



# Court Appointed Receiverships and Corporations

Talk presented to IPA NSW Study Group

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# Topics

- Examples of court appointed receiverships
- Who can be appointed
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# Classic court appointed receivership



- Old equitable remedy to preserve property whilst final entitlements are resolved.
- Interim measure - where a jeopardy to assets.
- **Examples:**
  - To enforce an equitable charge on a default, such as a charging clause in a guarantee.

# Examples cont.



- To secure property which is charged and is under jeopardy, where the charge is not yet enforceable.
- To aid equitable execution of a judgment debt – risk of fund dissipation.
- Where a board is deadlocked and the company is solvent.
- To assist in a mareva injunction or an exceptional asset preservation need.

## Corporations Act Specific Remedies

- Where directors are mismanaging the affairs of the company or oppressing members: section 233(1)(h).
- Section 1323 of the Corporations Act – ASIC application

# Who can be appointed?

- Section 418(1) of Corporations Act concerns receivers of property of a corporation. It excludes, relevantly:
  - A mortgagee, or officer, senior manager or employee of the mortgagee;
  - An auditor/a director, secretary, senior manager, or employee of the corporation or a related corporation;
  - A person who is not a registered liquidator.
- Equity would not usually appoint a person having an interest in the property (partnership excluded) or closely associated with the moving party.

# How are they appointed?

- The appointment is an interim remedy. Usually the application must be accompanied by a prayer for some final relief against the company or another party e.g. a declaration.
- Applicant's proposed receiver usually provides either a consent in open court or a signed form of consent verified on affidavit.
- Party seeking order may also be required to give an undertaking as to possible damages if appointment is later found to be unjustified.

# Security



- The court can order security to be given by the applicant, to ensure there is an accounting by the receiver.
- An experienced liquidator proving PI insurance, may not be required to do so.

Federal Court of Australia: Order 26 Rule 3 – Form 40 Guarantee to Registrar/Uniform Civil Procedure Rules: Part 26 Rule 26.3 – Form 41.

# Court's power to appoint



- The court can appoint a receiver by an interlocutory order: "*In any case in which it appears to the court to be **just or convenient** so to do.*" : Section 57 of the Federal Court of Australia Act, section 67 of the Supreme Court Act.
- This is a broad power, the categories of which are not closed.

# Court's Approach

- Most often there needs to be an interest in property (in a broad sense) before a receiver will be appointed.
- Usually the remedies at law or other equitable remedies must be inadequate before the appointment will be made.
- The court will look to see if there is a less drastic remedy available such as an undertaking or an injunction before ordering a receivership as: *"Even if the army of occupation is withdrawn after only a short time, things may never be the same again": Bond Brewing case.*
- The court exercises: *"very great circumspection"*.
- Ex parte application will not normally be granted except in an emergency: *"Only the most pressing needs warrant such an invasion without notice". Bond Brewing case*

# Court's Approach cont.



- A court should not appoint a receiver and manager to administer the affairs of the company in financial difficulties, where the company opposes the course: Bond Brewing.
- The exception is an application by a charge holder.
- An unsecured creditor would normally apply for the appointment of a provisional liquidator where insolvency is likely.

# 1323 Corporations Act

- ASIC can apply to a court for the appointment of a receiver where:
  - An investigation is being carried out under the ASIC Act or the Corporations Act, in respect of an act or omission of a person that constitute or may constitute a contravention of the Corporations Act.
  - A prosecution has begun against a person, for a contravention of the Corporations Act; or,
  - Civil proceedings have begun against a person under that Corporations Act and;
  - the court considers it is necessary to appoint a receiver to protect an aggrieved person to whom that person/corporation may be liable to pay compensation or damages.

# 1323 Corporations Act

- Usually granted where the evidence suggests fraud, serious or persistent breaches, or a dissipation of assets.
- No undertaking as to damages may be ordered: 1323(4).

eg: Westpoint Group appointment: ASIC, In the matter of Richstar Enterprises Pty Ltd v Carey (No 3) [2006] FCA 433.

# Powers of the receiver?

- As a court appointee, receiver's powers will be first those conferred by the court in the appointment order;
- Section 420 Corporations Act adds powers (but the court may restrict them in its orders). These include:
  - Taking possession and control of the property, leasing, letting disposing or hiring it;
  - Borrowing money on the security of it;
  - Carrying on the business
  - Executing documents in the name or on behalf of the corporation;
  - Engaging employees and other agents
- No property vests in the receiver but it is contempt of court to interfere or withhold assets from the receiver.

# Duties



- Fiduciary obligations owed to persons interested in the property they are dealing with.
- Must exercise reasonable skill and care.
- Must act impartially, fairly and honestly.
- Must not act for one party or be directed by it – not their agent.

# Duties cont.



- Corporations Act duties include:
  - Section 420A duty of care in exercising the power of sale.
  - Section 421 keeping bank accounts and accounting records.
  - Section 421A managing controller to report
  - Section 429 (2) obtain a report as to affairs.
  - Section 432 lodging of accounts
  - Section 433 payment of preferential debts (only if appointed on behalf of debenture holders) in a respect of a floating charge.

# Liability

- A receiver and manager contracts as a principal, and incurs a personal liability, but see 420(2)(k) - power to sue or defend in name of company.
- If the company merely continues to perform a contract in existence at the time of appointment, then a receiver does not incur personal liability.
- Personal liability arises when they enter into a new contract, or by novation adopt an existing contract, but can exclude personal liability – subject to Section 419.
- Section 419 liability for debts incurred – but only if appointed: *“for the purpose of enforcing a charge”*.
- Section 419A dealing with occupation or possession of property.
- A receiver can ignore contracts which do not affect the goodwill of the company. If the position is unclear they need to approach the court to seek directions, under the court’s inherent jurisdiction.
- A court appointed receiver is an officer pursuant to Section 9 of the Corporations Act.

# Supervision



- A receiver is an officer of the court and thus cannot be removed except by a court order.
- The court appointed receiver can be supervised by the court, either inherently, or pursuant to s423 (inquiry) or 434A (remove for misconduct) of the Corporations Act.
- A receiver's decision can be appealed by a person aggrieved: Section 1321 of the Corporations Act.
- The receiver must strictly comply with the court appointed orders.
- There is an inherent power in the court to give the receiver directions.
- Need court leave to sue the receiver.

# Remuneration



- The receiver derives their income under the terms of the order by which they were appointed: Federal Court of Australia Court Rules Order 26(4) / UCPR Part 26 Rule 26.4.
- The remuneration approval protocol should be spelt out carefully in the appointment order.
- The court order should fix the hourly rate at which the receiver or staff are to be paid.
- Receiver's remuneration is payable ahead of claims of creditors, unless the property is encumbered in favour of those creditors.

# Remuneration cont.



- Receiver has a right of indemnity and lien over the assets to pay approved remuneration and properly incurred expenses.
- The salvage principle may allow the receiver to have priority over prior encumbrances, for work done preserving or protected these secured assets.
- If the assets are insufficient a receiver cannot look to the court or the parties who sought his appointment for indemnity.

# Termination of the receivership

- Normally discharged by a court order.
- The court order should ensure that the receiver holds back a proportion of money, if there is excess funds available to meet his unpaid fees (to be fixed), expenses and any liability.
- Upon discharge, the receiver has to lodge accounts under s432. The receiver must also notify ASIC.
- The receiver should notify creditors and suppliers once they have ceased to act.

# Case Examples



- *Bond Brewing Holdings Ltd and Ors v National Australia Bank Ltd And Ors* (1990) 1 ACSR 445.
  - Consortium of unsecured banks had receivers appointed to Bond Brewing Holdings at 4pm on 29 December 1989, in an ex parte application, where they gave no security or undertaking.
  - Breach of a covenant had occurred, leading to a demand being given, on the same morning, calling in a debt of A\$800 million.
  - The Court of Appeal overturned the receivership appointment. Special leave was refused by the High Court of Australia.

# Bond Brewing

- Don't bring an ex-parte application, when notice could have been given, except in an emergency.
- No undertaking as to damages was given or even offered. It should have been on an interlocutory application.
- In considering the appointment of a receiver, consideration should be given as to the balance of convenience.
- Court will not appoint a receiver to an insolvent company at an unsecured creditor's request, if it is opposed.

# ABC2

- *Commonwealth v ABC2 Group Pty Ltd* (2008) 69 ACSR 228.
  - Commonwealth of Australia approached the court as creditor of ABC Learning Centres Ltd, to seek the appointment of a receiver to ABC2, a company incorporated to buy 228 unprofitable child care centres for \$1.
  - The sale was for the goodwill of the centres' licences, to use the equipment and leased premises and to employ staff (subject to their consent).
  - Commonwealth to provide assistance to fund the program of assessment and rationalisation of the centres, to enable their improvement and sale.

# ABC2 cont.



- Sale conditional upon the court approving the appointment of Parbery & Bryant from PPB as receivers.
- Application under 447B(2) of the Corporations Act – *“on the application of a creditor of a company the Court may make such order as it thinks necessary to protect the creditor’s interests while the company is under administration.”*
- Court felt its inherent jurisdiction could be invoked, if that section was not.

# ABC2 cont.



- Court appointed the receiver, felt there would be a benefit otherwise unavailable, namely the real possibility deriving financial benefit from the unprofitable centres which would not be achieved without this proposal.
- No undertaking as to damages was given in the very special circumstances of the case.
- The receivership was ordered until further order.

# Painaway Australia



Unreported – 11/11/10 Supreme Court of NSW, Ward.J

- Shareholders in a dispute agreed to orders to appoint a receiver.
- The company became insolvent.
- Painway applied to first have the receiver appointed as provisional liquidator and in the same application, a moment later, the receiver was given leave to appoint himself and his partner voluntary administrators.
- See also *Re Southern Cross Airlines Holdings Ltd* (1993) 10 ACSR 466 – receiver appointed a provisional liquidator.



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