

LPA Receivers – Back With A Vengeance!

Law of Property Act Receivers ("LPAs") – A common phenomenon during the last recession and now, it appears, on the increase during this latest economic downturn.

One Real Estate consultancy has reported an 850% increase in the number of appointments of LPAs during the first half of this year, with the residential housing section being the hardest hit, due to the increasing number of failures in the buy-to-let mortgage sector.

It is easy to see the advantages to any lender with a fixed charge over a property in the appointment of an LPA. The main advantage is that the lender is not liable for the actions of the LPA since, on their appointment by the lender the LPA becomes the agent of the borrower, not of the lender. The effect of the agency relationship is that the borrower will not be able to sue the lender for any negligence which may result from any acts or omissions of the LPA. However, the LPA himself will find himself in the unhappy position of being in the firing line in the event that the borrower suggests he has carried out his duties negligently.

LPAs are more commonly appointed on a borrower's financial default in circumstances where the repayments due to the lender under the Charge document have ceased. However, an LPA may also be appointed in circumstances where the borrower is in default of other terms of the borrowing, usually where relations between the borrower and lender have become hostile, leading to a failure to reach a mutual resolution of issues relating to the security.

Under the Law of Property Act 1925 an LPA's powers are restricted to collecting rent and to selling the property although these powers are normally extended by the lender under the terms of its Charge. A LPA Receivership is therefore primarily a useful mechanism to intercept the rental stream that the borrower may be receiving from the properties but choosing not to pay to the lender in times of hardship. The appointment of an LPA in such circumstances will avoid the lender taking on the onerous legal obligations of a mortgagee in possession in circumstances where cashflow may be the lender's main interim priority.

Whilst it is easy to see the advantages to the lender of the appointment of an LPA Receiver, what are the Receiver's obligations?

The recent case of Bell v Long & Others brought a Receiver's obligations into sharp focus. The issue concerned the sale by the Receiver of a portfolio of four properties in circumstances where they had previously received offers for three out of four of the properties from individual sellers. Having taken their local selling agent's advice, the Receiver decided to reject the individual offers and sell the properties as a portfolio of four and ultimately achieved a successful sale of the portfolio. However, the Receiver was sued by the Borrower's assignee on the grounds that the Receiver could and should have obtained a better price had the properties been sold on an individual basis. There were also secondary allegations that the Receiver did not take adequate valuation advice, relying only on the selling agent's opinion and that the Receiver had failed to test the market properly in relation to the sale of the individual properties.

The court, however, rejected all those arguments and found in favour of the Receiver. The court held that whilst the Receiver was under an obligation to obtain a proper price for the properties, he was not obliged to either "ride the market" or to take on onerous expenditure in order to achieve a sale. The Receiver had the right to choose the time of the sale no matter how disadvantageous that may be for the borrower. In addition, whilst the marketing of any property had to be appropriate, the Receiver nonetheless should look to the lender's interests in deciding how to sell. In the circumstances of this particular case, given that serious offers had been received for the portfolio of properties, had the Claimant's arguments been adopted, the Receiver would have been put in the position of rejecting those offers and holding out until individual sales of the properties were achieved. In the circumstances, weighing the certainty of the portfolio sale (given the firm offer received) as against the uncertainties of a possible lengthy marketing campaign of the individual properties, the Receiver was well entitled to adopt the chosen strategy in relation to the timing of the sale.

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Similarly, an earlier case of *Silven Properties v RBS* had also found in favour of the Receiver. It decided that a Receiver had no obligation to incur expenditure in order to prepare a property for sale. In that case a borrower unsuccessfully argued that the Receiver should have expended funds in order to apply for planning permission as the planning consent would have increased the potential realisation.

Given the restrictive statutory powers enjoyed by LPAs, it is common for lenders to extend the Receiver's powers under the terms of the Charge document to give the lender more flexibility in dealing with the property. Therefore, it is common for the Charge document to provide the Receiver with power to carry on business from the property. Some business properties may attract a higher price if the business can be managed and sold as a going concern and at the same time avoid the potentially high costs of security being deployed for vacant premises susceptible to vandalism.

In these cases LPAs are more at risk of adverse litigation even though in practice the LPAs sub-contract out the running of the business to specialist management companies. It is important to note that the LPA is not under any obligation to carry on any business at the property but if he does decide to trade, he is under an obligation to carry on the business profitably in order to maximise any price which may be obtained on the sale of the property.

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