SYMPOSIUM ON REMEDIES ON DEFAULT

Comment by

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There are two lanes down which I wish to proceed today in terms of the progress of the receivership.

Let me say the first action one takes, when one is appointed as receiver and manager, is to pray. The second thing, and there is nothing that concentrates the mind more wonderfully, are the terms of the pre-existing documentation. The receiver and manager almost certainly will become involved in a review of all the documentation which was in existence prior to his appointment, and that of course will include the facility documentation, before the support agreement, as well as the terms of the actual support agreement.

No doubt, all of the lenders, will be similarly reviewing that documentation. There are a number of matters which may arise. For example, did the support agreement mean that the respective position of each of the lenders was preserved in the contractual arrangements? In other words, if before the support agreement one of the lenders had dual recourse against all of the companies in the group, does the support agreement retain that position for that particular lender and the advantage he may in fact have over another lender who is a party to the support agreement, who prior to entering into the support agreement did not have dual recourse?

What is the position of the lenders when the support agreement comes to an end? Presumably the appointment of receivers and managers will be an act of default and will bring the support agreement to an end. If the support agreement has not addressed that question, will in fact the pre-existing documentation, that is the facility documentation before the support agreement, come back into force?

The first speaker today addressed the question of the negotiation of the support agreement, and of course this will have been absolutely fundamental. It is fundamental in terms of the lenders ensuring that their positions vis-a-vis the other lenders are protected, and in particular, in the loss sharing arrangements. Questions will arise whether the "facility", that

is the total amount which a lender undertakes to make available, is the basis upon which he will share in the loss, or whether it is the actual exposure on the date at which either the loss sharing arrangement is entered into or the date of the appointment of the receivers and managers.

Query - if we look at a practical aspect of the receivership, the position of the unsecured creditor? In the example we have been given today, the arrangement that has been entered into is one between the banks with a view to them protecting their position as against all other creditors.

What happens with unsecured creditors? Has the security, granted by way of both the fixed and floating charge, had the effect of preferring the bankers to the unsecured creditors? Have the creditors been considered and arrangements made between the banks and the creditors for the creditors to rank in priority? If no such arrangement has been made, will the creditors, once they become aware of the support agreement, be prepared to continue supplying goods and services?

Query again, what happens on the appointment of a receiver and manager by the court? The application for the appointment of a receiver and manager has been made by the secured creditors, but once appointed by the court, he acts as an officer of the court and is looking after the interests of all creditors, that is the secured and unsecured creditors. He would, of course, need to look at the timing of the charges and when they were created. There are both fixed and floating charges.

The example indicates that the floating charges are being granted as security for antecedent debts, and therefore run the risk of being struck down if there is a subsequent liquidation within six months of the creation of the charge.

So as a practical matter, the receiver and manager appointed by the court would need to consider protecting the interests of all creditors. He should issue a petition to wind up the company and thus set the date for the commencement of a possible subsequent winding-up. Such a course of action will effect the security of the secured creditors under the support agreement.

In looking at some of the practical aspects (and I think this might be one of the quickest receiverships in history having only been allocated five minutes) the receiver is concerned with maintaining the status quo pending further applications to the court. Normally a receiver and manager when appointed by the court will not have authority to dispose of the assets or the undertaking. Once appointed the obvious alternatives are to move to an ultimate liquidation or to consider a scheme of arrangement. If the position of unsecured creditors had not been previously addressed in the support agreement, a scheme of arrangement will be high on the priority list if it is hoped to be able to continue operations for an orderly wind down.

The position of the bankers, where under the self receivership position they have been given authority to issue directions to the company, is one which would be of concern to a receiver and a

subsequently appointed liquidator. I would be concerned with the issues referred to by John Cadell earlier, ie whether the bankers, in issuing any directions to the officers of the company, were in fact becoming de facto directors and thus liable under all of the provisions of the Code.

The basis of the loss sharing in the support agreement and the relative positions of the lenders with a subsequent appointed receiver and manager will effect the provision of ongoing funding to the receiver and manager. The receiver and manager will have to keep the business operating pending a decision being reached on the future, and accordingly he will require funding. He can only get funding, one would think, from the lenders, and the lenders would be somewhat reluctant to continue to advance funds if on a review of their documentation through the support agreement, they have found that their position has not been adequately protected.