

# The things a security taker needs to know about receivership under BVI law

GUIDE

December 2016

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## Introduction

One of the main reasons the BVI remains a popular place to establish an asset holding company is that its insolvency law is creditor friendly and modelled on the English Insolvency Act 1986. Consequently, lenders around the world are comfortable lending money to BVI companies.

This guide examines the things a security taker needs to know about receivership under BVI law. In it, **security giver** means a BVI company that has created security over an asset owned by it.

## What is receivership?

Receivership is a remedy available to a security taker both under statute and the terms of a security document. The power to appoint a receiver arises when the security giver or some other person fails to pay an amount, or to perform another obligation, under a loan agreement or other debt document.

It is customary to appoint more than one receiver and for each receiver to be able to act individually. This ensures that there is always a receiver who is available to act.

The role of the receiver is to take custody and control of, collect the income from, and (if necessary) sell, on behalf of the security taker, an asset over which the security taker has taken security.

The Insolvency Act 2003 (the **Insolvency Act**) is the primary legislation governing receivership under BVI law. The Insolvency Act applies to a receiver appointed under a security document, the Insolvency Act itself or another statute. In the context of international financing transactions, the other legislation which gives a statutory right to appoint a receiver is the BVI Business Companies Act 2004 (the **Companies Act**) and Conveyancing and Law of Property Act 1961 (the **Conveyancing Act**).

## What types of receiver may be appointed?

For the purposes of the Insolvency Act, there are two types of receiver: a simple receiver (sometimes called a fixed charge receiver) and an administrative receiver.

In this guide, **receiver** means both a simple receiver and an administrative receiver unless we indicate otherwise.

The Insolvency Act defines a **receiver** as being a receiver of the whole or any part of the assets of a security giver, including:

- a manager and a receiver and manager;
- a receiver of income; and
- an administrative receiver.

The Insolvency Act defines an **administrative receiver** as a receiver of the whole, or substantially the whole, of the business, undertaking and assets of a security giver appointed by:

- a security taker out of court under a security document which includes a security interest that was created as a floating charge (whether or not the document creates any other security interest); or
- the High Court under the Insolvency Act.

## How does the right to appoint a receiver arise?

A receiver can be appointed out of court or by an order of the court.

### Out of court appointment

In the vast majority of cases, a receiver will be appointed out of court because it is quicker and cheaper.

Where a receiver is appointed out of court:

- the appointment must be made in writing;
- the appointment takes effect from the time the receiver receives notice of appointment; and
- is not effective unless the receiver accepts the appointment before the end of the next business day following receipt of notice of appointment.

Where the appointment of a receiver made out of court is invalid, the court may order the security taker to indemnify the receiver against any liability that may arise as a result of the invalid appointment if it is satisfied that the receiver acted honestly and reasonably.

### **Court appointment**

The court may only appoint a receiver where it is given a statutory power to do so.

An application to appoint a receiver may be made under the West Indies Associated States Supreme Court (Virgin Islands) Act 1969 in accordance with Part 51 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. A court appointed receiver:

- is an officer of the court;
- has the powers set out in the order appointing the receiver; and
- is supervised by the court in carrying out the receivership.

The Companies Act gives a security taker who holds a mortgage or charge over shares in a BVI company the power to appoint a receiver over those shares.

The Conveyancing Act gives a security taker the power to appoint a receiver if the security document is a mortgage (which is defined to include a charge) that is created by way of deed. The power is only exercisable once the power of sale under the Conveyancing Act has arisen.

### **Who may be appointed as a receiver?**

An administrative receiver must be a licensed insolvency practitioner. A simple receiver need not be a licensed insolvency practitioner, but almost invariably, will be.

Instead of listing who may be appointed as a receiver, the Insolvency Act lists the persons who may not be appointed as a receiver. These are:

- a security taker of any asset of the security giver;
- a person who is, or during the previous two years, was:
  - an officer or employee of a security taker of any asset of the security giver; or
  - a shareholder of the security taker or a company related to it;
- a person who is disqualified from being an insolvency practitioner due to bankruptcy or a disqualification order;
- a person who is, or at any time in the previous three years, was:
  - an auditor of the security giver or employee of its auditor; or
  - a director of the security giver;
- a body corporate;
- the official receiver (unless appointed by the court); and
- any person prescribed from being appointed.

If a person who is ineligible to be appointed as a receiver accepts an appointment or acts as a receiver, the person commits an offence and, upon being convicted, is liable to a fine of up to US\$4,000.

### **What is the status of a receiver?**

The Act says that:

- a simple receiver appointed out of court is taken to be an agent of the security giver unless the security document states otherwise; and
- an administrative receiver is taken to be an agent of the security giver.

Similarly, the Conveyancing Act says that:

- a simple receiver appointed under it is taken to be the agent of the security giver; and
- the security giver is solely responsible for the receiver's acts or defaults unless the security document states otherwise.

It is also customary for the security document to say that a receiver is an agent of the security giver. The reason for this is that making a receiver the agent of the security giver means that the security taker will not be liable for the receiver's acts.

A receiver's agency terminates if a liquidator is appointed, but this does not affect the power of the receiver to deal with the assets over which the receiver was appointed.

What is the effect of appointing a receiver?

### Public documents

Where a security giver is in administrative receivership, every public document issued by the security giver, the administrative receiver or any liquidator on which the name of the security giver appears, must state that an administrative receiver has been appointed.

Where a simple receiver is appointed in respect of any asset of a security giver, every public document issued by the security giver or the receiver relating to the asset must contain a statement that a receiver has been appointed.

The failure to comply with these requirements is an offence punishable by a fine, but does not affect the validity of any document.

### Effect on directors

The appointment of a receiver displaces the power of the directors to exercise control of the assets that are subject to the receivership. The appointment of a receiver does not, however, remove the directors from office and they retain residual powers in respect of matters not affected by the receivership.

In the case of an administrative receiver, since the security taker will have a floating charge over the whole, or substantially the whole, of the security giver's assets, although the directors will remain in office, effectively the administrative receiver will displace the directors in the management of the security giver and its business.

### Administration

Although Part III (Administration) of the Insolvency Act has not yet been brought into force, it is worth noting that, if Part III is brought into force, an administrator cannot be appointed over a security taker if a qualifying administrative receiver has been appointed unless the security taker consents to the appointment of the administrator.

### Does the insolvency of the security giver affect a security taker's right to appoint a receiver?

The Insolvency Act says that, with effect from the start of the liquidation of the security giver (among other things):

- the liquidator has custody and control of the security giver's assets;
- the security giver's directors and officers remain in office, but cease to have any powers, functions or duties other than those required or permitted under the Insolvency Act or authorised by the liquidator;
- unless the High Court orders otherwise, no person may:
  - commence or proceed with any action or proceeding against the security giver or in relation to its assets; or
  - exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the security giver; and
- unless the High Court orders otherwise, no share in the security giver may be transferred.

Any act done, or attempted to be done, in breach of these matters is void.

Despite the above, the Insolvency Act says that a security taker may take possession of, and realise or otherwise deal with, assets of the security giver over which it has security.

## Preferential creditors

Where a:

- security giver is not in liquidation; and
- receiver is appointed on behalf of the holder of a floating charge,

the security giver's preferential creditors are to be paid from the assets coming into the hands of the receiver in priority to any claims for principal or interest under the security document under which the receiver was appointed or any other security document secured by a floating charge.

Any payment made to a preferential creditor by a receiver is to be recouped (as far as is possible) from the assets of the security giver that are available for payment of unsecured creditors.

## What are the powers of a receiver?

### Insolvency Act

As mentioned above, in the vast majority of cases, a receiver will be appointed out of court, and accordingly, the receiver will be given wide ranging powers in the security document.

Under the Insolvency Act, a simple receiver has the powers expressly or impliedly given to the receiver:

- (in the case of a simple receiver appointed out of court) by the security document; or
- (in the case of a receiver appointed by the court) by the court order,

under which the receiver was appointed.

Unless the security document, or court order, under which the receiver is appointed expressly states otherwise, a simple receiver may:

- demand and recover, by action or otherwise, income from the assets over which the receiver has been appointed;
- issue receipts for income recovered;
- manage, insure, repair and maintain the assets over which the receiver has been appointed; and
- exercise, on behalf of the security giver, a right to inspect books or documents that relate to the assets over which the receiver has been appointed in the possession, or under the control, of a person other than the security giver.

Where a simple receiver appointed out of court is authorised to execute documents in the name of, or on behalf of, a security giver (whether under a power of attorney or otherwise), the authority continues in respect of documents necessary or incidental to the receiver's powers despite the security giver going into liquidation.

Unless the security document under which an administrative receiver is appointed states otherwise, the powers of an administrative receiver, in relation to the assets to which the appointment relates, include the power to:

- take possession of, collect and get in, the assets of the security giver (and to take any proceedings to recover possession of them);
- execute any document under hand or seal;
- sell, create security over or otherwise dispose of the security giver's assets;
- borrow money on a secured or unsecured basis;
- appoint any solicitor, accountant or other professionally qualified person or agent;
- commence, continue, discontinue or defend any action or other legal proceedings in the name of, and on behalf of, the security giver;
- do all things necessary to realise the security giver's assets;
- make any payment;
- carry on the business of the security giver;
- make any compromise or arrangement on behalf of the security giver;
- rank and claim in the bankruptcy or insolvency of any person;

- make or defend an application for the liquidation of the security giver; and
- amend the security giver's memorandum of association or change the location of its registered office.

### Companies Act

Under the Companies Act, a receiver appointed over shares in a company may (subject to the terms of the security document):

- exercise the votes attached to the shares
- receive distributions in respect of the shares; and
- exercise other rights and powers of the security giver in respect of the shares, until the security interest is discharged.

### Conveyancing Act

The Conveyancing Act gives a security taker a statutory power to appoint a receiver if the security document is a mortgage (which is defined to include a charge) that is created by way of deed. The power is only exercisable once the power of sale conferred under the Conveyancing Act has arisen.

It is preferable to appoint a receiver under a security document rather than relying on the power of appointment in the Conveyancing Act because the powers given to a receiver under the Conveyancing Act are much more restricted than those normally given under a security document.

Under the Conveyancing Act, a receiver has the power to demand and recover all the income from the secured assets, give receipts and exercise any powers delegated to the receiver by the security taker under the Conveyancing Act.

### What information rights does a receiver have?

The security giver and every officer must:

- make available to the receiver all books, documents and information relating to the assets in respect of which the receiver has been appointed in the possession, or under the control, of the security giver or officer;
- if required to do so by the receiver, verify by statutory declaration that the books, documents and information are complete and correct; and
- give the receiver any assistance the receiver may reasonably require.

### Court directions

The Insolvency Act gives the High Court wide ranging power to make orders relating to the performance of a receiver's duties. It may make an order:

- giving any directions it considers appropriate;
- declaring the rights of persons before it; and
- it considers just.

An application for an order may be made by:

- the receiver;
- the security taker;
- a person in whose interest the receiver is acting; or
- the BVI Financial Services Commission (**Commission**) if the security giver is or has been a regulated person.

### What are the duties of a receiver?

#### Notifications and filings

Immediately on being appointed, a receiver must:

- send a notice of appointment to the security giver; and
- file a notice of appointment with the registrar of corporate affairs (**registrar**) and (if the security giver is or has been a regulated person) the Commission.

In addition, an administrative receiver must, within:

- five business days of being appointed, advertise notice of appointment; and
- 28 days of being appointed, send a notice of appointment to all of the security giver's creditors.

Failure to comply with these requirements is an offence punishable by fine, but does not invalidate the appointment.

### Primary duty

The Insolvency Act says that the primary duty of a receiver is to exercise the receiver's powers in:

- good faith and for proper purposes; and
- a manner the receiver believes, on reasonable grounds, to be in the best interests of the security taker.

To the extent consistent with this primary duty, a receiver must exercise the receiver's powers with reasonable regard to the interests of the:

- creditors of the security giver;
- sureties who may be called upon to fulfil obligations of the security giver;
- persons claiming an interest in assets in respect of which the receiver was appointed; and
- security giver.

That Insolvency Act says that, where a receiver appointed out of court acts, or refrains from acting, in accordance with instructions given by the security taker, the receiver will not be in breach of the receiver's duty to act in the best interests of the security taker.

### Power of sale

A receiver who exercises a power of sale over assets in respect of which the receiver has been appointed owes a duty to obtain the best price reasonably obtainable at the time of sale to the:

- creditors of the security giver;
- sureties who may be called upon to fulfil obligations of the security giver;
- persons claiming an interest in assets in respect of which the receiver was appointed; and
- security giver.

### Accounting records

A receiver must keep accounting records that correctly record and explain the receipts, payments and other transactions relating to the assets in respect of which the receiver has been appointed. The records must be kept for at least six years after the end of the receivership.

### Receivership accounts

A receiver must prepare accounts covering the following periods:

- the period of 12 months following the receiver's appointment;
- each subsequent period of six months; and
- where the receiver ceases to act as receiver, the period from the:
  - end of the period covered by the last accounts filed, or if the receiver has acted for less than 12 months from the date of appointment, to the date of ceasing to act; and
  - date of the receiver's appointment to the date of ceasing to act, unless filed in accordance with the paragraph above.

The accounts prepared by the receiver must:

- show all payments received and made by the receiver during the period covered by them; and
- within 30 days of the last day of the period covered by the accounts be filed with the registrar and (if the security giver in receivership is or has been a regulated person) the Commission.

A receiver appointed by the court must, in addition to complying with requirements set out above, file at court accounts in any form, covering any periods and within any time, the court may order.



## Keep moneys separate

A receiver must keep money relating to the assets in respect of which the receiver was appointed separate from other money received in the course of, but not relating to, those assets and from other money held by, or under the control of, the receiver.

## Report unlicensed financial services business

If it appears to a receiver that the security giver is carrying on, or has carried on, unlicensed financial services business the receiver must report it to the Commission as soon as reasonably practicable.

## Fiduciary duties

A receiver owes the following fiduciary duties.

- The primary duty of a receiver is to try to repay the secured debt.
- In exercising the receiver's powers, the receiver owes duties to:
  - preserve and protect the secured assets;
  - act in good faith and for the purposes of realising the secured assets; and
  - act with due diligence.
- A receiver must get the best price reasonably obtainable for the secured assets at the time they are sold, but when deciding whether or not to sell, and if so, how and when to sell, the receiver need only consider the interests of the security taker.

A receiver may not buy the secured assets from the security taker.

A receiver's fiduciary duties are owed to the security taker and to the security giver and any other person with an interest in the equity of redemption for the secured asset (including any guarantor, person giving security for the debt and later security taker). However, if there is a conflict between the interests of the security taker and another person with an interest in the equity of redemption, the receiver may put the interests of the security taker ahead of the interests of those other persons.

## Administrative receiver

An administrative receiver must, as soon as practicable after being appointed, require at least one person who is, or was in the two years preceding the administrative receiver's appointment, a promoter, director or secretary or an employee of the security giver, to prepare a statement of affairs.

A statement of affairs must be verified by an affidavit and set out (among other things) the:

- security giver's assets and liabilities;
- names and addresses of the security giver's creditors; and
- security interests created by the security giver and the dates on which they were created.

An administrative receiver must, within three months of being appointed, prepare and file with the registrar and (if appointed by the High Court) with the court, a report setting out the:

- events leading up to the administrative receiver's appointment;
- disposal or proposed disposal of any assets of the security giver, and the carrying on of any business of the security giver, by the administrative receiver;
- amounts of principal and interest payable to the security taker and the amounts payable to any preferential creditors;
- amount (if any) likely to be available for the payment of other creditors; and
- persons who have submitted statements of affairs and a summary of them and the administrative receiver's comments on them,

and containing any other information that may be prescribed.

Within 14 days of filing the report, the administrative receiver must:

- send a copy to the:
  - security giver or (if it is in liquidation) its liquidator; and
  - Commission if the security giver is or has been a regulated person;

- send a copy of the report to each creditor of the security giver or publish a notice stating the address of an office to which creditors may write for a copy of the report and at which the report can be inspected during normal office hours; and
- call a meeting of unsecured creditors (unless the High Court makes an order dispensing with this requirement).

Where a liquidator is appointed after the administrative receiver has sent a copy of the report to the security giver, the administrative receiver must send a copy of the report to the liquidator within seven days of the liquidator being appointed.

### Notice of completion

On completing a receivership, a receiver must:

- give notice to:
  - the security giver or (if it is in liquidation) its liquidator;
  - in the case of an administrative receiver, the creditors' committee (if any); and
  - the Commission if the security giver is or has been a regulated person; and
- file a notice of completion with the registrar and (if the security giver is or has been a regulated person) the Commission.

### How is a receiver's remuneration set?

The general position is that a receiver appointed under a security document may be remunerated in accordance with the terms of the security document or as may be agreed with the security taker.

As a condition to agreeing to act as receiver, a receiver will generally insist that the security taker (or some other person) gives the receiver an indemnity in respect of the receiver's remuneration and the costs and expenses of the receivership.

A receiver appointed by the court or in accordance with an enactment other than the Insolvency Act is entitled to be paid any remuneration the court may order or the enactment may provide. In addition, a receiver appointed by the court is entitled to be indemnified from, and has a lien over, the assets in respect of which the receiver is appointed for the receiver's remuneration and the reasonable costs and expenses of the receivership. The receiver's lien survives discharge of the receivership.

However, the High Court may review and fix the remuneration of a receiver on the application of:

- the receiver;
- the security giver or (if it is in liquidation) its liquidator;
- any person with an interest in the assets in respect of which the receiver has been appointed; or
- the Commission if the security giver is or has been a regulated person.

### What are the liabilities of a receiver?

#### Liabilities

Except as mentioned below, a receiver is personally liable for:

- any contract entered into by the receiver in the performance of the receiver's duties; and
- the payment of wages or salary (including amounts due for holidays, sickness, sums payable in lieu of holiday and contributions to a pension scheme) that, during the period of the receivership, accrue under an employment contract adopted by the receiver and, for this purpose:
  - any action which the receiver takes, or fails to take, within 14 days of being appointed is taken not to amount, or contribute, to the adoption of an employment contract;
  - the receiver is taken to have adopted an employment contract if the receiver does not give a termination notice within 14 days of being appointed; and
  - where a simple receiver is appointed by the court, unless the court orders otherwise, all employment contracts are terminated with immediate effect.

Despite any other enactment or rule of law to the contrary or anything contained in the security document under which a receiver is appointed:

- it is not a defence in proceedings against a receiver for a breach of the primary duty mentioned above that the receiver was acting as the agent of the security giver or under a power of attorney from the security giver; and
- a receiver is not entitled to compensation or an indemnity from the assets in respect of which the receiver was appointed or the security giver in respect of any liability incurred by the receiver arising from a breach of the primary duty mentioned above.

### Protections

Except where a receiver breaches the primary duty mentioned above, the receiver may be indemnified for any liability for the matters mentioned above from the assets in respect of which the receiver was appointed. It is also customary for the receiver to insist upon an indemnity from the security taker or some other person.

In addition, a receiver appointed out of court is not personally liable on any contract entered into by the receiver in the performance of the receiver's duties to the extent that the contract excludes or limits the receiver's liability.

### In what circumstances does a receiver vacate office?

Under the Insolvency Act, a receiver vacates office if the receiver:

- dies;
- resigns;
- ceases to be eligible to act as receiver (see *Who may be appointed as a receiver?* above); or
- is removed from office.

Where a receiver resigns, ceases to be eligible to act or is removed, the receiver must:

- as soon as practicable, notify the:
  - security taker and any joint receiver;
  - security giver or (if it is in liquidation) its liquidator; and
  - members of the creditors' committee (if any); and
- within seven days of ceasing to hold office, notify the registrar and (if the security giver is or has been a regulated person) the Commission.

### Resignation

The resignation of an administrative receiver appointed out of court is not effective unless the administrative receiver gives at least seven days' notice of resignation to the:

- security taker;
- security giver or (if it is in liquidation) its liquidator; and
- members of the creditors' committee (if any).

Unless the court orders otherwise, the resignation of a court appointed receiver is not effective unless the receiver has given at least seven days' notice of resignation to the court and any other person the court specifies.

### Removal

A simple receiver appointed out of court may be removed in accordance with the terms of the security document or by an order of the High Court.

A court appointed receiver and an administrative receiver may only be removed by an order of the High Court.

An application to the High Court to remove a receiver may be made by:

- the security giver or (if it is in liquidation) its liquidator;
- the directors of the security giver;

- the security taker;
- a creditor of the security giver;
- the Commission if the security giver is or has been a regulated person; or
- any other person the court is satisfied has a legitimate interest in the removal of the receiver.

An application to remove a receiver must:

- specify the grounds on which the applicant is seeking to remove the receiver; and
- be served on the receiver at least five days before the hearing date.

## Contacts

To find out more, please get in touch with your usual Mourant contact, or alternatively, a full list of contacts specialising in BVI litigation can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED