REMEDIES OF SECURED CREDITORS

Questions and Answers

Question - David Wicks (Baker McEwin & Co):

For years I have always put into debenture deeds a clause as part of a notices clause the proposition which goes something to this effect: "the mortgagor shall be deemed to have the money instantly and on the spot available notwithstanding any delay on it whatsoever". And while I would always go through the motions with allowing a proper opportunity for the mortgagor to get to the bank and give us the money, it has never happened yet. While I would always allow that, I have always felt that a clause of that kind was of considerable comfort.

The other point I want to make is really a question. And that is, there is a section in the Code, it was 186 in the old Act and I think it is 323 or something like that now, which says that various people are not entitled to be a receiver - one them was the mortgagee and the other was anybody who didn't hold a liquidators licence.

I have always wondered how you would define a receiver. When is a receiver not a receiver? Is it when you gave him the label "Receiver" or are there some other people who perform exactly identically the same functions as a receiver performs? In other words is the principal of the agent that you have been talking about, is he in fact acting as a receiver when he is doing identically the work that a receiver would be doing in this sort of thing? Is this mortgagee in possession trick that we are getting up to open to attack under that section?

Answer - James O'Donovan:

Thank you for those interesting comments and questions. May I start with the last one which was the only genuine question in your list? A receiver is what a receiver does. There is a case called Popraki v. Scott in which Mr Justice Brinsten in the Supreme Court of Western Australia decided that the label receiver should be attached to anyone who is either appointed as receiver and manager or someone who acts as such.

Now a mortgagee in possession, even if the mortgagee in possession is acting through an agent, is not a receiver. They are conceptually different, they are different legal categories as you know, their range of responsibilities is quite different,

so a mortgagee in possession, even if acting through an agent, is not a receiver and manager. He is not subject to the statutory duties and obligations of a receiver and manager and is not subject to the general law duties and obligations of a receiver and manager. It is a completely different ball game.

Comment - Andrew Marks (Corrs Pavey Whiting & Byrne):

By way of further elaboration to this mortgagee in possession "trick" as the last speaker called it, I regret that I don't know the name of the case but only last week or the week before Mr Justice Gobbo of the Supreme Court of Victoria decided that a mortgagee in possession was not a trustee for the purposes of section 221P of the Income Tax Assessment Act, so it seems that that procedure will be followed more often than it has been in the past.

Question - John Shertham (Clayton Utz):

A question for Mr McIntosh. Alex can you normally assume that when your client bank rings up in the middle of the morning and says that such and such a borrower has gone down the plug-hole and that he wants to appoint a receiver that day, that either he or the prospective receiver has sat down and had a look at whether there is any unpaid group tax which would justify going the mortgagee in possession route?

Answer - Alex McIntosh:

Normally John, they don't because usually the debtor will not confess not to have paid the group tax. It is only when you confront him with the answer to the question that he says "Oh dear me". So invariably I would say that you don't have the opportunity to ascertain whether there is group tax owing or not. Very few debtors will confess to not having paid their group tax, or anything else.

Question - Bob Baxt (Monash University):

I wanted to ask a question of the panel in relation to the duties of receivers, in particular as a result of the Expo International v. Chant ([1979] 2 NSWLR 820) and some remarks made by Lord Denning in Standard Chartered Bank case where he suggested that the receiver/manager had a duty of care similar to the duty of care arising from Donoghue v. Stevenson and a line of cases terminating with Anns v. Merton Borough. Recently that particular concept of a duty of care at least was accepted in passing by Mr Justice Mann in the English High Court in the American Express litigation.

In view of the definition of receiver as an officer under section 229(5) and the duties of care expected of receivers as officers pursuant to section 229, in view of the dicta that had been flying around about the duties of directors and officer perhaps to creditors, I just wonder what the panel thinks about this line

of reasoning extending the duty of care to the receiver and manager beyond the duty to the creditor that is appointing him and a duty extending to others within the corporate sphere?

Answer - James O'Donovan:

I no longer draw any comfort from Expo International v. Chant. I think it has been swept aside in part at least by section 229 and I think we have to accept the fact that receivers and managers are now liable for negligence by another name perhaps, to the company itself (the borrower). It says "at all times take reasonable care or take reasonable precautions" I think. So that is akin to negligence and I believe receivers and managers are liable to the borrower corporation for negligence.

The other part of your question related to the Cuckmere Brick ([1971] 2 WLR 1207) case and with respect I think it is nonsense to extend the Donoghue v. Stevenson neighbour principle to this context. They are completely different contexts. With respect it is a question of getting the context wrong. The Donoghue v. Stevenson principle of course deals with the general law of negligence. The other context, the real context that we are talking about here is the context of exercising powers - powers conferred upon people for specific purposes. It is an equitable duty to exercise the power for purposes serving that power. In other words, not to commit a fraud on the power. They are completely different contexts and the Cuckmere Brick case should not be followed in Australia and to my knowledge has not been followed in Australia. I think our line is to insist upon mere good faith not the more onerous obligation imposed in Cuckmere Brick. That is, of course, with the exception of Queensland where section 85 is a statutory exception to that proposition.

Question - Cathy Walter - (Clayton Utz, Melbourne):

A question for Professor O'Donovan and it addresses the question of timing of retirement of a receiver rather than the appointment question. From time to time you have a receiver approach you who has conducted a lengthy receivership and sees that it may provide the fruits of many profits in the future and is unwilling to retire although he is coming to the end of his own realisation requirements and he has perhaps enough in kitty to pay out a subsequently appointed receiver.

What do you see as the obligation as to the timing of retirement in a situation say where the debentures under which he has been appointed is silent on the question?

Answer - James O'Donovan:

That is probably one of the most perplexing questions in receivership at present. It has been resolved by statute in New Zealand by a specific statutory provision there clarifying the area and, as you know, it is clarified in some mortgage debentures, making it easier for a receiver and manager to

vacate, allowing the charge to refloat in giving the lender the option of re-appointing the receiver and manager at a later date. Now in the absence of that particular provision it is a problem.

I think the receiver and manager should vacate when the law of diminishing returns begins to apply, when there is really no point in prolonging the receivership through a more protracted period when for instance his costs are more substantial than the receipts. I think that would be to me the litmus test from a pragmatic point of view. As far as I am aware there is no legal obligation reflected in the case law to vacate at a particular point in time. I think you would have to look at his general law duties to the lender and to the borrower to a certain extent and consider whether he is sacrificing the assets of the borrower in the interests of protracting the receivership and escalating his own fees.

Now reputable receivers don't do that and in my experience they are prepared to vacate as soon as possible. When it looks as if they are trying to get blood out of a stone, they will vacate.

Question - Tony Tobin (Sly & Russell):

Could I ask James O'Donovan this question because he raised the prospect of it. If a receivership is invalidly created the receiver is improperly appointed. You mentioned that there are two possible courses of action that the borrower can take: either to sue for damages or to seek to recover the profits of the receiver's activities.

My first question is if the borrower takes the second course of action, that is to seek an account of profit, does the receiver have, or the receiver and the bank, have the possibility of recovering something from the debris by getting some form of quantum meruit type entitlement for the remuneration of the receiver? And, if the answer to that question is yes, then is the receiver and or the bank in a position where they can require or direct the borrower to seek that method of recovery rather than damages where presumably there is no ability to recover anything in a receiver's remuneration?

Answer - James O'Donovan:

That is a very interesting question again. I think the borrower certainly has that option of suing for damages and trespass or in effect retrospectively ratifying the appointment at least to a limited extent and seeking the fruits of the receivership. I don't think the lender or the receiver and manager can force the borrower to exercise that option in a particular way. However, I think the improperly appointed receiver and manager would have a valid restitutionary claim on "quantum meruit" grounds to some just reward for the services rendered, and that claim would be on the "quantum meruit" basis.

There have been (Re Harknett possibly) cases in recent times and one case recently where a liquidator was improperly appointed and he was entitled to claim expenses (and so on) legitimately incurred which would assist a subsequent liquidator who had been properly appointed.

So I think there is ample justification there for a claim based on quantum meruit grounds but that is where the borrower benefits from the administration and you were talking about that situation where profits were generated, so I think there is ample justification there for a quantum meruit claim.