

THE ECONOMIC DOWNTURN SERVES UP AN “ACE” FOR “LPA” RECEIVERS

m u n d a y s

March 2009

2009 may have seen a drop in interest rates, house prices and bank lending but one area showing an upward trend is the number of appointments of Law of Property Act receivers. 2007 recorded approximately 1,000 appointments and in 2008 this figure increased eight fold, quite where it will end up in 2009 is as unpredictable as a Nadal/Federer Grand Slam final!

Appointing a Receiver

Lenders have the right to appoint an LPA receiver by the powers vested in them under the Law of Property Act 1925. The power arises when the “mortgage money has become due”. This will occur where the fixed term loan has come to an end or if a demand has been made and it has not been paid or if there has been some other default under the mortgage terms which gives rise to the repayment of the loan.

There are procedural requirements which must be complied with when appointing a receiver and it is crucial that these are followed. In particular, to ensure the validity of the appointment, the lender must make sure that there is no administration order in place, that correct notices have been served and that timescales have been complied with.

Whilst the appointment of a LPA receiver does bring an additional cost element to the lender, there are a number of advantages to the lender in appointing a receiver. As well as providing a useful buffer between the lender and the borrower, it also allows a new look and a fresh insight into how to address the problems which the borrower and the lender may be facing. Of course for the bank there is also the added advantage that the bank is not liable for the actions of the receiver as invariably the receiver will act as agent of the borrower and not of the lender.

The office of “LPA receiver” is not regulated so as to require its officeholders to hold a specific qualification. However, the receiver will be subject to a number of obligations and duties and so it is not a role for the faint hearted! In practice, a receiver will often be either an insolvency practitioner or surveyor or even a solicitor. Their statutory powers emanate from the Law of Property Act 1925 but will be enhanced by the express provisions set out in the lender’s charge.

Powers, Duties and Obligations.

The receiver’s **powers** when “managing” the property in question may include terminating contracts of employment/employing staff, obtaining possession by issuing proceedings, opening bank accounts, insuring the property, collecting rent and ultimately exercising the mortgagee’s power of sale. On the flipside, the **duties** extend to paying taxes, complying with the borrower’s contractual obligations and statutory obligations in relation to the property. These can be extensive depending on the nature of the property and the business carried out at the property. The receiver may want to check prior to appointment whether there are substantial breaches of statutory duties in relation to the property before accepting its appointment and would certainly be well advised to obtain an indemnity from its lender at the outset.

The **obligations** of the receiver have unsurprisingly been considered extensively by the courts and case law has arisen which acts as a guide for LPA receivers as to the extent of their obligations. The extent of the duty of care of the receiver will depend on “the circumstances of each case”. Whilst, some recent case law has seen a broadening of their obligations other cases have helped provide some clarity on these extended obligations.

The **obligations** of the receiver have unsurprisingly been considered extensively by the courts and case law has arisen which acts as a guide for LPA receivers as to the extent of their obligations. The extent of the duty of care of the receiver

update

meeting legal
challenges
with solutions

munday's
solicitors

will depend on "the circumstances of each case". Whilst, some recent case law has seen a broadening of their obligations other cases have helped provide some clarity on these extended obligations.

Case Law

The 1993 case of *Downsview Nominees Ltd v First City Corporation* (1993) AC 295 held that the receiver/mortgagee – (they were to be treated as largely the same as regards their duties) owed a duty to the borrower and by extension to the borrower's guarantor but that the duty of care was founded in "equity" and therefore more restricted than the form of "duty of care" based in negligence. The case suggests that the receiver's obligation would be satisfied if it acted in good faith with the object of preserving and realising assets for the benefit of the lender. In those circumstances it could not be criticised even if it was "incompetent".

However, a receiver's obligations have been extended by subsequent cases. In particular, in the case of *Medforth v Blake*, the court criticised the receiver for not maximising the financial position. In that case, the receiver of the business of a pig farm was held liable for failure to negotiate a bulk discount for the pig feed it purchased. The principle of a good faith referred to in the *Downsview* case was extended to include the duty of due diligence.

The 2003 case of *Silven Properties and others v Royal Bank of Scotland and others*, provided further light on the obligation of the receiver. In that case, it was concluded that the LPA receiver was not obliged to pursue a planning application which might increase the value of the property. The suggestion being that the receiver was under a duty to expend money to maintain the value of the security but not to improve it. He therefore was not under an obligation to take steps to improve the security by obtaining the planning permission.

The 2008 case of *Bell v Long* revisited the issue. The case concerned the sale by a receiver of a portfolio for properties as one "complete" portfolio. The question arose as to whether or not the receiver should have sold the properties as one portfolio or individually prior to sale. The receiver had received offers for three out of the four properties from individual sellers but after taking advice from a local agent rejected those three individual offers and sold the properties as a complete portfolio to one purchaser. Action was taken against the receiver on the grounds that the receiver would have obtained the best price had the properties been sold on an individual basis

The arguments were rejected and the court held that whilst the receiver was under an obligation to obtain a proper price for the properties he was not obliged either to "ride the market" or "take on onerous expenditure in order to achieve a sale".

CONCLUSION

Whilst the origins of the "receiver" can be dated back to 16th century and those of the LPA receiver back to 1925, it is clear that this method of recovery, whilst steeped in history has not been banished to the history books. In fact, 2009 will see a resurgence of this useful approach to recovery.

For more information please contact

George Georgiou
 DDI: 01932 590500
 e-mail: george.georgiou@mundays.co.uk

This document is for general information only, it does not intend to provide legal advice. Mundays accepts no responsibility for loss which may occur from reliance on information contained in this document.

receiver

Mundays LLP
 Cedar House
 78 Portsmouth Road
 Cobham
 Surrey KT11 1AN

DX 36300 Esher
 tel +44 (0) 1932 590500
 fax +44 (0) 1932 590220
 email enq@mundays.co.uk
 web www.mundays.co.uk