The Powers of a Company Receiver and Manager Appointed Out of Court

JAMES O'DONOVAN*

The powers of a company receiver and manager appointed out of court flow from the debenture under which he was appointed.[1] subject of course to any relevant statutory provisions. This instrument usually confers upon the appointee broad powers to discharge his primary responsibility of realising the assets of the company charged by the security with a view to liquidating the outstanding debt due to the debenture-holders. It will be convenient to examine some of the powers commonly conferred upon receivers and managers before making a few more general points.

1. Standard Clauses

(a) The Power to Collect the Property Charged.

A power in the following terms is normally inserted in the standard debenture:

> To take possession of, collect and get in the property and assets charged by the debenture, and for that purpose to take any proceedings in the name of the company or otherwise as the receiver considers expedient.[2]

A receiver, as such, is not ordinarily entitled to bring an action in his own name since no property is automatically vested in him by his appointment.[3] He can, however, institute legal proceedings in the company's name even without its consent.[4] Indeed, this power has been implied where it was not expressly conferred by the debenture. Thus in *M. Wheeler & Co.* v. *Warren*[5] Lawrence L.J., referring to the general power to get in the property charged, remarked:

> That power, in my judgment, implies a power to do all things necessary or proper for the purpose of getting in the property, and in particular a power for the purpose of collecting debts and other moneys of the plaintiffs in the hands of third parties to take all proper legal proceedings in their name. It is true that in many debentures there is found express authority to bring proceedings in the company's name, but in my judgment there is no real necessity for the insertion of such a provision, which in a case like the present is clearly implied.[6]

The Court of Appeal in *M. Wheeler & Co.* v. *Warren*[7] decided that this implied power to sue in the company's name entitled a receiver and manager

* B.A., LL.B. (Qld.), Ph.D. (A.N.U.), Senior Lecturer in Law, University of Queensland.

1. See *Inglis Electrix Pty. Ltd.* v. *Healing (Sales) Pty. Ltd.* [1965] N.S.W.R. 1652.
2. This clause is based upon a form in *The Encyclopedia of Forms and Precedents* 4th Ed. Vol. 6. (London: Butterworth & Co. (Publishers) Ltd., 1967), p. 1185.
3. *Bolton* v. *Darling Downs Building Society* (1935) St. R. Qd. 237, at 243. See also *Re Scottish Properties Pty. Ltd.* (1977) A.C.L.C. 29, 271, at 29, 277.
4. *M. Wheeler & Co. Ltd.* v. *Warren* [1928] Ch. 840.
5. [1928] Ch. 840.
6. *Ibid.*, at 845.
7. [1928] Ch. 840.

to sue for recission of a contract entered into by the company for the sale of a house in the course of construction and for forfeiture of the deposit or, alternatively, for specific performance of the building contract. Moreover, the power to gather in the company's assets and to take proceedings for that purpose has been held to include the power to bring an action for conversion and trespass claiming injunctive relief and punitive damages.[8] It might also be mentioned that where the receiver and manager is empowered to sue in the company's name the defendant is, in general, entitled to security for his costs. Until such security is provided there will be a stay of proceedings.[9]

It is usually the responsibility of the directors or the liquidator to get in uncalled capital but a properly-drafted debenture will authorise a receiver and manager to make calls in the names of the directors. It should also empower the appointee to make calls on unpaid premiums.[10]

(b) Power to Carry on the Business.

Most debentures expressly empower a receiver and manager appointed by the debenture-holders to carry on or concur in carrying on the business of the company.[11] Moreover, an appointee is often authorised to do all acts which might be done in the ordinary conduct of the business for the protection of the assets used or employed therein and for obtaining a return from such assets. In *Inglis Electrix Pty. Ltd.* v. *Healing (Sales) Pty. Ltd.*[12] Asprey J. of the Supreme Court of New South Wales held that a similar power enabled a receiver to obtain such compensation as the law permits for any wrong done to the business.

The general power to carry on the business is amplified by a host of incidental powers and bounded by the powers conferred on the company in its memorandum of association.[13] The ancillary powers may be tacked onto the main power in the deed itself. Thus in *Caines* v. *J.E. Austin & Sons*[14] the receiver's powers in terms of the debenture included a power "to carry on or concur in carrying on the business of the company and for that purpose to raise money on the premises charged in priority to the debentures or otherwise". Alternatively, the debenture deed may contain a separate incidental power enlarging the scope of *all* the powers conferred upon the receiver.[15]

Even without the assistance of express ancillary powers, the power to carry on the company's business is construed broadly. In *Lawson (Inspector of Taxes)* v. *Hosemaster Co. Ltd.*,[16] the Court of Appeal held that a power to manage the company's business carried a duty to enter into transactions clearly advantageous to the company and its debenture-holders. There, the transaction in question was part of a dividend-stripping scheme. It added some 240,000

8. *Inglis Electrix Pty. Ltd.* v. *Healing (Sales) Pty. Ltd.* [1965] N.S.W.R. 1652.
9. *H.G. Palmer Pty. Ltd.* v. *Hill* (1967) 1 D.C.R. (N.S.W.) 250. See also Uniform Companies Acts, 1961–1962 (hereinafter referred to as "U.C.A."), s. 363.
10. The absence of such a power caused unnecessary expense in *Re South Australian Barytes Ltd. (receiver appointed)* (1977) A.C.L.C. 29, 578.
11. In the absence of an express provision, no such power will be implied: *Kerr on the Law and Practice as to Receivers* 14th Ed. by Raymond Walton (London: Sweet & Maxwell Limited, 1972), p. 317.
12. [1965] N.S.W.R. 1652, at 1656.
13. As the receiver or receiver and manager is normally expressed to be an agent of the company he may not exceed the powers of his principal. See *Lawson (Inspector of Taxes)* v. *Hosemaster Co. Ltd.* [1966] 1 W.L.R. 1300, at 1315.
14. (1958) 75 W.N. (N.S.W.) 267.
15. See below, p. 90.
16. [1966] 1 W.L.R. 1300.

pounds to the company's coffers which at one stage were too depleted to cover the amounts owing under the debentures.

(c) The Power to Borrow.

In the standard form of debenture this power appears in one of two ways: either it is annexed to the power to carry on the business (as in *Caines* v. *J.E. Austin & Sons*[17]) or it stands as a separate power broadly similar to the following clause:

> The receiver may for the purpose of carrying on the business of the company and of defraying any costs charges losses or expenses (including his remuneration) which shall be incurred by him in the exercise of the powers authorities and discretions vested in him and for all other purposes hereof or any of them raise and borrow money on the security of the mortgaged premises or any part thereof either in priority to the security hereby created or otherwise and at such rate or rates of interest and generally on such terms and conditions as he may think fit.[18]

The latter is preferable because it is comprehensive and more explicit.

Where a receiver is not given an express power in the above terms, a power to borrow a reasonable amount for the purposes of the business will be implied but only, it seems, if the company is a trading or commercial undertaking. And even then[19] the implied power will yield to an express prohibition upon borrowing.

The power to borrow money on the security of the property charged in priority to the debenture was considered in *MacDuff's Ltd.* v. *National Bank of N.Z. Ltd.*[20] Myers C.J. of the Supreme Court of New Zealand acknowledged that a receiver appointed by the court could not create a lien in priority to the security of the debenture-holders without the leave of the Court. But he added that there was no compelling reason why the same position should obtain in the case of an extra-curial appointment. In the result, he allowed a receiver with the consent of all interested parties to pay a dividend to a company's unsecured creditors in priority to the debenture held by the company's bank. The payment, which was financed by a further cash advance from the bank, fell squarely within the clause in the debenture governing the receiver's borrowing powers.

In *MacDuff's Ltd.* v. *National Bank of N.Z. Ltd.*[21] the receiver's power to create a security in priority to a previous debenture was derived from an express power in the debenture deed itself. A similar power to pledge the assets of the company in priority to an existing charge is inherent in the receiver's general mandate to carry on the company's business and to make such arrangements as he might think expedient in the interests of the debenture-holders.[22]

In *Caines* v. *J.E. Austin & Sons Ltd.*[23] Hardie J. of the New South Wales Supreme Court held that where a debenture gives a receiver power to borrow capital for the purpose of carrying on the company's business a

17. (1958) 75 W.N. (N.S.W.) 267.
18. This clause is adapted from a form in *The Encyclopedia of Forms and Precedents* 4th Ed. Vol. 6. (London: Butterworth & Co. (Publishers) Ltd., 1967), p. 1316.
19. See *General Auction Estate and Monetary Co.* v. *Smith* [1891] 3 Ch. 432 and *Re Patent File Co., ex parte Birmingham Banking Co.* (1890) 6 Ch. App. 83, at 86 and 88.
20. [1939] G.L.R. 539.
21. *Ibid.*
22. *Robinson Printing Co. Ltd.* v. *Chic Ltd.* [1905] 2 Ch. 123, at 133.
23. (1958) 75 W.N. (N.S.W.) 267.

lender is not obliged to inquire whether the advance is for a proper purpose or an improper purpose. In this respect the lender is in exactly the same position as he would have been had he advanced money to the company prior to the receivership. But to dispel any lingering doubts about this decision draftsmen should attach the following statement to the clause dealing with the receiver's borrowing powers:

> no person lending any such money shall be concerned to inquire as to the propriety or purpose of the exercise of this power or to see to the application of any monies so raised or borrowed.

(d) Power to Sell Company Property.

The receiver and manager is usually given a wide power to sell or concur in selling in the interests of the secured creditors any of the property charged by the debenture on such terms as he shall think fit.[24] Since the appointee is normally the agent of the company he can enter into contracts in the company's name. Despite this broad grant of power he would be wise to take some precautions. Prudent receivers usually obtain at least two independent valuations of the property prior to a sale. Moreover, in general, it is advisable for the receiver to attempt to sell the property at a public auction or by tender using a private sale only as a last resort. The need for caution was recently emphasised by the Court of Appeal in *Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.*[25] Although that case involved a mortgagee exercising a power of sale it appears that a receiver might be equally liable if he failed to take reasonable care to obtain a proper price for the property sold.[26]

If the debenture does not give the receiver and manager an adequate power of sale the debenture-holders have a number of courses open to them. First, they could fall back upon their statutory power of sale.[27] Alternatively they could apply to the court for the appointment of a receiver who could then be authorised by the court to sell the charged property on certain conditions.[28] Finally, where an order for sale is made by the court in reference to an equitable mortgage of land, the court may make one of a variety of orders designed to facilitate the vesting of a legal estate in the purchaser.[29]

To avoid these unnecessary complications the draftsman should ensure that the receiver has not only a power of sale but also a power to convey the legal estate under a power of attorney in the name of the company or. where there are specific legal mortgages, in the name of the mortgagee–debenture-holder. Since the interest created by a floating charge is merely equitable a receiver appointed when such a charge crystallises will usually be unable to convey a legal estate in the property subject to the charge without the consent of the company as evidenced by the affixation of its seal. Here again the debenture should expressly confer a power of attorney upon the appointee to allow him

24. Section 83(1)(a) of the Property Law Act 1974–1975 (Qld.) would serve as a useful precedent.
25. [1971] Ch. 949.
26. In *Nelson Bros. Ltd.* v. *Nagle* [1940] G.L.R. 507, at 508 Myers C.J. declared that the duty which a receiver and manager owed to the debtor company was to exercise due care, skill and judgment in selling the goods and getting the best results reasonably possible in the circumstances. He added "if he unnecessarily and negligently sacrificed the goods, he would be liable in damages . . . ". See also *Re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, at 662 where Jenkins L.J., referring to a receiver and manager, stated: "his power of sale is, in effect, that of a mortgagee . . ".
27. See Property Law Act 1974–1975 (Qld.), s. 83.
28. Compare *Re South Australian Barytes Ltd. (receiver appointed)* (1977) A.C.L.C. 29, 578.
29. See Property Law Act 1974–1975 (Qld.), s. 100.

to convey the legal estate in the name of the company.[30] As an alternative, irrevocable powers of attorney could be granted to the debenture-holders who could later appoint the receiver and manager as their substitute. The advantage of this device is that the power might survive the winding up of the debtor company.[31]

Where the debenture creates a legal mortgage of the company's real property the conveyance of the legal estate may be effected by the debenture-holder himself[32] or by the receiver.[33] But the statutory power of sale is restricted to mortgages of land. A receiver or a receiver and manager may not exercise a power of sale over personalty unless he is specifically authorised to do so by the debenture itself.[34]

A prospective purchaser will of course be interested in obtaining a clear title when he buys property offered for sale by a receiver and manager. He will not wish to have his title tainted by some irregularity inherent in the appointment of the receiver and manager or the exercise of the power of sale. For this reason it might be useful to provide that the purchaser shall not be bound to inquire whether any default has occurred in terms of the debenture or whether any notices which must be given to the debtor company before the receiver and manager exercises the power of sale have in fact been given. It could also be provided in the debenture that, so far as the purchaser is concerned, a sale by the receiver and manager should be deemed to be within the power of sale notwithstanding any impropriety or irregularity in its exercise. Further, it could be expressly stated that the debtor company's remedy in the event of any such irregularity or impropriety would be restricted to damages.

Provisions of this nature would protect a purchaser who is not aware of any irregularity in the sale. In *Selwyn* v. *Garfit*[35] the Court of Appeal held that a purchaser could not claim the protection of this type of clause because she was aware, or should have been aware, that a condition precedent to the exercise of the power of sale by a mortgagee had not been observed. In that case it was clear on the face of the mortgage that, at the time of the sale, there had been no default by the mortgagor. But where the sale appears to be in order and there is nothing to place the purchaser on inquiry, the protective clause may well be effective.[36]

30. See Kerr, *Receivers*, p. 316. A conveyance may then be executed by the receiver himself by signing his own name in the presence of one witness in such a way as to show that he does so as attorney of the company: Property Law Act 1974–1975 (Qld.), s. 46(3). Section 45 contains the execution requirements where a deed is involved.
31. See Property Law Act 1974–1975 (Qld.), s. 173(1). Note that this provision only applies where a power of attorney is expressed to be irrevocable and is granted to secure a *proprietary interest of the donee* or the performance of an obligation owed to the donee. Persons "deriving title under" the donee of the power are treated as if they were donees of the power. But it is not clear whether a receiver and manager fits within this category because, strictly speaking, he derives no title from the debenture-holders.
32. Property Law Act 1974–1975 (Qld.), s. 83, particularly sub-sections (1)(a) and 4(a).
33. Although the statutory power of sale is vested in the mortgagee, section 89 of the Property Law Act 1974–1975 (Qld.) provides that it may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money. A receiver or a receiver and manager appointed by a debenture-holder answers this description.
34. The Propery Law Act 1974–1975 (Qld.) places no restriction upon the extension of a power of sale so as to cover personalty. See ss. 255(2) and 83(3).
35. (1888) 38 Ch. D. 273.
36. *Dicker* v. *Angerstein* (1876) 3 Ch. D. 600. Indeed, if the purchaser's title were not upheld the whole object of the arrangement between the company and the debenture-holder would be defeated: the purpose of the protective clause is to relieve the purchaser from the necessity of making inquiries into an alleged default under the instrument and to avoid any difficulties which might arise if the company attempted to abort the sale by refusing to answer questions about the alleged default: *Dicker* v. *Angerstein* (1876) 3 Ch. D. 600, at 604.

Statutory protection along the above lines is conferred upon purchasers who buy land from persons exercising the power of sale conferred by the Property Law Act 1974–1975 (Qld.).[37] It is important to note that the statutory power of sale conferred upon the mortgagee applies only where there is an instrument of mortgage of *land*.[38] The same is true of the statutory power to appoint a receiver of the income of the mortgaged property.[39] Section 89 provides that the statutory power of sale may be exercised by "any person for the time being entitled to receive and give a discharge for the mortgage money". Since a receiver answers this description it would appear that a person who purchases land from a receiver is entitled to the statutory protection afforded by Section 87. But if a receiver or a receiver and manager purports to sell personalty the prospective purchaser will not obtain the benefit of the statutory protection.[40] In this situation a purchaser's title might well be suspect unless he can rely upon a protective clause exempting him from inquiring into an alleged default.

A company receiver and manager appointed by the court is precluded by his fiduciary office from purchasing the company's property.[41] On the other hand, a receiver and manager appointed out of court is almost invariably an agent of the company. His relationship with his principal has been described as "perhaps, the only genuinely non-fiduciary agency".[42] His primary duty is to realise the assets charged for the benefit of the debenture-holders. In the absence of fraud, male fides and perhaps recklessnes he commits no breach of duty to his principal by selling property on terms which the company might consider unfavourable.[43] His duties are analogous to those equity imposes upon a mortgagee.[44] It follows that he may not be able to exercise a power of sale in favour of himself even if the purchase price is full value because "a sale by a person to himself is no sale at all".[45]

(e) Power to Employ Agents etc.

Receivership is often a complicated and protracted exercise. For this reason,

37. See Property Law Act 1974–1975 (Qld.), s. 87.
38. Property Law Act 1974–1975 (Qld.), s. 83(4).
39. Property Law Act 1974–1975 (Qld.), ss. 83(1)(c), 83(4).
40. Section 87 only protects the purchaser where the conveyance is made "in exercise of the power of sale *conferred by this Act*" (emphasis added).
41. *Re Magadi Soda Company Ltd.* (1925) 41 T.L.R. 297; *Nugent* v. *Nugent* [1908] 1 Ch. 646.
42. R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity Doctrines and Remedies* (Sydney: Butterworths Pty. Ltd., 1975), pp. 571–572.
43. See *Nelson Bros. Ltd.* v. *Nagle* [1940] G.L.R. 507. The standard applied is not dissimilar from that which governs the exercise of a power of sale by a mortgagee. See *Re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, at 662. There have been a number of recent cases which have redefined the mortgagee's duties in stricter terms: *Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.* [1971] Ch. 949; *Forsyth* v. *Blundell* (1973) 129 C.L.R. 477; and *Henry Roach (Petroleum) Pty. Ltd.* v. *Credit House (Vic.) Pty. Ltd.* [1976] V.R. 309.
44. *Re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634. In Queensland, see Property Law Act 1974–1975, s. 85(1).
45. *Farrars* v. *Farrars Ltd.* (1888), 40 Ch. D. 395, at 409. See *Fisher and Lightwood's Law of Mortgage* 8th Ed. by E.L.G. Tyler (London: Butterworth & Co. (Publishers) Ltd., 1969), p. 312.
In Queensland one is tempted to place a qualification upon the proposition in the text because a mortgagee is permitted by statute to buy in at an auction sale of the mortgaged land: *Property Law Act* 1974–1975 (Qld.), s. 83(1)(a). By the same token, there is no clear authority to suggest that a receiver and manager's duties are set by that statute rather than the rules of equity governing sales by a mortgagee. In other words, the appointee's obligations are analogous to those equity imposes upon a mortgagee exercising a power of sale, not to the obligations created by the statute.

most debentures give a receiver and manager an express power to employ and discharge such agents, managers, accountants, employees and others upon such terms as he thinks fit. In the absence of an express power, it would appear that a power to delegate would be embraced within the receiver and manager's power to carry on the business. The appointment of a receiver and manager out of court terminates the contracts of service of company employees in certain situations.[46] A power to employ new servants and agents is, therefore, essential to the smooth functioning of the receivership.

In *Inglis Electrix Pty. Ltd. (Receiver Appointed)* v. *Healing Sales Pty. Ltd.*[47] the debenture deed, after listing the normal powers of sale and the power to carry on the business, gave the receiver power "to employ managers solicitors officers and agents . . . and servants for all or any of the purposes aforesaid on such salaries and remuneration" as he thought fit. A number of other specific powers followed this clause. The issue was whether the words "for all or any of the purposes aforesaid" limited the power to delegate to situations covered by the preceding clauses in the deed. Asprey J. found that such a construction would be absurd. He preferred to give the words a meaning equivalent to "herein contained". The lesson for the draftsman is clear: replace the words "for all or any of the purposes aforesaid" with the words "herein contained".

(f) The Power to Repair and Insure.

It is advisable to give an appointee a broad power couched in the following terms:

> To make and effect all such repairs improvements and insurances as he shall think fit and renew such of the plant machinery and any other effects of the company whatsoever as shall be worn out lost or otherwise become unserviceable.[48]

Such a clause is essential for as Williams J. pointed out in *Visbord* v. *F.C.T.*[49] the appointee "can only insure or do necessary or proper repairs to the mortgaged property to the extent to which he is directed to insure or to do such repairs by the mortgagee in writing."[50]

In some cases a more detailed insurance clause might be desirable. If so the following clause which is adapted from section 83 of the Property Law Act 1974–1975 (Qld.) would be a useful precedent:

> To insure and keep insured against loss or damage by fire and by storm and tempest any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property hereby charged, and the premiums paid for any such insurance shall be a charge upon the property charged in addition to the debt due to the debenture-holder, and with the same priority and interest rate as that debt.

(g) The Power to Retain Documents of Title.

Not only is the receiver and manager usually authorised to repair and insure the property charged, he will normally be given power to retain the documents

46. See J. O'Donovan, "Corporate Redundancy" (1976) 4 A.B.L.R. 257.
47. [1965] N.S.W.R. 1652.
48. This clause is taken from *The Encyclopedia of Forms and Precedents* 4th Ed. Vol. 6 (London: Butterworth & Co. (Publishers) Ltd., 1967), p. 1190.
49. (1943) 68 C.L.R. 354.
50. *Ibid.*, at 382.

necessary to support the title of the debenture-holders.[51] Where the court orders the appointment it will direct that all books and documents relating to the property and assets of the company should be delivered to the receiver.[52] A similar provision should be inserted in debenture deeds to facilitate the appointee's dealings with the company's property. Such a power will create problems for directors who remain liable to perform certain statutory obligations. They will require the company's books and records from time to time in order to carry out these duties. In practice most receivers co-operate with the directors in allowing them access to the company's documents in order to discharge their statutory obligations but if the receiver proves intractable the directors are placed in an invidious position.[53]

(h) Power to Contract.

Possession of the company's documents of title enables a receiver to contract freely on behalf of the company. He is usually given a specific power to carry out and enforce specific performance of, or otherwise obtain the benefit of, all contracts entered into, or held by, the company as well as any contracts formed by the receiver in the exercise of the powers conferred by the debenture.[54] Moreover, the receiver and manager will have power to repudiate company contracts entered into prior to his appointment even if the debenture is silent on this point.[55]

(i) Power to Make Compromises and Arrangements.

A receiver and manager often inherits litigation based upon disputes which arose prior to his appointment. Moreover the property charged will usually include the company's book debts, recovery of which may be difficult. In addition, his exercise of the powers conferred by the debenture may involve him in disputes which it would be unwise to litigate. For these and many other reasons, debentures almost invariably give a receiver and manager power to make any arrangement or compromise which he thinks expedient in the interests of the debenture-holders. In *Robinson Printing Company Limited* v. *Chic Limited*[56] Warrington J. held that this power enabled a receiver to pledge a company's assets in priority to the charge created by the debenture where he considered it desirable to do so in the management of the company's business.

(j) The Incidental Power.

The final power to be considered is intended to amplify the others. Debentures usually provide that a receiver and manager shall have power:

> To do all such other acts and things without limitation as the receiver [or receiver and manager] may consider to be incidental or conducive to any of the matters and powers aforesaid and which the receiver may or can lawfully do as agent for the company.

51. This is not to say that the company will be denied access to these documents. See *Fenton Textile Association* v. *Lodge* [1928] 1 K.B. 1.
52. *Re Ind., Coope and Co. (Limited)* (1909) 26 T.L.R. 11; *Engel* v. *South Metropolitan Brewing and Bottling Company* [1892] 1 Ch. 442.
53. See W.R.D. Stevenson, "Receivers" (1973) 47 A.L.J. 438, at 445–446.
54. See e.g. *Inglis Electrix Pty. Ltd.* v. *Healing (Sales) Pty. Ltd.* [1965] N.S.W.R. 1652.
55. *Airlines Airspares Ltd.* v. *Handley Page Ltd.* [1970] Ch. 193.
56. [1905] 2 Ch. 123, at 133.

The words "without limitation" in the above clause should not be disregarded as mere surplusage. In *Inglis Electrix Pty. Ltd.* v. *Healing Sales Pty. Ltd.*[57] they assisted Asprey J. to conclude that a receiver was empowered to institute proceedings in trespass and in conversion against another company for compensation, including punitive damages.

2. Ultra Vires and Abuse of Powers

As mentioned earlier, the standard form of debenture provides that a receiver and manager appointed by the debenture-holders shall be the agent of the company. A proper exercise of any of the powers conferred on such an agent is therefore an act of the company. Section 20 of the Uniform Companies Act provides that no "act of a company . . . and no conveyance or transfer of property . . . to or by a company" shall be invalid by reason only of the fact that the company was without capacity or power to do such act or to execute or take such conveyance or transfer. Does this section render the company liable on a contract entered into by a receiver in excess of his powers? Clearly not. If the appointee ignores the limits of his agency the company would not be bound by his actions.[58] In any event the section cures invalidity caused by a lack of capacity in the company rather than the receiver.

When the actions of a receiver are challenged as being in excess of his authority he must show that the deed contains the power in question within its four corners either in express terms or by necessary implication.[59] If it is found that the receiver has in fact acted ultra vires he will be personally liable for any transactions he enters.[60] On the other hand, where the receiver abuses rather than exceeds his powers he may be acting in breach of his ill-defined general law duties. Fraud, male fides and possibly recklessness in the performance of his duties will cause the courts to intervene.[61] Again if he invokes a power of sale before it has become exercisable an injunction will issue.[62] But the courts will not interfere with a sale by a receiver merely because the purchase price is below the market value.[63]

A recent South Australian case, *Re S.A. Barytes Ltd. (receiver appointed)*,[64] illustrates how it is possible to overcome some of the problems faced by receivers and managers who lack the necessary powers to perform their duties effectively. The company's debenture charged its "uncalled capital and unpaid capital (if any)". It also provided for the appointment of a receiver and manager as agent of the company. But the receiver was given no express power to make calls. In addition there was some doubt whether a liquidator in the winding up of the company could recover the amount of unpaid premiums,[65] it being accepted that he could make a call for unpaid capital. It appeared that the company's assets apart from the outstanding capital and premiums were unlikely to realise sufficient to discharge its liability to the debenture-holder. Accordingly he

57. [1965] N.S.W.R. 1652, at 1655.
58. See *Cox* v. *Hickman* (1860) 8 H.L.C. 268, at 304 and 306. And cf. B. McPherson, *The Law of Company Liquidation* (Sydney: The Law Book Company Limited, 1968), p. 226.
59. *Bryant, Powis and Bryant Ltd.* v. *La Banque Du Peuple* [1893] A.C. 170, at 177.
60. See *Thomas* v. *Todd* [1926] 2 K.B. 511; *Gaskell* v. *Gosling* [1897] A.C. 575.
61. See n. 43 above.
62. *Hickson* v. *Darlow* (1883) 23 Ch. D. 690.
63. *Waring* v. *Manchester Ass. Co.* [1924] 1 Ch. 310; *Farrars* v. *Farrars Ltd.* (1888) 40 Ch. D. 395.
64. (1977) A.C.L.C. 29, 578.
65. As to this see *Niemann* v. *Smedley* [1973] V.R. 769.

sought a declaration that he held a charge upon the unpaid capital and unpaid premiums. Mitchell J. noted the uncertainty about who should make the appropriate calls but removed any doubts by appointing a receiver with power to call up both uncalled capital and uncalled premiums.

While it will usually be possible to apply to the court to appoint a receiver with powers broader than those contemplated by the debenture, it is an expensive method of curing defects which could easily be avoided by careful drafting.

3. Judicial Directions

Doubts about the scope of the appointee's powers often arise in the course of a receivership. For instance, while a receiver and manager may continue an action in the company's name after the commencement of a winding-up[66] it is doubtful whether he may initiate a fresh action in the company's name in this situation.[67] Fortunately a procedure exists for resolving issues of this nature. Section 188(3) of the Uniform Companies Act allows a private appointee to apply for judicial directions "in relation to any matter arising in connection with the performance of his functions".[68] *Re Manufacturers (N.S.W.) Finance Co. Ltd. and Companies Act*[69] involved an application under this section. There the receiver's summons for directions raised the following questions: "Which of the persons whose proofs of debt have been lodged are entitled to receive dividends as holders of debenture stock [under a trust deed] and which of the said persons are to be excluded from receiving such dividends?" Mr. Justice Street (as he then was) had no difficulty resolving the relatively narrow issues in a manner which need not concern us in the present context. Directions may also be sought upon much broader issues such as the payment of debts in priority to the debenture-holder's charge or the exercise of a power of sale in a particular situation.[70]

A receiver and manager who follows the directions of the court obtained in pursuance of s. 188(3) will be safeguarded against any subsequent allegations of breach of duty arising out of the conduct in question. In this way at least some of the hazards of receivership are avoided.

4. Effect of the Appointment upon the Powers of the Board of Directors

Some mention should be made of the impact of the appointment upon the powers of the directors. While it is true that the board survives the appointment of a receiver and manager, its powers are often severely curtailed. The extent to which the powers of the directors are displaced will vary with the scope of the receivership and the powers vested in the appointee.[71] In many cases the receiver and manager will be given broad powers of management which

66. *Gough's Garages Ltd.* v. *Pugsley* [1930] 1 K.B. 615.
67. *Re Henry Pound, Son & Hutchins* (1889) 42 Ch. D. 402, at 421.
68. The application shall be made on summons and shall be heard and determined by a Registrar who is invested with judicial powers for the purposes of this exercise. See e.g. The Companies Rules 1963 (Qld.) r. 55.
69. [1967] 1 N.S.W.R. 526.
70. Liquidators are also allowed to apply to the court for directions in relation to questions arising in a winding up: Uniform Companies Act, ss. 237(3) and 274(1)(a). Several illustrations of the application of these provisions are outlined in McPherson, *The Law of Company Liquidation*, pp. 229–230.
71. *Hawkesbury Development Co. Ltd.* v. *Landmark Finance Pty. Ltd.* [1969] 2 N.S.W.R. 782, at 790.

will eclipse the usual authority of the board. The directors nevertheless remain liable to perform their statutory obligations.

5. Effect of Liquidation upon the Receiver and Manager's Powers

(a) Effect upon Agency.

Just as the appointment of a receiver and manager can have a dramatic effect upon the scope of the directors' powers, liquidation can restrict a receiver and manager in the exercise of his powers. The agency given to the receiver and manager by the standard form debenture is cancelled by a compulsory winding up order.[72] Lord Justice Rigby's comment in *Gosling* v. *Gaskell*[73] is particularly apposite:

> The company was incapacitated by the winding-up order from carrying on business, and the receiver could not create debts which would be proveable in the liquidation against the unmortgaged assets of the company . . .[74]

Similarly, the appointee's agency terminates upon the commencement of the voluntary winding up of the company.[75] Yet in both forms of liquidation the cancellation of the agency does not leave a vacuum. While the receiver and manager may no longer bind the company he will be personally liable on any contracts which he enters as a principal.[76] Alternatively, where he purports to act for the company notwithstanding the revocation of his agency he may be held liable for a breach of warranty of authority.[77] For these reasons, a receiver and manager should ensure that he obtains a comprehensive indemnity from the debenture-holders before he accepts the appointment. It is, of course, possible that the debenture-holders themselves may be liable on any contracts which the receiver and manager enters during the course of the liquidation. But in general it will be difficult to establish that the secured creditors have given the appointee authority to act on their behalf.[78]

(b) The Surviving Powers.

Although a receiver and manager's authority to act as the company's agent is revoked, he is not paralysed by the winding up. Indeed he can still exercise some of his powers in the name of the company.[79] However, it is difficult to determine which of his powers remain intact. It is at least clear that he may take possession of the property comprised in the debenture and may continue to hold and dispose of it.[80] In addition, it appears the power to take proceedings in the name of the company to obtain a new lease of business premises and to protect the secured property generally will survive a winding up order.[81]

72. See e.g. *Gosling* v. *Gaskell* [1897] A.C. 575, H.L.
73. [1896] 1 Q.B. 669, C.A. Although Lord Justice Rigby dissented in that case his views were affirmed by the House of Lords. See [1897] A.C. 575, H.L.
74. [1896] 1 Q.B. 699, at 699–700.
75. *Thomas* v. *Todd* [1926] 2 K.B. 511.
76. *Ibid.*, at 518.
77. *Thomas* v. *Todd* [1926] 2 K.B. 511, at 518.
78. See e.g. *Gosling* v. *Gaskell* [1897] A.C. 575, H.L.
79. See *Re Henry Pound, Son & Hutchins* (1889) 42 Ch. D. 402, at 421 and 423. Cf. *Gough's Garages Ltd.* v. *Pugsley* [1930] 1 K.B. 615, at 626 where Mark Romer L.J. stated that the compulsory liquidation of the company "does not put an end in any way to the powers of the receiver".
80. *Re Landmark Corporation Ltd. (In Liq.) and the Companies Act* (1968) 88 W.N. (N.S.W.) 195; *Sowman* v. *David Samuel Trust Ltd. (In Liquidation)* [1978] 1 W.L.R. 22.
81. *Gough's Garages Ltd.* v. *Pugsley* [1930] 1 K.B. 615.

On the other hand, it seems that he may be enjoined from carrying on the business of the company as a going concern.[82] Further, it appears that he may be unable to make calls on company shares.[83]

The rationale of these restrictions is that a company in liquidation cannot authorise a receiver and manager to do any act which it is unable to do itself.[84] It is clear that such a company may not empower the appointee to create debts proveable against the uncharged assets of the company. But it by no means follows that he should be prohibited from carrying on the company's business incurring debts for which he would personally be liable. The thrust of the objection seems to be that the pursuit of the company's business during a liquidation will necessarily jeopardise the assets of the company available to general creditors. Once the implications of the appointee's personal liability are fully appreciated this reasoning loses much of its force.

It is often desirable to allow the appointee to be able to carry on the business of the company even after the commencement of its winding up. In this way a receiver and manager might be in a better position to sell the assets and goodwill of the company as a going concern. In *Inglis Electrix Pty. Ltd.* v. *Healing (Sales) Pty. Ltd.*[85] Asprey J. conceded the validity of this point:

> The power to carry on the business is a very real part of the security given to the mortgagee for the moneys lent and secured by the charge and the ability to dispose of assets in the course of trading as opposed to a bulk realization of them by auction or tender may greatly affect the amount of moneys received therefor and thus the ability of the mortgagor to discharge its indebtedness to the mortgagee.[86]

Unfortunately, as we have seen, the continuity of the business is interrupted by the termination of the appointee's agency. In an attempt to avoid this result one might invoke a section equivalent to section 173 of the Property Law Act 1974–1975 (Qld.)[87] which states that irrevocable powers of attorney granted to secure a proprietary interest of the donee survive the winding-up of the donor company. One could also point out that even at common law a power of attorney coupled with an interest was irrevocable.[88] But it is doubtful whether a power of attorney given by the company to the secured creditors in the debenture itself can be used by a receiver and manager to carry on the company's business in liquidation.[89] For one thing both at common law and under the statutory provisions the power of attorney must be given to the debenture-holder himself not to the receiver and manager. And even if the appointee can be treated as a substitute attorney there remains the obstacle which appeared in *Frith* v. *Frith*.[90] There, the appellant entered into

82. *Thomas* v. *Todd* [1926] 2 K.B. 511; *Re Henry Pound, Son & Hutchins* (1889) 42 Ch. D. 402, at 421.
83. *Re Henry Pound, Son & Hutchins* (1889) 42 Ch. D. 402, at 421.
84. See *Visbord* v. *F.C.T.* (1943) 68 C.L.R. 354, at 382 per Williams J.
85. [1965] N.S.W.R. 1652.
86. *Ibid.*, at 1654.
87. See: Conveyancing Act, 1919 (N.S.W), s. 161; Property Law Act 1969–1973 (W.A.), s. 86(1); Powers of Attorney Act 1934 (Tas.), s. 10; Instruments Act 1958 (Vic.), s. 124. There is no similar provision in the Law of Property Act, 1936–1975 (S.A.) or the Real Property Act 1886–1975 (S.A.)
88. See *Smart* v. *Sandars* (1848) 5 C.B. 895; and *Griffin* v. *Clark* (1940) 40 S.R. (N.S.W.) 409, at 413.
89. In *Sowman* v. *David Samuel Trust Ltd.* [1978] 1 W.L.R. 22 Goulding J. acknowledged that it was arguable that a power of attorney given to the debenture-holders might be exercised by a receiver and manager as a substitute attorney but declined to express his own views on this point.
90. [1906] A.C. 254.

possession of the respondent's premises under a power of attorney. The respondent then instituted ejectment proceedings, the success of which depended upon whether the power of attorney was irrevocable. It was argued that the power was, in fact, irrevocable on the ground that it was entered into for sufficient consideration and that it either formed part of a security or was given for the purpose of securing a benefit for the donee of the power.[91] The Privy Council rejected this submission on the evidence but nevertheless considered whether an irrevocable power of attorney would have entitled the appellant to resist the action for ejectment:

> . . . even if the authority conferred upon the appellant had been irrevocable, he has not a good equitable defence to the action of ejectment, inasmuch as the contract made with him being one entire thing incapable of being divided into independent parts, he would not, upon the authorities cited, be entitled to an injunction to restrain the respondent from suing in ejectment. That is, as the appellant's counsel admits, the test. A suit for such an injunction would, in this case, amount in effect to a suit for specific performance of a contract for hiring and service, a suit which cannot be maintained.[92]

The appellant in that case had a memorandum from the grantors of the power of attorney pledging that they would retain him as manager of the relevant property under the power for seven years at a salary of 60 pounds per annum. In other words, the appellant's contract with the grantors stated the term of his appointment and his remuneration. A receiver and manager appointed as a substitute attorney by the debenture-holders might well be in a similar position. If that were true, the liquidator of the company whose debenture-holders appointed the receiver and manager as a substitute attorney could institute ejectment proceedings against the appointee and have him removed from possession.

But how does this assessment square with the clear words of section 173 of the Property Law Act (Qld.) or its interstate counterparts? Perhaps we are left with the conclusion that although the power of attorney survives the company's liquidation, the donee or his substitute can possibly be restrained from carrying on the business of the company after the winding-up by ejectment proceedings instituted by the company's liquidator. On the other hand, unless and until so restrained, the attorney or his substitute would apparently be able to carry on the business with a view to realising the optimum sale price.

(c) Does the receiver and manager require leave to take possession of the property of a company being wound up by the court?

As mentioned earlier, a receiver and manager is entitled to take possession of the assets charged notwithstanding the appointment of a liquidator. But if the liquidator is appointed by the court and he refuses to hand over the property subject to the charge the receiver and manager may be liable for contempt if he seizes the assets without the leave of the court.[93] Normally, however, the liquidator raises no objection and leave is unnecessary. To quote Street J. (as he then was) in *Re Landmark Corporation Ltd. (In Liq.) and the Companies Act*:[94]

91. See n. 88 above.
92. [1906] A.C. 254, at 261.
93. *Re Henry Pound, Son & Hutchins* (1889) 42 Ch. D. 402.
94. (1968) 88 W.N. (N.S.W.) 195.

> The course of practice in the administration of company law should keep pace with the clarification of the law affecting debenture holders and their receivers. In what I have described as the ordinary case leave would be granted as of course, and I see no purpose whatever in perpetuating what is, after all, no more than an outmoded practice which involves a pointless expenditure on costs.[95]

(d) Does Section 227 of the Uniform Companies Act catch dispositions of company property by a receiver and manager?

Having relieved the liquidator of possession of the secured property, the receiver may wish to dispose of some or all of the assets in order to liquidate the debt due to the debenture-holders. Here section 227 of the Uniform Companies Act poses a problem. That provision avoids any disposition of the property of the company made after the commencement of the winding up by the court unless the court otherwise orders.[96] Taken literally, it would compel a receiver and manager to seek court approval for any disposition[97] of the assets of a company in the course of a compulsory liquidation. The cardinal issue is whether the words "the property of the company" extend to property which is mortgaged to the debenture-holders. The company's equity of redemption is a chose in action which could be described as property.[98] Moreover, in *Clifton Place Garage Ltd.*[99] the Court of Appeal assumed, rather than decided, that a receiver and manager required leave in order to dispose of property of a subsidiary company after a winding up petition had been presented. The receiver and manager was able to continue the trading of the company's garage with the assistance of a loan of nearly 4,900 pounds from the parent company. He deposited this sum in a special bank account and paid the garage's current trading expenses from that account. In the relevant period the income of the garage, amounting to more than 4,000 pounds, was also paid into the special account. It was this payment which the liquidator challenged as a disposition of the property of the company after the commencement of the winding up.

At first instance,[100] Megarry J. refused to validate the payment. On appeal it was unanimously held that approval should be granted on the ground that the appointee acted in good faith and the creditors suffered no detriment. The disturbing legacy of this case, however, is that no member of the Court of Appeal questioned whether there was any necessity for leave in the first place. Indeed, Harman L.J. commented:

> This was undoubtedly a disposition made after the date of presentation of the petition and is, therefore, a void disposition. It, therefore, is ineffective and the receiver cannot hold on to the proceeds of the payments unless the court otherwise orders.[101]

If that statement be good law the smooth functioning of a receivership will be frequently interrupted by applications to the court to approve every disposition of the property caught by the debenture. However, there is a

95. *Ibid.*, at 197.
96. Section 223 of the Uniform Companies Act provides that a compulsory windng up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.
97. The term "disposition" will be given a broad meaning: *Re Dittmer Gold Mines Ltd. (No. 3)* (1954) St. R. Qd. 275, at 282.
98. Indeed, section 227 itself refers to "the property of the company including things in action . . .".
99. [1970] Ch. 447, C.A.
100. [1970] Ch. 477, at 482.
101. [1970] Ch. 477, at 490.

suggestion in *Re Norman King & Co.*[102] that the "property of the company" within section 227 does not include property which belongs to a third party. There it was held that the section had no application to a disposition of property in which the company held merely an equitable interest. The fact that the mortgage in that case affected the company's beneficial interest was not sufficient to make it a disposition of the company's property. This reasoning can be readily applied to a sale by a receiver of company assets comprised in the debenture. He sells property which, after the crystallisation of the charge, belongs to the debenture-holders. Although the company's equity of redemption might also be transferred this should not bring the transaction within section 227. In any event, the equity of redemption will usually be extinguished when the receiver and manager accounts to the company for any surplus he receives over and above the debenture-holder's debt.

Perhaps it was this type of reasoning which prompted the recent remarks of Goulding J. in *Snowman's* case:[103]

> In truth the rights and powers given by the debenture are themselves property, but not property of the company, and if they are not extinguished by the fact of winding up, their enforcement or exercise is not within the scope of section 227 at all.[104]

Clearly this is the more sensible result. A receiver and manager should not be put to the expense and inconvenience of applying to the court every time he wishes to dispose of assets included in the debenture-holders' charge. The purpose of s. 227 is "to prevent, during the period which must elapse before a Petition can be heard, the improper alienation and dissipation of the property of a company *in extremis*".[105] It is designed to safeguard assets which will be available to the company's general creditors in the winding up and to prevent certain unsecured creditors being given preferential treatment.[106] None of these purposes is served by requiring a receiver and manager to obtain the court's imprimatur before disposing of assets described in the debenture. Moreover, such a requirement would seem to be inconsistent with the widely accepted principle that the debenture holders and the receiver and manager they appoint are entitled to stand outside the winding up of the company.[107]

6. Conclusion

Some of the problems outlined earlier stem from drafting errors and oversights in the debenture under which the receiver and manager was appointed. Most of the difficulties could be overcome if there were a statutory catalogue of a receiver or a receiver and manager's powers in the Companies Act, or preferably, in the Property Law Act.[108] It could be expressly provided that this index of powers could where necessary be amplified or extended by the debenture itself. If this were done there would be fewer risks involved in dealings with a receiver and manager and the appointee himself would be in a better position to discharge his duties.

102. *Re Norman King & Co.* [1960] S.R. (N.S.W.) 98.
103. [1978] 1 W.L.R. 22.
104. *Ibid.*, at 30.
105. *Re Wiltshire Iron Co; Ex parte Pearson* (1868) 3 Ch. App. 443, at 446–447.
106. See W.B. Lindley, *A Treatise on the Law of Companies* 6th Ed. (London: Sweet & Maxwell Ltd., 1902), p. 898.
107. *Strong* v. *Carlyle Press* [1893] I Ch. 268, at 276. See also Lindley, *A Treatise on the Law of Companies*, pp. 341–342.
108. Some of the provisions of the Property Law Act 1974–1975 (Qld.) dealing with a mortgagee's powers could be readily adapted to this exercise. Moreover, a useful catalogue of powers which might be conferred upon a receiver appears in s. 15(1) of The Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c. 67).