

Administration v Fixed Charge Receiver

When borrowers default what options are lenders left with to enforce their security? Moorfields explore the differences of Administration v Fixed Charge Receivership.

When considering enforcement options, a lender with both a qualifying floating charge and fixed charge security over specific assets will, in most situations, have the option of appointing an administrator to take control of the whole of a company and its assets, or a receiver to take control of specific assets or a class of assets.

Conventional wisdom suggests administration is relatively costly due to the more significant burden of statutory compliance. However, whilst that statement may be broadly correct in isolation,

the administrator's much broader range of powers and duties must be factored in. When considered holistically, the appointment of an administrator is often a more robust and productive recovery tool than receivership, which is generally appropriate for simple single asset situations, where the more limited power derived from the lenders security will suffice.

Moorfields compares and contrasts the two processes by looking at some key issues pertinent to each of them.

Administration	Fixed Charge Receivership
Where control is needed over a group of companies and assets operating under a parent company, or where a "prop-co/op-co" structure exists, the appointment of an administrator is likely to afford a greater degree of control and a wider range of restructuring options.	Receivership is likely to be more suitable for single asset enforcement strategies, especially where ongoing trade and management/company cooperation is not required.
An administrator's status as an agent of the company acting without personal liability, in combination with their wide range of powers and duties, allows them to take full control of all company assets and to trade on. They are also able to pursue antecedent transactions. This may extend the range and scope of available recovery strategies.	As agent of the borrower, a receiver's powers are limited, in the main, to the sale of the asset over which they are appointed and the collection of rent. Any other powers they have will be derived from the lenders security.
An administrator can compel certain parties to cooperate by delivering up records and information to assist them in discharging their duties. Cooperation from those with prior knowledge and experience of assets will enhance recoveries.	A receiver has no powers to require cooperation and no control over the borrower. Where the provision of company records is key to the sale of an asset, a lack of cooperation may be a significant impediment.
Whilst an administrator will not adopt contracts of employment, they can ensure continuity of employment during an ongoing trading period. Equally, they can dismiss staff if need be. Clearly this will be essential if trade is to continue.	Any powers to control staff will be derived from the lenders security.
An administrator is obliged to deal with a company's VAT affairs and can ensure the company recovers input VAT suffered on costs and expenses of the administration. This will enhance net cash flows and improve the overall outcome for creditors.	A receiver has no control over a company's VAT affairs. At present a receiver can account for input VAT suffered on certain costs to offset the liability output tax applied to the sale of an asset, thereby reducing their overall liability. A receiver cannot seek a refund of VAT where input VAT suffered in the period exceeds output VAT collected.
An administrator has control over a company's books and records and the power to compel any party in possession of records to deliver them up. The availability of documentation may be crucial to the realisation strategy.	A receiver has no power over books and records, which can present a significant impediment to the sale of an asset.

Administration		Fixed Charge Receivership
<p>One of the key benefits of administration is the moratorium against proceedings created once a notice of intention to appoint has been filed. This prevents the instigation or continuance of any legal process against the company and is often key to a rescue or restructuring process.</p>	<p>Creditor Pressure</p>	<p>A receiver has no statutory protection, although once appointed over an asset they are entitled to secure it.</p>
<p>Once an administrator is in office, the concurrent appointment of a liquidator (or any other office holder) would be prevented by the moratorium.</p>	<p>Other Office Holders</p>	<p>Once an administrator is in office, a fixed charge holder seeking to appoint a receiver over a specific asset would require the administrator's permission. That receiver would not act as agent of the borrower and would be personally liable for their actions.</p>
<p>The remit of an administrator's appointment extends over all of a company's assets and undertakings, including floating charge assets such as stock and debtors. Recoveries may significantly enhance a lender's overall outcome.</p>	<p>Other assets</p>	<p>A receiver is appointed over the fixed charge asset(s) described in the instrument of appointment.</p>
<p>Unless rental receipts are mandated to a lender and control is exercised via payment into a blocked account, rent received will be captured under the floating charge and subject to dilution by way of general costs, preferential claims against the company, the prescribed part and taxation.</p>	<p>Rent Receivable</p>	<p>Rent received will be available, net of costs, for distribution to the appointing lender.</p>
<p>Rent which falls due during the administration process will be an expense of the administration. Current case law dictates that the full rental liability will be due even when premises are only partially occupied.</p>		<p>These remain liabilities of the borrower.</p>
<p>Full rates are payable as a cost of administration during the period in which a company continues to occupy premises. Even if the company ceases to trade from premises, equipment and chattels left on site will give rise to an ongoing liability. With regard to empty properties, an administrator will adopt the position that business rates are not payable as a valid expense of the administration.</p>	<p>Rent and Rates Payable</p>	<p>Non-payment may eventually give rise to a corporate insolvency process such as liquidation, whereupon the receiver will lose their agency status.</p>
<p>The administrator is obliged to issue a report to the Secretary of State for the Department for Business, Innovation and Skills regarding the conduct as a director of any person who has held that office in the three year period preceding the date of administration. This includes shadow and de facto directors. An adverse report may give rise to disqualification proceedings.</p>	<p>Investigations</p>	<p>A receiver has none of the powers or duties of an administrator in this regard.</p>
<p>An administrator has a wide range of powers to investigate and seek redress on behalf of creditors for antecedent transactions such as preference payments, transactions at an undervalue, wrongful trading and acts of misfeasance perpetrated by the directors or the company. This may lead to enhanced recoveries and can be helpful when trying to trace missing rent deposits or unauthorised lease surrender premia.</p>		
<p>In most administration scenarios (one exception being Limited Partnerships) post appointment capital gains and revenue taxes will be a company liability payable from floating charge realisations as an expense of the administration. Taxation can therefore dilute realisations available for distributions to the general body of creditors, although if there are no floating charge realisations the tax will not be capable of payment.</p>	<p>Tax</p>	<p>A receiver is not liable for capital or revenue taxes.</p>

Disclaimer

This guide is prepared as a general guide only. No responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication can be accepted by the author or publisher. Always seek professional advice before acting. Moorfields Corporate Recovery LLP is registered in England and Wales No OC334837. A list of members is available at the registered office 88 Wood Street, London, EC2V 7QF. Simon Thomas and Shelley Bullman are licensed as insolvency practitioners in the UK by the Institute of Chartered Accountants in England and Wales. Partners acting as Administrators, Administrative Receivers or Receivers contract as agents and without personal liability.

CONTACT US

Moorfields Corporate Recovery LLP

88 Wood Street, London
EC2V 7QF

t +44 (0) 207 186 1143
f +44 (0) 207 186 1177

www.moorfieldscr.com
info@moorfieldscr.com