiver is appointed over shares, he will need to have the shareholder execute a share transfer form to effect the transfer of shares to him. If he is to exercise voting powers to change control of a parent company or its subsidiary boards, this power must be expressly given as his appointment does not vest this right in the receiver. For property located in a foreign jurisdiction, the receiver would need to obtain possession of the foreign assets in accordance with the laws of that jurisdiction.



Liability of the receiver- sale of assets

When exercising a power of sale, the receiver owes duties to the Interested Parties to sell for the best price reasonably obtainable and to segregate the monies he receives from the secured asset from other monies under his control. The receiver will be in breach of his duties if, on selling an asset, he fails to obtain the best price reasonably obtainable and fails to have

reasonable regard to the Interested Parties. He will not be able to assert the defence that he acted as an agent of the company or under a power of attorney. He will also not be entitled to compensation or indemnity from the company's assets for liabilities arising because of his breach of duty in relation to the secured asset. Subject to the receiver fulfilling his duties to Interested Parties, he is personally liable for contracts he enters into to secure the asset. He is however entitled to indemnification from the assets of the company.



Routes to challenging the receiver

Only specific categories of persons may apply to the court to seek the removal of the receiver provided they can justify the removal. The 2003 Act gives standing to the company, its directors, creditors or any person with a legitimate interest in his removal. In *JTrust Asia Pte v Mitsuji Konoshita and anor* Appeal No 31/2020, 31 May 2021, the Court of Appeal confirmed the guiding principles for challenging a receiver's decision in relation to the exercise of his powers. The threefold considerations are: (i) whether he has power to perform an act; (ii) whether he genuinely holds the view that the act will benefit the company and its creditors; and (iii) whether he is unconflicted and acting rationally.



Completion of receivership

The receiver is entitled to remuneration as agreed by the person appointing him or as may be fixed by the court. On completion of the receivership, the receiver should notify the company and file a notice of completion with the Registrar of Corporate Affairs.

