RECEIVERSHIP IN THE COVID-19 CRISIS

Ongoing receiverships

The Covid-19 crisis, and the Government's containment measures, have had an extraordinary effect on business and society. This article looks at the legal implications for receiverships, focussing on the effect on existing receiverships.

Receiverships continue

The starting point is that nothing in the recent legislation would have the effect of bringing a receivership to an end. Notwithstanding the practical difficulties discussed below, receivers remain in post, unless the receivership is terminated in one of the ordinary ways. Where there are particular difficulties, receivers may wish to resign, if their terms of appointment permit it, though plainly receivers will not want to do so across the board.

Sole receivers (or those who are left as sole receivers after the death of a joint receiver) may, however, wish to resign in order to be re-appointed as joint receiver with a colleague. Given the increased risk of absence from work, and since receiverships are personal appointments, it seems to us that it makes sense to ensure that all receiverships are joint. Of course, receivers can and should also make arrangements for the continued management of receivership properties if they both fall ill, by giving suitable agency to other members of their team.

So, what must the receivers do during the "lockdown"? Management of the property under receivership beyond securing it and/or making it safe will depend on its type.

Where the Borrower occupies the property

Let us start with a case where the borrower is, say, developing a site. In the vast majority of cases, the site will have been shut down.

The receivers are, in our view, obliged to do what they can to secure the site. If there are inadequate resources in the receivership to do the necessary, receivers ought to revert to the

lender to seek the necessary additional funding. If the lender declines, it can hardly complain later if there is damage to the site.

Although, like all of us, receivers and the staff of their firms (and contractors) must only go outside for work in so far as they cannot work from home, we consider that works necessary to secure a site or vacant building will be treated as necessary.

We do not consider that the receivers' obligations will end once he has secured the site or building; it will be necessary for the receiver to have some system for checking that the site remains secure, and in the case of a building that it remains watertight and essential maintenance is being carried out. If it is not practical for the receiver to install cameras which can be monitored remotely, receivers will, in our view, have to undertake inspections from time to time, the frequency depending on the extent of the risk in the property. We do not, however, suggest, that receivers will be able to continue "ordinary" works to properties during this period. Works which receivers can legitimately instruct will be strictly limited to those which cannot await the end of the lock-down. The government has issued non-statutory (ie not binding) guidance, found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876500/Consolidated_Landlord_and_Tenant_Guidance_COVID_and_the_PRS_v4.2.pdf, which suggests maintenance should be limited to matters which require urgent attention only (see para 3.8).

Of course, what is necessary may vary depending on the nature of the property: if the property is not a building site, but a residential property occupied by the borrower and his family, then it is likely that any work which is necessary to enable the occupants to enjoy its full advantages (such as fixing the washing machine) will be permitted. In the government Guidance on closure of businesses, https://www.gov.uk/government/publications/further-businesses-and-premises-to-close/further-businesses-and-premises-to-close-guidance#work-carried-out-in-peoples-homes, at section 2, the Government has advised that tradespeople can continue to attend homes for repairs and maintenance as long as they remain at least two metres from occupants, and unless someone occupying is self-isolating because of Covid-19 symptoms or because they are at high risk. If the repairs are an emergency, they can attend even if the premises are occupied by someone in self-isolation.

Another common question is: where the borrower was a tenant of the property, must the receiver continue to pay the rent? The government has not enacted any legislation providing a rent holiday; so, unless the particular terms of the lease justify an argument that the rent is suspended during this time (or unless the landlord agrees a suspension or reduction), the rent remains payable, and the receiver must continue to use any income from the receivership to pay it. The good news, however, is that where there is no income and the rent cannot be paid, the landlord will be unable to take any steps to forfeit the lease: by s82 of the Coronavirus Act 2020, a right of re-entry or forfeiture for non-payment in a business lease, cannot be enforced until at least 30 June 2020. This prevents both forfeiture by court order and by peaceable re-entry. Locks cannot be changed. Similar provisions in s81 preclude landlords taking possession of residential properties too.

Some businesses are of course still running. If the mortgage is over the business run in the commercial property, the receivers can continue to run that business if it is one of the limited exceptions to the requirement of closure in the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020.

That leads to an important question. The requirement of closure is, under reg 2, placed on "a person responsible for carrying on [the] business". By reg 2(9), that "includes the owner, proprietor, and manager of that business". Is that definition capable of including a receiver, notwithstanding his deemed agency? "Manager" is not further defined. However, its inclusion suggests that someone who is an employee or agent of a business owner is capable of being liable under the Regulations. Thus it must be arguable that a receiver who has power to run the business is so caught – so that if the business continues to operate in breach of the regulations, the receivers will be committing an offence.

Where the borrower is not in possession

Just as landlords cannot take possession against receivers, so too receivers cannot take possession from the borrower's tenants, or even from squatters, or indeed from the borrower itself.

In addition to ss81 and 82 of the Coronavirus Act 2020, a new Practice Direction 51Z of the Civil Procedure Rules stays all proceedings for possession, and all proceedings to enforce a possession order, until 27 March 2020.. Thus though a claim can be issued, it will not progress any further, even if contested and even if directions to trial have already been given. See https://www.falcon-chambers.com/publications/articles/possession-all-bets-are-off-at-least-for-now.

This Practice Direction applies to all possession claims. In the context of residential property, it is uncommon to take possession without a court order, since that is prohibited for most tenancies and licences by the Protection From Eviction Act 1977. More generally, the taking of possession without the assistance of the court, where the premises is occupied whether lawfully or not, and whether the premise are residential or commercial, can be criminal by reason of s6 of the Criminal Law Act 1977. The Practice Direction also applies to mortgage possession claims, so that the lender cannot seek possession via the court either, though it could take possession of an empty house by simply changing the locks. Thus the Practice Direction has made the taking of possession all but practically impossible in the residential sphere. For commercial property, possession can be taken physically (provided that the ground for possession is not rent-based forfeiture of a business tenancy, caught by s82 of the 2020 Act,) if, for example, it is empty, without risk of a Criminal Law Act 1977 defence.

The Practice Direction applies even to trespass claims. Despite the lockdown, and the government direction to councils to house the homeless, trespass must remain a real risk for vacant buildings. The only recourse if there is a trespass, if the police will not assist, and the locks cannot be changed without the assistance of the court because of the risk of a s6 Criminal Law Act 1977 offence, is to seek an injunction. Injunction claims in relation to property are permitted: they are expressly excluded from the Practice Direction; furthermore, they are included in the list of cases which the County Court "must" hear notwithstanding the lockdown: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877242/Civil_court_listing_priorities_1_April_2020.pdf. It remains to be seen how in practice this will occur, because the default position at the moment is that cases are to be heard remotely, via video link – but it seems unlikely that this will be possible if the claim is brought against "Persons Unknown" and/or people who may not have access to the technology required

to conduct a remote, or even telephone, hearing. In addition, an injunction is a blunter instrument for rapid removal of trespassers than a possession claim: the effect is to put the trespassers at risk of committal to prison if they do not vacate rather than, as a possession order does, allowing their removal by bailiffs or sheriffs.

There is some good news in the recent legislation for receivers who are in the position of landlords of commercial property: s82 also prevents landlords from waiving the right to forfeit by, for example, accepting later rent. Waiver can only be express, in writing. The receivers' acts (or indeed those of the borrower) are unlikely to be waivers of any right to forfeit for non-payment of rent. So, when all this is over, the receivers won't be precluded (by waiver) from collecting back rent from the tenant.

Sale

This is the goal of many receiverships. How have recent events have impacted on the receivers' ability to sell the security? Unlike possession, sale is not barred by statute or court procedure. So, if receivers have already entered into a sale contract, there is, on the face of it, nothing to prevent completion from taking place. The Land Registry is maintaining its service, so that the sale will be registered (though the time until registration may be longer).

If the buyer refuses to complete on the due date, the receivers can, in theory, seek specific performance of the contract, via the High Court. This is the type of case which the Court will likely be able to process and dispose remotely.

However, there are certain practical challenges: first, getting an order for specific performance is of little help if the reason the buyer has not completed is that it no longer has the funds to do so. Secondly, receivers are only entitled to an order to specific performance if they are "ready, willing and able" to complete themselves: unless the property is already vacant, the receivers will have to show that they will be able to deliver vacant possession on the completion date. Government guidance in the residential sector (at https://www.gov.uk/guidance/government-advice-on-home-moving-during-the-coronavirus-covid-19-outbreak) suggests that if the property is not already vacant, the parties should agree to delay the move date unless it is impossible. We do not consider that an order for specific performance will be made if the consequence of the order will be to require contractors to leave their homes to work in order to

empty the property, only for it to remain vacant because the buyer's business is unable to trade from it.

If a sale has not yet been agreed, there are real practical difficulties in the way of making any progress towards sale at the present time:

(1) Physical viewings will be impossible.

(2) Many estate agents will have furloughed staff as a result.

(3) There is real uncertainty as to value: the RICS recommends that valuers consider adding a material uncertainty clause in all valuations: https://www.rics.org/uk/upholding-professional-standards/sector-standards/valuation/valuation-coronavirus/. This is bound to affect the number of potential purchasers at this time, and to lead to risks for the receivers that it will later be said that they sold at an undervalue. The best approach in general seems to be to put the property into an (online) auction so that the auction itself can be evidence of value.

(4) Lending has, we understand, slowed considerably. In the particular case of a sale by receivers, there may be an opportunity for this particular problem to be overcome: the appointing lender may prefer to lend some money to a potential purchaser of good covenant strength than to continue with the current defaulting borrower. Receivers may be able to broke creative solutions here.

What is a receiver to do faced with these difficulties? The receiver must, of course, consider whether to sell or not if he has the power to sell. It seems to us that, in light of all these difficulties, a receiver would not likely be in breach of duty if he decided, in good faith, to wait until the lockdown were over before commencing marketing – at least unless it becomes clear that the lockdown will last more than a few months. Of course if a credible third party were to make an offer at pre-lockdown market value, that might be different.

If, on the other hand, the receiver decided to proceed with a sale to recoup what he could in the short term despite the difficult market conditions, would that be a breach? Every case will turn on its own facts, but generally, a receiver is entitled to sell at the time of his choosing and must simply get the best price then obtainable: *Bell v Long [2008] EWHC 1273 (Ch)*. Given the uncertainty as to how long this situation will last and what the market will look like when it is over, we consider it unlikely that a receiver's judgment call to proceed with a sale (if it is

possible to effect one) in the short term would amount to a breach of duty, unless there was clear evidence that a delay would increase the price (see *Meftah v Lloyds TSB Bank Plc [2001] 2 All ER (Comm) 74*). Given the uncertainty of the present world, such clarity seems unlikely.

Whatever course of action receivers decide to take, they should be particularly careful to obtain and retain evidence, for example of valuations and other advice which informed their decisions to sell or delay, so that it can be produced if there is any later dispute.

One final observation

Receivers' personal liability is considerably limited as a result of the deemed agency. Their acts are, often, deemed to be those of the borrower and it is the borrower who has liability for them. However, the deemed agency is lost if the borrower is insolvent, because, it appears from the case law, the insolvency legislation prevents liabilities falling on the insolvent borrower. In particular, it has been suggested, obiter, in *Rees v Boston Borough Council [2001] EWCA Civ* 1934, a rating case, that a receiver in possession of the receivership property might be personally liable for some statutory property obligations which would have fallen on the borrower, if the borrower becomes insolvent. Since insolvency is likely to be increased as a result of the Covid-19 crisis, this risk is something receivers should bear in mind.

Stephanie Tozer QC
Cecily Crampin