REMEDIES OF SECURED CREDITORS
THE MODE AND VALIDITY OF THE APPOINTMENT OF A RECEIVER AND MANAGER

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1. THE METHOD OF APPOINTMENT

(i) The Form of the Appointment

While there is no prescribed form for the appointment of a receiver and manager, most mortgage debentures require the appointment to be made "by writing". In most States it is unnecessary to appoint the receiver and manager by deed, although this is commonly done because the only agent who can, under the general law, execute a deed is one appointed by deed. [1] It might be desirable to give the appointee power to execute a deed on behalf of the company, where for example he effects a compromise with some of the company's debtors.

Under the general law, a receiver and manager is not normally entitled to use the common seal of the company. [2] But s.324A(2)(n) now gives a receiver and manager an express power "to use a seal" of the company. Unfortunately, one is left with the impression that the sub-section was not carefully drafted, but rather dictated in a lift! Notice that s.324A(2)(n) does not specifically confer power to execute a document as a deed by affixing the common seal of the company.

So, appointments by deed are desirable, although strictly unnecessary. If an appointment by deed is made it will, of course, be necessary to satisfy local statutory requirements in relation to the execution of deeds. [3]

In New South Wales, the formal requirements are more elaborate. A privately-appointed receiver and manager shall not be entitled to exercise any powers in respect of the mortgaged property unless:

(i) default has been made in respect of the mortgage; and

(ii) that appointment was made by an instrument in writing which has been registered.

See s.115A of the Conveyancing Act 1919 (NSW).

It was argued, but not decided, in Butler Pollnow v. Garden Mews St Leonards [4] that s.115A applied only in relation to an exercise of powers in relation to land. This argument turns on the true scope of Part X of the Code. Is it a comprehensive scheme overriding s.115A? Probably not. There are large tracts of law, relating to the effect of an appointment and the powers and duties of the appointee, which are not covered in Part X. The better view appears to be that the private appointments in New South Wales must be in writing, usually in the form of a deed which must be registered in the Register of Deeds.

It is not necessary for the mortgagee to demand payment of the outstanding moneys before the document of appointment is prepared. That document can be prepared in advance, but the appointment does not take effect until the document is presented to the proposed appointee by the mortgagee or his duly-authorised agent and until the appointee expressly or impliedly accepts the appointment. [5]

(ii) Is a Prior Demand Necessary?

One of the most controversial issues in recent years has been whether or not a demand for outstanding moneys must precede the appointment. With respect, the English cases must accept most of the blame for this confusion and uncertainty. In Cripps (Pharmaceuticals) Ltd v. Wickenden [6] Goff J. held that a prior demand was essential. That finding, however, was no doubt attributable to an express clause in the mortgage debenture which made the mortgagee's money repayable on demand. In Windsor Refrigerator Co Ltd v. Branch Nominees Ltd [7] the Court of Appeal imported a requirement that the mortgagee demand the outstanding moneys before appointing a receiver even though the mortgage debenture contained no such requirement.

In my view, it is unnecessary to make a demand for the moneys owing unless the mortgage debenture specifically requires such a demand. If the mortgage debenture provides that a receiver and manager can be appointed in certain circumstances there would appear to be no room for an overriding implication that a demand must be made. In Company Receivers and Managers [8] I discuss the conflicting authorities on this point in more detail. There are no Australian cases expressly on the point but there is a helpful dictum in Young v. Queensland Trustees Ltd [9] suggesting that a demand is unnecessary.

In most cases a demand will be made, whether it is required or not. It is clearly established that the demand need not specifically set out the precise amount outstanding, unless of course the mortgage debenture requires such precision. As Starke J. stated in O'Day v. Commercial Bank of Australia Ltd: [10]

> "The demand is for the purpose of bringing home to the Company that the Bank is demanding its money, and that is sufficiently indicated by claiming all principal interest and other moneys owing to it." [11]

More recently, in Bunbury Foods Pty Ltd v. National Bank of Australasia Ltd [12] the High Court held that it was sufficient to demand "all moneys due and owing". It was not necessary to specify the amount, and even an error in the final account would not invalidate the demand. [13]

There is, however, a more disturbing legacy of the Bunbury Foods case. There, the mortgage debenture stated that a receiver and manager could not be appointed until "after" the money secured became payable. For this reason, an appointment could not be made contemporaneously with the demand. The word "after" suggests a lapse of time sufficient to indicate that the mortgagor company either would not or could not meet the demand. The mortgagor company may waive this breathing space [14] but unless it does so a reasonable time must be given to allow the mortgagor to comply with the demand.

(iv) What Period of Time must Elapse after Demand before the Receiver and Manager Takes Possession of the Mortgaged Premises?

The mortgagee or his duly authorised agent or officer is simply obliged to give the company time to obtain the money from some convenient place; he is not required to allow it time to negotiate a deal which might liquidate the existing debt. [15]

The question whether a reasonable time was allowed to elapse after the demand and before the appointment of the receiver and manager depends upon the circumstances of the case. [16] The following factors are relevant:

(i) the nature of the security;
(ii) the character of the debt;
(iii) the amount of the loan;
(iv) the risks;
(v) the length of the relationship between parties;
(vi) the character and reputation of the debtor;
(vii) the debtor's ability to raise the money demanded;
(viii) the circumstances surrounding the demand itself; and
(ix) the debtor's response to it. [17]

Even a demand for immediate payment of a substantial sum will be valid if the debtor does not ask for an extension of time to pay and does not explain how he will be able to raise the money within a few days. [18] It is imperative, therefore, that the lender or its duly authorised officer making the demand keeps detailed diary notes of the circumstances surrounding the demand and, in particular, the debtor's response.

The following periods have been considered reasonable in the circumstances of particular cases:

(i) three days; [19]
(ii) one day; [20]

(iii) two hours; [21]
(iv) a "now" demand for immediate payment. [22]

(v) The Effect of Delay

It seems clear that the mortgagee will not lose the right to appoint a receiver and manager if he delays making the appointment even for a considerable period after default or even after a demand. Indeed in Re C.H. McKay Investments Pty Ltd [23] McLelland J. was not prepared to deny a mortgagee his right to appoint a receiver and manager even though the mortgagee had previously declined an invitation to appoint a receiver and even though the court had in the meantime appointed a receiver at the instigation of the mortgagor company itself.

(vi) Demands for Possession

It is sometimes suggested that a mortgagee must not only demand the balance due, he must also make a demand upon the mortgagor to deliver up possession. This suggestion stems from a remark in Yorkshire Banking Company v. Mullan [24] which involved a court-appointed receiver and manager. Such a receiver is an officer of the court, an entirely different appointee from his private counterpart, who is usually expressed to be an agent of the mortgagor company. It seems highly unlikely that an agent of the mortgagor company would be required to demand possession before entering the mortgaged premises unless the mortgage contains an attornment clause and the company is already in liquidation at the time of the appointment. [25] If a receivership commences when the company is in liquidation, the appointee cannot be the agent of the company so there is a change of possession when the appointee assumes control. In the absence of a demand for delivery of possession, this entry into possession might be unlawful.

2. VALIDITY OF THE APPOINTMENT

(i) The Receiver's Responsibility

A receiver should satisfy himself that one of the "events of default" within the meaning of the mortgage debenture has occurred. In Kasofsky v. Kreegers [26] Goddard J. stressed the importance of this point:

> "If one of the events which justified the appointment of a receiver had happened, then the appointment of the receiver crystallised the debenture holder's charge upon the assets, and gave a receiver a right to take possession. But if nothing had happened to give the debenture holder a right to appoint a receiver the fact that she wrote on a piece of paper that she had appointed a receiver does not crystallise her charge, nor does it give a right to receiver to take possession of the goods." [27]

(ii) Consequences of an Invalid Appointment

These are horrendous. Under the general law, the invalidly-appointed receiver and manager could be held liable as a trespasser; [28] so too could the mortgagee-debenture holder responsible for his appointment. [29] Alternatively, the mortgagor company could elect to treat the appointee as its agent and thereby claim the fruits of his receivership. [30] Moreover, the appointee could be held liable to account as a receiver and manager. [31] Section 324(3) of the Companies (Western Australia) Code now provides a measure of relief for a person entering into possession or assuming control who believes on reasonable grounds that he had been properly appointed as receiver. The court may order that the appointee be relieved in whole or in part of any liability incurred by him that he would not have incurred if he had been properly appointed. And the court may further order that the person responsible for the appointment shall bear this burden. Note that this section can only be invoked "In any civil proceeding arising out of any act alleged to have been done" by the appointee. Far from relieving the mortgagee this confirms their ultimate liability.

There is no general protection along the lines of the provisions relating to liquidators and directors to the effect that their actions shall be deemed to be valid notwithstanding any defect which may afterwards be discovered in their appointment. [32]

(iii) Judicial Guidance

There is no inexpensive way of determining in advance the validity of a proposed appointment. Section 324F allows a receiver and manager to apply to the Court for "directions in relation to any matters arising in connection with the performance of his functions".

There are several important points worth noting about this provision. First, it might apply only to properly appointed receivers and managers. [33] But this would appear to be inconsistent with the High Court's approach to de facto directors in Corporate Affairs Commission v. Drysdale. [34] Even if the "receiver" overcomes this difficulty, the scope of the directions is limited to "any matter arising in connection with the performance of his functions". Do these words extend to the threshold issue of the validity of his appointment?

Even if they do, will the directions be final and conclusive? The court is not given power to "determine" the question, and it may even decline to give any directions at all. The directions do not raise an estoppel [35] but they should afford the receiver and manager some grounds for relief under s.535. Yet, once again, this assumes that "receiver and manager" in s.535(5) includes an improperly-appointed receiver and manager.

There is a genuine need for a summary and inexpensive procedure through which an insolvency practitioner can have the validity of his appointment as receiver and manager determined.

FOOTNOTES

[1] Steiglitz v. Eglinton (1815) Holt N.P. 141; Berkeley v. Hardy (1826) 5 B. & C. 355.

[2] Re Leslie Homes Pty Ltd (1984) 8 A.C.L.R. 1020.

[3] See e.g. Property Law Act 1969-1979 (WA), s.11.

[4] (1983) 9 A.C.L.R. 91 and 117.

[5] Windsor Refrigerator Co Ltd v. Branch Nominees Ltd [1961] Ch. 375.

[6] [1973] 1 W.L.R. 944.

[7] [1961] Ch. 375.

[8] Law Book Co Ltd, 1981, p. 32.

[9] (1956) 99 C.L.R. 560, at 566.

[10] (1933) 50 C.L.R. 200.

[11] Ibid at 216.

[12] (1984) 59 A.L.J.R. 199.

[13] Ibid. See also (1983) 1 A.C.L.C. 621, at 632.

[14] See O'Day v. Commercial Bank of Australia Ltd (1933) 50 C.L.R. 200, at 216-217. See also Lezuba Pty Ltd v. Ferrier (1983) 1 A.C.L.C. 1, 192 (where the court found that there was no waiver).

[15] Cripps (Pharmaceuticals) Ltd v. Wickenden [1973] 1 W.L.R. 944, at 955.

[16] Wharlton v. Kirkwood (1873) 29 L.T. 644.

[17] See e.g. Bunbury Foods Pty Ltd v. National Bank of Australasia Ltd (1984) 58 A.L.J.R. 199.

[18] Mister Broadloom Corporation Ltd v. Bank of Montreal (1980) 101 D.L.R. 713; Lister v. Dunlop Canada Ltd (1979) 105 D.L.R. (3d) 684.

[19] Bunbury Foods Pty Ltd v. National Bank of Australasia Ltd (1984) 58 A.L.J.R. 199.

[20] O'Day v. Commercial Bank of Australia Ltd (1933) 50 C.L.R. 200.

[21] Australia & New Zealand Banking Group N.Z. Ltd v. Gibson [1981] 2 N.Z.L.R. 513.

[22] See cases cited at n.18.

[23] (1984) 2 A.C.L.C. 251.

[24] (1887) 35 Ch.D. 125, at 127.

[25] Atkins v. Mercantile Credits Ltd (1986) 10 A.C.L.R. 153.

[26] [1937] 4 All E.R. 374.

[27] Ibid at 377.

[28] Re Goldburg (No 2) [1912] 1 K.B. 606.

[29] Ibid.

[30] Ex parte Vaughan (1884) 14 Q.B.D. 25; Re Simms [1934] Ch. 1.

[31] Wood v. Wood (1828) 4 Russ. 558; 38 E.R. 976.

[32] Cf. Companies (Western Australia) Code, ss. 224 (directors), 373(9) and 407 (liquidators).

[33] See Re Wood & Martin [1971] 1 W.L.R. 293.

[34] (1978) 141 C.L.R. 236.

[35] Re Blackbird Pies (Management) Pty Ltd (No 2) [1970] Q.W.N. 14.