

Amendments to the text of draft chaptersCh.8 RECEIVERSHIPS

Para 2 Line 6 was amended to read "call the receiver or debenture holder to account" followed by an additional sentence:-  
 "On the other hand, when this happens, the holder of a floating charge will himself also have gone short as figures never balance so finely. It cannot therefore be suggested that it is a position the floating charge holder himself regards lightly."

The last two sentences were amended to read:-

"The rights of the holder of a floating charge are conferred by the debtor, not by the general law, and are conferred for the purpose of enabling the holder of the charge to realise his security. The empty nature of the winding up, where a floating charge exists, is simply the consequence of a creditor's security which extends to the whole or substantially the whole of the debtor's assets."

Para 4 was redrafted to read:

"A floating charge may be, and occasionally is, granted over a limited category of assets; though the great majority of floating charges are granted over the whole, or substantially the whole, of the assets of the company. For simplicity, we shall deal in this chapter with the common case, though except where their nature makes them obviously inapplicable our proposals extend equally to the case of the more limited charge."

Para 5 The last sentence was amended to read "...unsecured creditors who are highly critical of the apparent lack of concern for their interests when a receiver has been appointed."

Para 6 and the beginning of para 7 were redrafted as follows:-

"6 Many of the complaints which we have received have been concerned with the low level of distribution to unsecured creditors in a liquidation where there is a floating charge, and with such injustices (as they have been represented to us) as the right of the receiver to retain goods for which the supplier has not paid. Such complaints are due to the nature and extent of the security constituted by the floating charge itself. We shall deal with them, and set out our recommendation in a later chapter of this Report. In the present chapter, we shall deal exclusively with the position of the receiver appointed under a floating charge. The two problems are, however, closely related. Most of us are convinced that no complete answer to the criticisms which have been levelled at the nature of the receiver's obligations can be made until the unsecured creditors can be certain of having a financial interest in the proceeds of the receiver's realisations.

6A The most frequent complaint which we have received is of the lack of information once a receiver has been appointed. This is a complaint which we have received, not only from creditors, but also from shareholders. Another, widely felt, grievance is the belief that the receiver has too much regard for the interests of the debenture-holder, and that insufficient attention is paid to the interests of the other creditors and the shareholders.

7 Criticism has also been directed against the practice of appointing receivers who are closely connected....."

Para 8

After this a new sub-heading and para was inserted as follows:-

"Qualifications of a Receiver

8A At present anybody can be appointed a receiver. We believe that the law should demand that a receiver must hold a suitable qualification and we put forward detailed recommendations in Part II of this Report."

Para 9

The second sentence was amended to read:-

"It has been used somewhat loosely to cover what are three separate issues: to whom should a receiver be responsible, in the sense of owing duties at law, to whose interests should he look, and by whom ought he to be controlled."

Para 10

was amended to read:-

"Two opposing viewpoints are discernible in the evidence to us. On the one hand, there is a recommendation that a receiver should have a duty to account for his actions to the ordinary creditors. On the other hand, there are those who see no justification for imposing on the receiver any duty to take account of any interests other than those of the debenture-holder. Between these two views lies a range of views as to the "accountability of receivers"."

Para 11

was amended to read:-

"We are firmly of the view that it would be wrong to make the receiver specifically "accountable" to anyone, even the debenture-holder, if that would involve a requirement to take instructions from the person or persons concerned. Under the present law a receiver owes fiduciary duties to the debenture-holder, for whom he holds and manages the property charged, and to the company debtor for whom he is invariably deemed to be acting as agent. He also owes a duty not only to the debenture-holder but also to the company to exercise all reasonable care to obtain the true market price for property sold by him and preserve the goodwill of the company's business, if any, so far as practicable, and he has statutory obligations to preferential creditors."

Para 13

was amended to read:-

"While we recognise that there are, occasionally, receivers who are little more than creatures of their debenture-holders, they are exceptional; the damage they can do, which no doubt has inspired the criticisms mentioned in para 7 above, must not blind us to the fact that, fortunately, they are small in number. We consider it wrong and unhelpful to conceive of receivers as merely the nominees of the persons who appointed them."

Para 17

Lines 3 and 4 were amended to read "floating charge would be seriously weakened. Creditors would be.....".

Para 18

The last four lines were amended to read:-

"the result would be to increase the opportunities for expensive and delaying litigation without introducing any true benefit to the unsecured creditors."

Para 21

was deleted.

Para 22

Line 5 was amended to read "assured of a stake".

Para 25

In line 6 "who" was deleted and the end of paras 25 and 26 were run together to read "...realise the security, and in practice the debenture will almost invariably provide.....".

Para 34

The second sentence would read:-

"It would be convenient if all receivers appointed out of court.....". In lines 5-7 "who should be....power in the deed" was deleted,

Para 39

Following this a new para 39A was inserted:-

"In making these proposals, we think that there should be no distinction between compulsory and voluntary winding up procedures."

Para 42

was amended to read:-

"Conflicting opinions have been expressed to us as to the date from which the receiver's appointment takes effect. It appears to be thought by many that the appointment takes effect from the date of execution of the deed by which the receiver is appointed. However, we understand that the law is that the appointment of a receiver runs from the time of receipt of the instrument of appointment by him or his authorised agent, provided he accepts the appointment (RA Cripps & Son Ltd v Wickenden (1973) 1WLR944). The person appointing the receiver is required to notify the Registrar of Companies within seven days."

Para 44

The last sentence was deleted.

Para 47

was amended to read:-

"In the following paragraphs we make a number of recommendations on practical aspects of the receivership. They are designed to deal with some of the criticisms referred to in para 6 above, and to some extent they codify the "best practice" which, as said in para 8, is already followed by many practitioners in this field."

Para 48

At the end was added "since the cost of notification to them is not thought to be justified".

Para 53

At the end was added, "To the extent of our recommendation<sup>s</sup> in these five paragraphs we shall have created a certain relationship of accountability between the receiver and the unsecured creditors."

Para 59

The sub-heading should read "Summary of receipts and payments". In line 6 "for example" was deleted. The last sentence was deleted.

Para 63

The first sentence would end at "committee". In line 4 "of course" was deleted.

Para 64

Line 6 would read "We recommend therefore.....".

Para 65

"free from encumbrance" was amended to "on such terms as the court thinks fit and that a provision along the lines of Section 21 of the Scots Act of 1972 be adopted."

Para 66

At the end was added "in order to strengthen the receiver's independence discussed earlier in this chapter."

Para 68 A new sub-heading and new para were inserted after this para:-  
"Receiver's powers"  
69 We recommend that the powers of a receiver should be contained in a Statute so that it is not necessary to refer to every specific debenture to find out what powers the receiver can exercise in a particular case. We believe that Section 15 of the Scots Act of 1972, which contains a list of powers, could usefully be adopted subject to the obvious modifications."

Ch.12 COURT PROCEEDINGS FOR INSOLVENT COMPANIES

Para 3 of the redraft. Lines 3-4 were amended to read "in many cases". Line 7 would read "In unopposed cases....".

Para 4 of the redraft. Line 4 was amended to "in many".

Para 5 of the redraft. The phrase at the end "and in which..... realise" was deleted.

Para 17 of the chapter was amended to read:-  
"17 If the court requires further information relating to the application and in particular in relation to the company's capacity to meet its offer to pay all creditors of whom the court has formal notice in accordance with the provisions of Chapter 10 para 14(ix) the court will have power to adjourn the application to enable such information to be supplied: owing to the need for an early decision on the making of a Protection Order the court will, be reluctant to grant such an adjournment and it will in any event be for a short period only. On granting such an adjournment the court will make any ancillary orders it may deem appropriate including those relating to filing of information, stay of proceedings or continuation of trading."  
*2/2*  
*normally*

Para 18A would be a new para starting:-  
"Where the company is able to pay in full the debts of all parties before the Court, it will be entitled [ continuing then as in para 15 of Chapter 11. ] "  
*normally*

Para 19(b) would become a new para 20A - see below.

Para 20 was amended to read:-  
"If a Compulsory Winding Up Order or an Order for Liquidation of Assets is subsequently made, the date on which the Protection Order is made will be regarded, for all purposes, as the commencement of the winding up."

Para 20A would read:-  
"The Official Receiver will forthwith advertise the making of the Protection Order and register at the Companies Registration Office and convene meetings of creditors and shareholders to be held within one month."  
*WJ*

Para 21 would be replaced by:-  
"The Official Receiver will act as Chairman of both meetings. The first meeting of shareholders will normally be of a fairly formal nature, its main purpose being to receive a report from the Official Receiver. The shareholders will be at liberty to recommend an Order for Liquidation of Assets or, if so minded, a Compulsory Winding Up Order, or to request

the appointment of an administrator. They will also be at liberty to nominate a qualified person to act as Liquidator or Administrator, but if they nominate a person different from that nominated by the creditors, the court will normally oppose the choice of the creditors."

*appoint*  
Para 22 At the end was added "or the appointment of an Administrator."

Para 22A would be a new para reading:-  
"The directors will have a right to be present at the creditors' meeting, but their right to speak will be in the absolute discretion of the Official Receiver as Chairman."

Para 23 The words in brackets were deleted and at the end was added:-  
"For the reasons given in Chapter 11, it will normally be prudent for the creditors, even if recommending a Compulsory Winding Up Order, to nominate a professional liquidator to act in case the court should decline to make anything but an Order for the Liquidation of Assets."

Para 25 The last sentence was deleted.

Para 26(b) Would end at "Insolvency application."

Para 26(f) was deleted and in its place was inserted:-  
"(f) To sanction a voluntary arrangement.  
(g) To appoint an Administrator."

Para 27 A new sub-heading "Compulsory Winding Up" was inserted.

Para 28(b) This would read "wrongful or dishonest trading".

Para 28(c) would read ".....part of a network of companies whose affairs require investigation."

Para 29 The last three lines were amended to read:-  
".....unless the OR considers that a Compulsory Winding Up Order is necessary so that a full investigation may be made."

Para 31 would read: "....Act of 1948, for any interested party to apply to the Court for the company to be restored to the Register. If the court makes such an order it would at the same time reinstate the Protection Order and make, whether immediately or subsequently, either an order for the Liquidation of Assets process or a Compulsory Winding Up Order. Any such application could be made in circumstances such as the following.....".

Para 33 The last sentence was deleted and the following was added:-  
"In practice, the provisions enabling a Public Examination to be held are a dead letter. No public examination has been held since 19..".

Para 34 The first sentence would end at "reviewed".

Paras 38-39 were deleted. [ This material would be incorporated in Part II of the Report. ]