
RECEIVERS AND THE CREDIT CODE — ISSUES FOR SUCCESSFUL RECOVERY (A CASE STUDY)

QUESTIONS AND ANSWERS

Question – Andrew Luckhurst-Smith (Australian Legal Recoveries Pty Ltd, Adelaide):

I have a question for Kevin Dundo. It is about the provisions under the Corporations Law whereby the bank could seek a declaration of the validity of the proposed appointment of the receiver. My question really goes to the practical issue and how one goes about framing such an application given that the security is so vulnerable in this case – namely, cars in a car yard. In issuing the application to the court, could an application seeking a declaration be obtained ex parte, so that there was not the risk of the bank appointee arriving and finding no cars in the car yard? And secondly, what do you think would be involved in actually obtaining the order? Would a final order be made or some interim order?

Response – Kevin Dundo (Speaker):

My view would be that it could not be made ex parte because there are a number of parties whose interests are affected.

In framing the application, I know that in Western Australia (and I am sure similar case management exists in other States) we have a procedure which is referred to as the expedited list in dealing with commercial matters and court matters. So therefore a very quick decision could be made – a declaration could be obtained very quickly through that case management process in Western Australia. So I think in framing the application, because it is a narrow point in terms of what the court has to declare, it is whether or not there has been an event of default and whether or not the bank can rely upon that particular provision in the mortgage where it is in the reasonable opinion of the bank that there has been a significant change both in value and in the operations of the company. In Western Australia the application would go on affidavit and through the expedited list I believe a very quick decision could be made.

To protect the interests of Oz Bank during the process of making the application, because you are dealing with cars (one would assume that a greater problem would be if it was perishable goods) I would think that the court would give some interim relief by way of injunction, for example the administrator not dealing with the property against the wishes of the bank.

To conclude, I think that some interim relief could be granted and if a similar system exists in other States as I have explained through the expedited listing in Western Australia, a very quick decision as to whether or not there is an event of default and a declaration to that effect could be obtained.

Question – Andrew Luckhurst-Smith (Australian Legal Recoveries Pty Ltd, Adelaide):

A question for Colin. In relation to the Ombudsman, do you get many complaints or are you getting involved in any conciliation work in relation to appointment of receivers and managers?

Response – Colin Neave (Speaker):

In short, no. We would be happy to consider it but have not been approached on this issue to date.

Question – Andrew Ham (ANZ Banking Group Ltd, Melbourne):

I would like to ask Colin Neave if he could expand a bit on how the ABIO would deal with some of the contraventions that have been raised today as far as those are within the terms of reference. For example, there was the possibility of enforcement notices being deficient and in breach of the Code and not having sufficient disclosure.

Response – Colin Neave (Speaker):

First of all, the backdrop in relation to the Consumer Credit Code is that we are not a regulatory agency. So issues which have the potential for civil penalties or are potentially breaches of the Code in so far as they come up, we would refer out to the appropriate tribunal or depending upon how the States have structured (because they are all different in various States) the enforcement side which might involve penalties.

I think that our office is going to have to work towards having established appropriate protocols with the various State-based enforcement organisations to deal with some of those problems. But I think the essence of a scheme such as ours is that we need to maintain the trust of the banks in sharing issues and their files with us and to make sure that we keep our role as an alternative dispute resolution service – a complaint handling service, sitting in the middle primarily. If as a result of any particular investigation we feel that there is a matter which needs to be dealt with by a regulatory agency, then we will need to refer that to that agency.

Question: Sally Pitkin (Chairperson):

I have a question for Kevin. In light of Judy's comments that the receivers might be personally liable for breaches under the Credit Code, would that be something that would be covered under the usual indemnities that the bank would give the receivers on their appointment?

Response: Kevin Dundo (Speaker):

I think the short answer is, no. I think that most deeds of indemnity given to receivers would have the usual provisions that the receivers are not covered for negligence and any similar conduct. I think that in this case the failure of the receivers and managers to acquaint themselves with the operational needs of Ritz Car Finance may in itself be negligent and therefore their exposure as a consequence would not be covered by the deed.