DUTIES OF RECEIVER AND MANAGER

I. INTRODUCTION

The legal duties of receivers are derived from the terms of their contract of appointment, the general common law, the statutes, secondary legislation and rules in the profession. The duties of a receiver are owed to the company because a receiver is usually designated as the company's agent. However, under the terms of his appointment, generally it is clear that he has primary obligations to the debenture holder as well - principally, to obtain the charged assets and realise them with a view to paying the secured creditor's debt.

In *Downsview Nominees Ltd* v *First City Corporation*[1] the Privy Council endorsed the classic exposition of a receiver's duties outlined in *Re B Johnson & Co (Builders) Ltd*[2] by Jenkins LJ:

> The primary duty of the receiver is to the debenture holders and not to the company. He is receiver and manager of the property of the company for the debenture holders, not manager of the company... But the whole purpose of the...appointment would...be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers...

[1][1993] 2 WLR 86 at 98-99.
[2][1955] Ch D 634 at 662-3.

Thus the primary duty of the privately-appointed receiver and manager is to take possession of the property constituting the debenture holders' security and to realise it for their benefit. A receiver owes duties both in contract and tort to the debenture holder who appoints him.[3] His appointment on acceptance becomes a contract between his appointor and himself giving rise to contractual and tortious obligations. He will also owe fiduciary duties to his appointor in respect of the realisation of charged assets.[4] However, it is very rare to have a debenture holder suing the receiver for a breach of his duties because the inefficient receivers will not be appointed again - a *de facto* sanction.

The aim of this article is to analyse the various duties which a receiver owes to the company and its creditors. A receiver owes duties to the company over whose assets he is appointed.[5] Thus, a mortgagor company in receivership may sue the receiver appointed by the mortgagee if the receiver acts improperly and to the detriment of the company.[6] A duty of care is also imposed on the receiver to any other mortgagees of the same mortgaged property. This principle may be deduced from the case of *Midland Bank Ltd* v *Joliman Finance Ltd.*[7] A second mortgagee sought an interim injunction to restrain the first mortgagee from completing a contract of sale on the ground that the sale was undercut. The first mortgagee asserted that there had been no collusion between themselves and the purchaser. The second mortgagee alleged that the price was so low as to amount to evidence that the first mortgagee had totally disregarded the interest of other people in the land. This submission was rejected by Geoffery Lane J and he observed that if a mortgagee acted collusively with a purchaser,

---

[3]See Lightman and Moss, *The Law of Receivers of Companies,* (London, Sweet & Maxwell, 1986), 85-86.
[4]See Lightman and Moss, *ibid* at 96.
[5]*Gomba Holdings Ltd* v *Homan* [1986] BCLC 331.
[6]*Watts* v *Midland Bank plc* [1986] BCLC 15.
[7][1967] 203 Estates Gazette 1039.

then the mortgagee could be restrained from acting so and any purported sale would be set aside. But Geoffery Lane J found no evidence of equitable fraud or unconscionable behaviour and therefore, he concluded that the first mortgagee had acted with perfect propriety and dismissed the second mortgagee's motion.

A duty of care owed by a receiver to subsequent secured creditor of the same property has also been accepted in a recent Privy Council case of *Downsview Nominees Limited* v *First City Corporation Limited*.[8] In the opinion of Lord Templeman, a mortgagee owes a general duty to subsequent encumbrancers and to the mortgagor to use his powers for the sole purpose of securing repayment of the monies owing under his mortgage and a duty to act in good faith.[9]

In the earlier authorities, a receiver was said to owe no duty of care towards the guarantor of the company's loan.[10] However, it is now established that a receiver owes a duty of care to a guarantor of the company's secured debt. In *Standard Chartered Bank* v *Walker*,[11] the Court of Appeal held that a receiver realising assets under a debenture owed a duty to the guarantor of the debt to take reasonable care to obtain the best price under permitted circumstances. Lord Denning pointed out that a receiver was the agent of the company and not of the debenture holder, the bank. A receiver owed a duty not only to the company but also to the guarantor because the guarantor was liable to the same extent as the company. A guarantor was entitled in equity to an allowance if it appeared that the receiver had not used reasonable care to realise the assets. Furthermore, the amount of the guarantor's liability depended entirely on the amount of the stock realised when sold with proper care and a guarantor was within the test of 'proximity'.

---

[8] *Supra* n 1.
[9] *Ibid* at 98.
[10] *Barclays Bank* v *Thienel* (1978) 122 SJ 472; *Latchford* v *Beirne* [1981] 3 All ER 705.
[11] [1982] 1 WLR 1410.

The decision in *Standard Chartered* was followed by Mann J in *American Express International Banking Corp* v *Hurley*[12] where the judge held that the receiver was under a duty to the guarantor of the mortgagor's debt to take reasonable care to obtain the true market value of the mortgaged property when he realised the property in the exercising the power of sale. The receiver in this case had not taken reasonable care to obtain the true market value of the musical equipment. Although the receiver knew that the equipment was of a specialist nature, he failed to take specialist advice from anyone in the popular music business and he did not advertise the sale in publications specialising in the popular music industry. Therefore, the receiver had been negligent and the bank was liable to the guarantor.

It is submitted that the principle in *Standard Chartered Bank* is a sound principle because a guarantor's liability to the company's loan repayment is directly reduced by the amount recovered from the sale of the security by the receiver. This principle was in fact followed in a Malaysian High Court case of *Malaysian Industrial Development Finance Bhd* v *Eureka Ferro-Alloy Sdn Bhd & Ors*[13] where the court held that the receiver had breached his duty to the guarantor to obtain the best market price for the charged assets.

A more difficult question is whether the duty of care is owed to anyone else, and in particular to the unsecured creditors of the company. Sir Neil Lawson, sitting as a judge of the High Court, in *Lathia* v *Dronsfield Bros Ltd*[14] held that the receivers did not owe a duty to the company's creditors, their duties being owed to the debenture holder and also to the company as agents. The author submits that this is a wrong decision because the receiver should also owe a duty to the unsecured creditor for any negligent act by the receiver would directly affect unse-

---

[12][1985] 3 All ER 564.
[13][1989] 2 MLJ 117.
[14][1987] BCLC 321.

cured creditor's recovery repayment from the company especially when the receiver exercises his power of sale.

However in New Zealand, section 18(3)(c) of the Receiverships Act 1993 requires a receiver to exercise his powers with reasonable regard to the interests of the unsecured creditors of the company. This provision represents a marked departure from the previous position. Section 18(3) of the Receiverships Act 1993 now requires a receiver to have reasonable regard to the interests of other parties other than the appointor.

It seems that a receiver owes no duty of care to a beneficiary of a mortgagor trustee when exercising his power of sale to obtain a proper price of the charged property. In a recent English case of *Parker-Tweedle* v *Dunbar Bank Plc (No 1)*,[15] the Court of Appeal held that the duty owed by the mortgagee of property to the mortgagor to take reasonable care when exercising his power of sale to obtain a proper price for the property did not extend to a beneficiary under a trust of the mortgaged property of which the mortgagor was the trustee even if the mortgagee had notice of the trust.

II. DUTIES OF RECEIVER WITH RESPECT TO REALISATION OF ASSETS

A receiver's power of sale has been equated to that of a mortgagee exercising his power of sale. Jenkins LJ in *Re B Johnson & Co (Builders) Ltd*[16] referred to a receiver's power of sale as 'in effect, that of a mortgagee'. Thus, the same principles are applied to a receiver when he exercises his power of sale. In a Malaysian High Court case of *Asia Commercial Finance (M) Bhd* v *Development & Realtor Sdn Bhd*[17] Edgar Joseph Jr J commented on the duty of a chargee under the Malaysian National Land Code as follows,

---

[15][1990] 2 All ER 577.
[16]*Supra* n 2.
[17][1992] 2 MLJ 504 at 516.

> It is settled law that a chargee in exercising the power to sell under the Code owes a duty to a chargor which flows from equity's recognition that a chargor has an interest in the surplus (if any) arising from the sale.

It has long been accepted that a mortgagee is not the trustee of the power of sale for the mortgagor.[18] Where a receiver exercises this power of sale he must exercise it in good faith.

III. DUTY OF GOOD FAITH AND REASONABLE CARE

The principle that the duty of a mortgagee engaged in selling the mortgaged property is to act *bona fide* originated from the case of *Warner* v *Jacob*.[19] Kay J observed that the power of sale is given to the mortgagee,

> ...for his own benefit, to enable him to realise his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

A receiver committed no breach of duty to the company by a *bona fide* sale, even though he might have obtained a higher price which from the point of view of the company[20] is to their advantage. In other words, Jenkins LJ

---

[18]In the first half of the nineteenth century, the view seems to have been that the mortgagee was the trustee of his power of sale. Lord Eldon LC in *Downes* v *Grazebrook* (1817) 3 Mer 200 at 207 set aside a sale where an agent for the mortgagee was the only bidder. It appears that the last English case in which the concept of trusteeship of the power of sale was accepted was the decision of Stuart VC in *Robertson* v *Norris* (1857) 1 Giff 421. In 1880 the proposition that a mortgagee was the trustee of his power of sale was rejected by the English Court of Appeal in *Nash* v *Eads* (1880) 25 Sol Jo 95. Sir George Jessel MR said that the mortgagee was not the trustee of the power of sale for the mortgagor. Kay J, after reviewing most of the authorities, concluded that a mortgagee was strictly speaking not a trustee for sale.

[19]See (1882) 20 Ch D 220 at 224.

[20]*Re B Johnson & Co (Builders) Ltd supra* n 2 at 662.

said that in the absence of fraud or *mala fides*, the company could not complain of any act or omission of the receiver and manager provided that the receiver did nothing that he was not empowered to do and omitted nothing that he was enjoined to do by the terms of his appointment. This view could be explained when it is viewed from the English common law concept of mortgage. At common law, after expiration of the contractual right to redeem, the mortgagee was in form and substance the legal owner. He can exercise the power of sale of his own property for his own benefit. The mortgagor cannot maintain an action at law against the mortgagee for negligence in the sale if in the eye of the law it was the mortgagee's own property.[21]

In the Privy Council case of *Downsview Nominees Limited* v *First City Corporation Limited*[22] Lord Templeman reinstated the narrow formulation of the duties of a receiver and manager as found in *Re Johnson*. In the opinion of Lord Templeman,[23] if a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. The duties owed by a receiver and manager do not compel him to adopt any particular course of action by selling the whole or part of the mortgaged property.

Before the decision of *Downsview Nominees Ltd* it was suggested that in addition to the duty of good faith a mortgagee also owed a duty of care in the conduct of sale. In *Cuckmere Brick Co Ltd* v *Mutual Finance Ltd*[24] the Court

---

[21] *Gilligan and Nugent* v *National Bank Ltd* [1901] 2 IR 513.

[22] *Supra* n 1. See an article by Alan Berg, "Duties of A Mortgagee and a Receiver" [1993] *Journal of Business Law* 213, where the implications of the case for the duties of a mortgagee and receiver are very well-aired.

[23] *Ibid* at 98.

[24] [1971] Ch D 949. This decision has been followed in a number of subsequent English decisions: *Bank of Cyprus (London) Ltd* v *Gill* [1979] 2 Lloyd's Rep 508, *CA; Standard Chartered Bank* v *Walker* [1982] 1 WLR 1410; *American Express International Banking Corp* v *Hurley* [1985] 3 All ER 564.

of Appeal held that a mortgagee owed a duty to the mortgagor to take reasonable care to obtain a proper price. The mortgagee was entitled to exercise the power of sale for his own purposes whenever he chooses to do so. In the opinion of Salmon LJ, it did not matter that the time of the sale might be unpropitious and that by waiting a higher price could be obtained. There was nothing to prevent a mortgagee from accepting the best bid the mortgagee could obtain at an auction, even though the auction was badly attended and the bidding exceptionally low. However, these adverse factors must not be due to any fault of the mortgagee. In the case of a conflict of interests, the mortgagee can give preference to his own interest. Salmon LJ concluded that in addition to good faith, a mortgagee also owed a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. If the sale shows a deficiency, the mortgagor has to make it good out of his own money. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. Furthermore, it would be strange if the mortgagee were under no legal obligation to take reasonable care to obtain the true market value at the date of the sale in circumstances where the power of sale was for the benefit of the mortgagee and that he was entitled to choose the moment to sell which best suited him.

This duty of care owed by a receiver was again brought up in a recent English case of *Knight* v *Lawrence*.[25] The borrowers brought an action claiming damages for negligence against the receiver where he failed to serve the notices necessary to put in motion the rent reviews when he became the receiver of the properties. As a result the rents were not increased as they would have been had the notices been served. Browne-Wilkinson VC held that the defendant was under a duty of care to the plaintiffs, in terms of the 'neighbour principle' it was plainly foreseeable that the owner of property would be prejudiced if a rent review was missed.

---

[25][1991] BCC 411.

In the opinion of Browne-Wilkinson VC, the function of the receiver was to look after the property of which he was receiver for the benefit of all those interested in it. He was not just an agent of the appointor, he was bound to safeguard the property for all who have an interest in it. The receiver should have engaged solicitors or others to review the position of the rent review clauses, and to take the necessary steps to ensure that the reviews took place.

In *Asia Commercial Finance (M) Bhd* v *Development & Realtor Sdn Bhd*,[26] Edgar Joseph Jr J discussed the two lines of authorities as to the standard of care owed by the chargee to the chargor namely, first, that a mortgagee's only duty to act *bona fide* in the conduct of sale and second, as explained in *Cuckmere Brick Co Ltd* v *Mutual Finance Ltd*,[27] where Salmon LJ based the obligation of the mortgagee on a legal duty based on the tort of negligence and stemming from the proximity of the mortgagor and of the mortgagee. Edgar Joseph Jr J preferred the *Cuckmere* test, when he said that, 'I note, however that in the Hong Kong Privy Council case of *Tse Kwong Lam* v *Wong Chit Sen*[28] their Lordships accepted the *Cuckmere test.* I would respectfully do the same.'[29]

In some jurisdictions statute has imposed on the receiver when selling the property of the company a duty to obtain the best price reasonably obtainable as at the time of sale. In New Zealand, section 19 of the Receiverships Act 1993 provides that a receiver owes a duty to the company, the persons claiming interests in the property in receivership, the unsecured creditors and sureties to the company's loan to obtain the best price that the receiver can obtain as at the time of sale. It is clear that effectively the same duty may be owed to the appointor under section 18(2) of the Receiverships Act 1993 which provides that a receiver must exercise his powers in a manner he believes on reasonable grounds to be in the best interests of the

[26] *Supra* n 17.
[27] *Supra* n 24.
[28] [1983] 1 WLR 1394.
[29] *Supra* n 17 at 516.

person in whose interest he was appointed. This statutory duty is no more than a restatement of the common law rule that a mortgagee exercising a power of sale must take reasonable precautions to obtain the true market value of the property.[30]

A similar provision is also found in Ireland. Section 316A(1) of the Irish Companies Act 1963 provides that,

> a receiver, in selling property of a company, shall exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale.

This provision is similar to New Zealand. Both in Ireland and New Zealand, the statutes provide that the receiver cannot use the defence that he is acting as the agent of the company or under a power of attorney given by the company against any action brought against him in respect of breach of this duty.[31] The receivers are also not entitled to be compensated or indemnified by the company for any liability the receiver may incur as a result of a breach of this duty.[32]

In Australia, section 420A(1) of Corporations Law imposes on the receiver a duty to take reasonable care to sell property for not less than the market value or, in the event that the property does not possess a market value, the best price reasonably obtainable. It seems that the duty imposed on the receiver in Australia by the Corporations Law is much clearer or perhaps wider than that imposed on the receivers in New Zealand by the Receiverships Act 1993. In Australia section 420A(1) of the Corporations Law provides that a receiver must take all reasonable care to sell the property for (a) if, when it is sold, it has a market value - not less than the market value or (b) otherwise

---

[30]*Cuckmere Brick Co Ltd* v *Mutual Finance Ltd supra* n 24.

[31]S 316A(1)(a) of the Companies Act 1963 (Ireland); s 20(a) of the New Zealand Receiverships Act 1993.

[32]S 316A(1)(b) of the Irish Companies Act 1963; s 20(b) of the Receiverships Act 1993 (NZ).

- the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold. In New Zealand section 19 of the Receiverships Act 1993 provides that a receiver who exercises a power of sale of property in receivership owes a duty to obtain the best price reasonably obtainable as at the time of sale. There is no similar provision in the English Insolvency Act 1986.

The adoption by Malaysia of similar statutory provisions imposing a duty on the receiver when he sells the property of the company will increase the efficiency of the receivership process in Malaysia because the receiver must make sure that he obtains the best price for the sale of the company's property and he must discharge this burden to the satisfaction of the court. The author would like to suggest that Malaysia adopt something similar to the Australian provisions because it is clearer than the provision in New Zealand.

In Malaysia, the court seems to adopt the principle that a receiver has a duty of care to obtain the best market price for the sale of the charged properties. In *Malaysian Industrial Development Finance* v *Eureka Alloy Sdn Bhd*[33] the defendant alleged that the receivers had breached their duty to obtain the best market price for the charged assets because they failed to account for stocks that were not sold, excluded various items from the sale by tender and did not levy rentals on the successful tenderer who was allowed to keep the machinery they purchased in the first defendant's factory. The defendant claimed damage for loss of rentals. Siti Norma Yaakob J dismissed the receivers' appeal and held that there was a breach of duty by the receivers to obtain the best market price because the receivers had failed to account for stocks that were not sold and the receivers had allowed the successful tenderer to keep the machinery they purchased in the first defendant's factory without levying any form of rentals.

[33][1989] 2 MLJ 117. There was no mention and discussion in the case of *Cuckmere Brick* and the *Standard Chartered Bank* case.

A receiver is expected to monitor the realisation of the security to see that no more is realised than necessary to discharge the debtor company's liability. In a Singapore High Court case in *MBF International Ltd* v *Royal Trust Merchant Bank Ltd*,[34] the court held that where shares were deposited as security and they have to be sold in the event of default, the mortgagee can reasonably be expected to monitor the realisation of the security to see that no more[35] is liquidated than is necessary to discharge the borrower's liability. In a sale of shares, as long as the mortgagee made a reasonable effort to guard against excessive sale, he cannot be faulted if the quantity sold turned out to be more than is required for that purpose. In this case the mortgagee should not have sold any of the other shares since the sale of some of the shares has already realised a surplus. The sale of the shares by the mortgagee was thus a breach of its duty as mortgagee. The borrowers were therefore, entitled to go into the market to buy a quantity of the shares corresponding to the shares which the mortgagee had sold. The loss sustained by the borrower in buying back the shares was reasonably foreseeable, and the mortgagees were liable to make good the loss.

It is submitted that Malaysia should not follow the decision in *Downsview Nominee Ltd* because the case was wrongly decided and badly argued. The court disregarded the numerous authorities (as discussed above) where in addition to the duty of good faith, there is a duty to take all reasonable care to obtain the best price. Thus Malaysia, it is submitted, should have a provision in her companies

---

[34][1993] 3 SLR 216.

[35]In a recent English case of *Rottenberg* v *Monjack* [1993] BCLC 374, Roger Cooke J held that where a receiver appointed by a debenture holder had paid the debenture holder in full and all that remained before the termination of the receivership was payment of his own remuneration, but the company disputed the figure claimed by the receiver for his remuneration, the company could obtain an interlocutory injunction to restrain the receiver from selling any further property pending the determination of the question of the disputed remuneration which could reveal whether there was any need to realise any further sums.

legislation to make it a statutory duty on the receiver to take reasonable care in order to increase the efficiency of the receivership process.

IV. TIME OF SALE

A receiver has control of the decision to sell and the time of sale. This rule gives the receiver the discretion to choose at what time it is best to sell in the interest of the debenture holder and this makes the receivership process more efficient. In *Cuckmere Brick* v *Mutual Finance*,[36] Salmon LJ said that once the power of sale has accrued, the mortgagee is entitled to exercise it whenever he chooses. This means that the sale can proceed even though by waiting, a higher price could be obtained. In a decision by Hoffmann J in *Re Potters Oils (No 2)*[37] the same principle was applied where the judge said that the debenture holder was under no duty to refrain from exercising his rights merely because in doing so he may cause loss to the company or its unsecured creditors. He owes a duty of care to the company but this duty is qualified, being subordinated to the protection of his own interest. This common law duty of care was further explained in *Re Charnley Davies Ltd (No 2)*,[38] by stating that,

> it is not an absolute duty to obtain the best price that circumstances permit, but only to take reasonable care to do so; and ... that means the best price that circumstances, as he reasonably perceives them to be, permit.

A receiver and manager who cannot dispose of the assets may in the circumstances be entitled to shut down the entire business.[39] A receiver was held liable for recklessly carrying on the company's business and incurring large losses in not selling off the assets in time.[40]

---

[36] *Supra* n 24.
[37] [1986] 1 WLR 201 at 206.
[38] [1990] BCLC 760 at 775.
[39] Forde M, *The Law of Company Insolvency*, (The Round Hall Press, 1993) 62.
[40] *RA Price Securities* v *Henderson* [1989] 2 NZLR 257.

V. SALE OF PROPERTY TO THE RECEIVER

It appears that a mortgagee cannot sell charged assets to himself either alone or with others, or to a trustee for himself, nor to any one employed by him to conduct the sale,[41] save where the sale is made by the court and he has obtained leave to bid.[42] The reason for this principle is that a sale by a person to himself is no sale at all and the power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even though such price be the full value. Thus a receiver, whether acting as an agent of the debenture holder or as an agent of the company, cannot sell to himself.[43] In exercising the power of sale as deemed agent of the company he also owes fiduciary duties to the debenture holder and a sale to himself would breach those duties.

A sale of the charged property by a mortgagee to a company in which he has an interest is valid. In *Farrar* v *Farrars Ltd*[44] a solicitor who was one of three mortgagees and acted for the mortgagees negotiated a sale of the charged property and agreed a price at the time when he had no connection with the purchasers. He subsequently took shares in a company formed by the purchasers to carry the sale into effect. It was contended that the sale was by a mortgagee to himself and under the guise of a sale to a limited company. Lindley LJ rejected the submission by stating that a sale by a person to a corporation of which he was a member was not a sale by a person to himself. However, the sale, in the opinion of Lindley LJ, might be invalid, if there was fraud, at an undervalue or it might be made under circumstances which throw upon the purchasing company the burden of proving the

---

[41]*Farrar* v *Farrars Ltd* (1888) 40 Ch D 395 at 409; *Hodson* v *Deans* [1903] 2 Ch D 647.

[42]*National Bank of Australia* v *United Hand in Hand and Band of Hope Co* (1879) 4 App Cas 391 PC; *Farrar* v *Farrars Ltd* (1888) 40 Ch D 395.

[43]See *Martinson* v *Clowes* (1882) 21 Ch D 857, on appeal (1885) 52 LT 706, CA; *Hodson* v *Deans* [1903] 2 Ch 647.

[44](1888) 40 Ch D 395.

validity of the transaction, and the company may be unable to prove it. The Court of Appeal held that the sale was valid because it was made honestly and at fair value. The question for the court here was whether the court wanted to lift the veil of the company or not between the shareholder and the controller.[45]

The above decision was supported by Lord Templeman in a Privy Council case from Hong Kong, *Tse Kwong Lam* v *Wong Chit Sen*,[46] where he said that there was both on authority and on principle no hard and fast rule that a mortgagee might not sell to a company in which he was interested. However, the mortgagee has to show that he has made the sale in good faith and has taken reasonable precautions to obtain the best price reasonably obtainable at the time. The Privy Council held that the mortgagee failed to take all reasonable steps to obtain the best price reasonably obtainable and failed to convince the court that his company bought at the best price. The Privy Council gave the following reasons for its decision. Only one bid was made at the auction and the company purchased the property at a price fixed by the mortgagee. The auctioneers could have been instructed to seek out potential purchasers and bidders and to arouse interest in the bidders. The mortgagee did not appear to have taken any step to secure any interest in the auction and failed to consult estate agents about the method of sale and for securing the best price. The company knew all about the property through the mortgagee and knew the amount of reserve in advance. The mortgagee ought to show that he protected the interest of the borrower by taking expert advice as to the method of sale, as to the steps which have been taken to make the sale a success and as to the amount of the reserve.

Thus, whether the sale of a mortgaged asset to a company where the mortgagee has an interest is valid or not, depends entirely on the degree of his interest in the company.

---

[45]See *Salomon* v *Salomon & Co Ltd* [1897] AC 22.
[46]*Supra* n 28 at 1355.

If his interest is substantial, then the transaction may not be valid because there is a conflict of interest, that is, the interest of a purchaser buying the charged property cheap and the interest of a mortgagee to get the highest price for the property in order to pay off his loan.

VI. DUTY TO NOTIFY

In Malaysia there is no statutory provision which requires a receiver to notify the Registrar of Companies of his appointment as a receiver of the property of a company. This obligation to inform the Registrar is instead imposed on the person who appoints the receiver. The Malaysian Companies Act 1965, section 186(1)[47] provides that where a receiver has been appointed under the powers contained in any instrument the person so appointing or procuring the appointment shall notify the Registrar within 7 days or render himself liable to a fine or default fine. The Registrar on receiving such notification is obliged to enter in the register of charges. The reason for imposing this duty on the person who appoints the receiver is to inform the public of the appointment of the receiver and also as part of the public registration system for company charges. It has been commented[48] that such provision lacks an effective sanction to ensure compliance. As a deterrent against non-registration, it would have been more effective if the law were to provide that until registration, the appointment would have no effect as against the rights of third parties. However, in New Zealand, section 8 of the Receiverships Act 1993 provides that the duty to give notice to the Registrar of Companies of the appointment is to be imposed on the receiver himself. By imposing the duty on the receiver, it becomes a matter which can be supervised through a compliance procedure. It is also the duty of the receiver to give public notice of his appointment.[49]

---

[47]Companies Act 1985 s 405 (UK), s 427 of Corporations Law (Australia).
[48]Milman D and Rushworth J, *Receivers and Receivership*, (Jordan & Sons Limited, 1987), 11.
[49]S 8(1)(b) of the Receiverships Act 1993.

Similarly, in Australia, section 427(1B) of the Corporations Law imposes a duty on the receiver within seven days after entering into possession or taking control, to lodge a notice that he has done so and within 21 days after entering into possession or taking control, cause to be published in the Gazette.

In England, section 46(1) of the Insolvency Act 1986 requires that the receiver must himself on appointment forthwith send to the company and publish in the prescribed manner notice of his appointment.

As a further step of notifying the public of the receiver's appointment, section 187(1) of the Malaysian Companies Act 1965[50] provides that invoices, orders and business letters issued by or on behalf of the company, its liquidators or receiver or manager, being documents on which the name of the company appears, must disclose the fact that a receiver or manager has been appointed. Failure to comply with this obligation will render the company and any officer, liquidator, receiver or manager responsible for the default, liable to a fine.[51] Unlike in New Zealand,[52] the section is silent as to the effect of a failure to comply with the subsection to the validity of the documents. In New Zealand, the failure to comply with the section does not affect the validity of any such documents.[53]

A receiver is also to inform the company "forthwith" of his appointment. Under section 188(1) of the Malaysian Companies Act 1965,[54] a receiver or manager must forth-

[50]Insolvency Act 1986 s 39 (UK), s 428(1) of Corporations Law (Australia), s 10 of the New Zealand Receiverships Act 1993 and s 317 of the Irish Companies Act 1963.

[51]See s 187(2) of the Malaysian Companies Act 1965.

[52]S 10(3) of the Receiverships Act 1993. There is no similar provision in the United Kingdom, Australia or Ireland.

[53]S 10(3) of the New Zealand Receiverships Act 1993 provides that the failure to comply with the section does not affect the validity of the deed or agreement or document.

[54]See Insolvency Act 1986 s 46(1)(a) (UK), s 429(2)(a) of Corporations Law (Australia), s 319(1)(a) of Companies Act 1963 (Ireland) and s 8(1)(a) of the Receiverships Act 1993 (New Zealand).

with give notice of his appointment to the company. Unlike in England,[55] the Malaysian Companies Act 1965 has no provision where the receiver is under the duty to inform all known creditors within certain period of time and notice of his appointment be published in the prescribed manner. The Act also does not provide that the person who appoints the receiver must advertise in the Gazette or in any newspaper to inform the public as to the appointment of the receiver. In New Zealand, sections 8 and 3 of the Receiverships Act 1993 require the person who appoints the receiver to advertise the appointment in the Gazette and in at least one issue of the local newspaper circulating in the district where the principal place of business of the company is situated.

It is submitted that the Malaysian Companies Act 1965 should adopt this type of provision because the public and creditors of the company should know that the company is in receivership so that they may be able to safeguard their interests.

VII. DUTY TO CARRY ON BUSINESS

The issue that should be considered now is the receiver's duty to carry on the business of the company. In Malaysia, the receiver does not have the benefit of a statutory provision giving him the power to carry on a business. He can only carry on the business if the debenture allows him to do so. However in England,[56] and Australia[57] this power is given by the statutes. New Zealand and Ireland are in a similar position with Malaysia because there are no statutory provisions allowing the receiver to do so.

A receiver's primary duty is to realise the security in the best interest of the chargee. The question arises whether a receiver has a duty to carry on the company's business and preserve its goodwill. The authorities are not satisfac-

[55]English Insolvency Act 1986, s 46(1) (b)
[56]Schedule 1, number 14 of the Insolvency Act 1986.
[57]S 420(2)(h) of the Corporations Law.

tory because they failed to consider the differing position of the two types of receiver, namely court-appointed receivers and out-of-court-appointed receivers. The English Divisional Court in *R* v *Board of Trade ex parte St Martins Preserving Co*[58] equated the court-appointed with the out-of-court-appointed receiver for the purpose of determining whether their management could be the subject of an investigation of the affairs of the company under sections 164[59] and 165 of the English Companies Act 1948 (now sections 431 and 432 of the English Companies Act 1985). Phillimore J suggested that there was in each case a duty to preserve goodwill, without noting the distinct roles of the receivers. In *Airlines Airspares* v *Handley Page*[60] the question was whether a receiver appointed by debenture holders could hive down the undertaking to a newly formed subsidiary in anticipation of the sale of such subsidiary. This action might result in the company being unable to fulfil an outstanding contract with the plaintiff. Graham J upheld the right of the receiver to proceed with his hive-down stating that a receiver can repudiate a contract if the repudiation will not adversely affect the realisation of the assets or seriously affect the trading prospects of the company in question, if it is able to trade in the future.

On the other hand, the Court of Appeal in *Re B Johnson & Co (Builders) Ltd*[61] laid down the rule that there was no duty on the part of a receiver appointed by debenture holders to carry on business. It has been suggested[62] that this duty to trade will only arise if (1) the company has the necessary funds (2) this course is necessary to secure a beneficial realisation of the company's undertaking as a going concern (3) a sale as a going concern in the short term is likely and (4) a cesser of business would lead only to a disadvantageous sale at a reduced break-up value.

---

[58][1964] 3 WLR 262.
[59]Malaysian Companies Act 1965, s 197.
[60][1970] 1 Ch D 193.
[61]*Supra* n 2.
[62]Lightman and Moss, *supra* n 3 at 96.

In performing the duties to carry on the business of the company, it seems a receiver owes his primary responsibilities to the debenture holder who appoints him and not the company who is his principal. It has been said that a receiver is appointed 'not to receive directions from the directors but to give directions'.[63] Thus the case of *Macleod* v *Alexander Sutherland Ltd*[64] illustrates the inability of the company to control the receiver where the Court refused to compel a company in receivership to carry out its existing contracts because that would expose the company to contempt proceedings should the receiver over whom the company had no control, fail to follow its requests.

A receiver must have close regard to the purpose for which the receiver has been appointed. He must not exercise his powers of management for any purpose other than for which he was appointed. In a New Zealand Supreme Court case of *McKendrick Glass Manufacturing Co Ltd* v *Wilkinson*,[65] on the information available, it was sufficient for the receiver to conclude that the company was unable to proceed on with the business. The losses incurred in carrying on the business were large. However, the receiver acting on instructions of the bank, wrongly and in breach of his duty, continued for more than five months to carry on the said business and unnecessarily incurred losses.

Richmond J agreed with the submission that the power to carry on the business of the company given to the receiver by the bank's debenture was for the purpose of protecting the security and enabling realisation of the security. Therefore if the receiver carried on the business not for the purposes for which the power was given but because he was instructed to do so by the bank at the request of the Crown, for the purpose of extending production in New Zealand, then such exercise of the power was known as 'a fraud on the power'. If a receiver used one of his

---

[63]See *Meigh* v *Wickenden* [1942] 2 KB 160 at 166 per Viscount Caldecote CJ.
[64][1977] SLT 44.
[65][1965] NZLR 717.

powers under a debenture for a purpose foreign to the power then a receiver could not between himself and the company be entitled to an indemnity out of the assets of the company in respect of losses incurred.

Therefore, a receiver is not obliged to carry on the business of the company at the expense of the debenture holders to whom the receiver owes a primary duty. Evershed MR in *Re B Johnson & Co (Builders) Ltd*[66] said that a person who is appointed as a receiver of a company does not have a duty to carry on the business of the company in the best interest of the company. But a receiver is appointed in order to realise, for the debenture holder or mortgagee, the security which they have. The decision by the receivers and managers in an Australian case of *Expo International Pty Ltd* v *Chant*[67] to grant substantial discounts to agents who were threatening to return unsold stock was held by Needham J not to be in the interest of the debenture holders of the company.

VIII. DUTY TO PROVIDE FINANCIAL INFORMATION

The Malaysian Companies Act 1965 imposes a duty on the receiver to provide financial information during the conduct of the receivership. A receiver must require certain persons to prepare and submit to him a statement of affairs.[68] The persons who may be required by the receiver to prepare the statement include the directors of the company, the secretary of the company, the officers and former officers of the company, those who have taken part in its formation at any time within one year before the date of the receiver's appointment, and the employees and certain former employees. The cost of preparing the statements can be met out of the receipts of the receiver.[69] Within 14 days[70]

---

[66]*Supra* n 2 at 646.

[67][1979] NSWLR 820.

[68]Companies Act 1965 s 188(1)(b), which is similar to the English Insolvency Act 1986 s 47.

[69]S 189(3) of the Companies Act 1965.

[70]In England it is 21 days : s 47(4) Insolvency Act 1986.

after the receipt of the notice from the receiver[71] the statement must be submitted to the receiver. The receiver or the Court on the application of a deponent may extend this period.[72]

The statement of affairs required by section 188 of the Malaysian Companies Act 1965 must disclose as at the date of the receiver's appointment the particulars of the company's assets, debts and liabilities, the names and addresses of its creditors, the securities held by them respectively, the date when the securities were respectively given and such or other information as may be prescribed. Failure to comply with section 189 of the Malaysian Companies Act 1965[73] without reasonable excuse can lead to fines and default fines.

From the statement of affairs, the receiver will obtain useful information when he is complying with his obligation under section 188(1)(c) Malaysian Companies Act 1965. However, the receiver is not obliged to make a report like the English administrative receiver.[74] Within one month after the receipt of the statement, he must lodge with the Registrar of the Companies a copy of the statement and the receiver may give his comments on the statement if he sees it appropriate. The receiver must also send to the company and the debenture holder a copy of his comments on the statement of affairs or a notice to the company that he has no comment to make.[75]

In England, a wider obligation to send a receiver's report is imposed on the English administrative receiver than the receiver in Malaysia. The administrative receiver is required[76] within three months after his appointment (or such longer period as the court may allow) to send the report to the registrar of companies, to any trustees for secured credi-

---

[71]S 188(1)(b) Companies Act 1965.
[72]S 188(1)(b) Companies Act 1965.
[73]S 47 of the Insolvency Act 1986.
[74]Insolvency Act 1986 s 48.
[75]S 188(1)(c)(ii) Companies Act 1965.
[76]S 48 of the Insolvency Act 1986.
[77]S 48(5) of Insolvency Act 1986.

tors of the company and (so far as he is aware of their addresses) to all known secured creditors. The administrative receiver's report should deal with, (i) the events leading up to his appointment (so far as he is aware of them), (ii) details of actual and proposed disposals by him and the carrying on by him of any business of the company, (iii) the amounts payable to the appointing debenture holders and any likely surplus available for other creditors. The report should also contain a summary of the statement of affairs sent to the receiver pursuant to section 47, together with his comments upon it.[77] The report need not contain any information whose disclosure would prejudice the performance of his functions by the administrative receivers.[78]

The administrative receiver must also send copies of the report to known unsecured creditors of the company or alternatively the administrative receiver should publish an address at which these creditors may obtain copies free of charge.[79] Where the company has gone or goes into liquidation, the administrative receiver must submit a copy of the report to the liquidator within 7 days of its submission to the Registrar or if later within 7 days of the nomination or appointment of the liquidator.

Section 48 of the English Insolvency Act 1986 gives better and more information to the debenture holder, the secured creditors and also the unsecured creditors than under the Malaysian Companies Act 1965 section 188(1). The Malaysian unsecured creditors do not have the right to information as to what are the receiver's plans and the total liability of the company. To make the Malaysian receivers more responsible in the exercise of their powers, it is submitted that these provisions in the English Insolvency Act 1986 should be adopted in the Malaysian Companies Act 1965.

[78]See Insolvency Rules 1986 r 3.5.
[79]S 48(2) of Insolvency Act 1986.

Similarly, in New Zealand, the Receiverships Act 1993 requires the receiver to report on the receivership at stages during the course of the receivership. Section 23(1) of the Act requires the receiver not later than two months after an appointment to prepare a report on the property in receivership and thereafter report at six-monthly intervals.[80] A final report must be made not later than two months after the date on which the receivership ends.[81] A copy of each report must be sent to the company, to every person whose interest the receiver was appointed and to the Registrar.[82]

In Australia, a receiver is also required to prepare a report about the company's affairs.[83] The purpose of the receiver's report is to make available to shareholders and creditors of the company the latest information about the financial position of the company. In Ireland, a similar duty on the receiver is imposed by section 319 of the Companies Act 1963.

Section 190 of the Malaysian Companies Act 1965[84] requires a receiver to send detailed accounts of the receivership to the Registrar of Companies. This section provides that the receiver must within one month after the expiration of the six months from the date of his appointment and of every subsequent period of six months and within one month after he ceases to act as a receiver or manager, deliver to the Registrar a detailed account showing his receipts and his payments during each period of six months, or where the receiver ceases to act as a receiver or manager, during the period from the end of the period in question, with the final abstract disclosing his aggregate receipts and payments. In the event of non-compliance by the receiver of his duties under this section, he will be liable to a fine and default fine of $1000.00.[85]

---

[80]S 24(1) of the Receiverships Act 1993.
[81]S 24(1).
[82]S 26(2).
[83]S 421A of the Corporations Law.
[84]S 38 of the English Insolvency Act 1986.
[85]S 190(5) Companies Act 1965.

A receiver is under the usual agent's fiduciary duty to account to the company. All agents who receive goods or money for their principals are bound to keep that property separate from their own and in equity they are treated as if they were the trustees of that property. A receiver as an agent of the company is obliged to keep proper accounts and to render account to the company on request. If he fails to do so or if he keeps the accounts improperly, everything will be presumed against him.[86] He must pay over to the company all monies remaining after he has discharged his personal obligations, taken his remuneration and paid off the security under which he was appointed. The accounting must be made either to the directors or the liquidator depending on whether the company has been wound up.

In a receiver's duty to provide an account to the company, it is not sufficient for the receiver merely to tender to the company the statements required by the Malaysian Companies Act 1965. In *Smiths Ltd* v *Middleton*,[87] the court held that a receiver was answerable to the company for the conduct of its affairs. The receiver was under a duty to keep full accounts and to produce those accounts to the company when required to do so.

IX. DUTY TO PAY PREFERENTIAL CREDITORS

A receiver of a floating charge is required to pay certain preferential debts and these have to be paid first before payments are made to the floating chargee.[88] The question is whether there is a duty on the receiver to pay the preferential creditors under the section? It appears that a receiver is under a duty to pay preferential creditors under this section. The decisions in *Westminster Corporation* v *Haste*[89] and *Inland Revenue Commissioners* v *Goldblatt*[90]

[86]*Gray* v *Haig* (1855) 20 Beav 219.
[87][1979] 3 All ER 842.
[88]S 191 of the Malaysian Companies Act 1965; s 40 of the English Insolvency Act 1986.
[89][1950] 1 Ch D 442.
[90][1972] Ch D 498.

clarify this duty of the receiver to pay preferential creditors in that, if the receiver has any assets out of which this payment for the preferential creditors could have been made, a receiver is under a liability in tort if there is a breach of this duty.

In *Westminster Corporation* v *Haste*,[91] the court held that the receiver was required to pay the preferential creditors out of any assets which went to him as receiver.[92] Therefore, if the receiver had any assets out of which this payment could have been made, the receiver was under a liability in tort to the plaintiffs. There was, therefore a breach of duty by the receiver because the receiver regarded the monies which he acquired as monies which were earned through his effort as a receiver. In the opinion of Danckwerts J, there was an obligation on the receiver to pay out of the assets, on the date when the receiver took over, the preferential creditors. The receiver became liable in damages if he failed to do so.

In *Inland Revenue Commissioners* v *Goldblatt*,[93] the receiver was removed from office by his appointor who instructed him to pass the assets back to the company which then assigned them to the debenture holder. An argument was put forward on behalf of the receiver that he was not liable because the duty to pay the preferential creditors was only 'in priority' to payments to his debenture holder and where his debenture holder was not paid the receiver had no duty to pay the preferential creditors. This argument was rejected in favour of a duty for the receiver to pay. The debenture holder was also found liable.

---

[91] *Supra* n 89 at 447.

[92] In *Re GL Saunders Limited* [1986] 1 WLR 215 Nourse J expressly approved a passage in Picarda, *The Law Relating to Receivers and Managers* (1984) p 191 in which the author stated that s 94 of the English Companies Act 1948 (now Insolvency Act 1986 s 40) imposed a positive duty upon the receiver.

[93] *Supra* n 90. The *dictum* of Danckwerts J in *Westminster Corporation* was approved.

In *Woods* v *Winskill*,[94] the court held that if the receiver dissipates assets which could have been used to pay the preferential creditors, he will be liable personally to them for a breach of his statutory duty.

X. DUTY TO CEASE TO ACT

A receiver has a duty to cease acting as receiver for the company in certain circumstances. Kerr said that:

> if at any stage of his management of the company, the receiver has in his hands sufficient money to discharge all the debts of the company which he is bound to discharge, all possible claims which could be made against him in respect of which he is entitled to an indemnity, his own remuneration and all moneys secured by the instrument pursuant to which he was appointed, it will be his duty to cease to act forthwith.[95]

This duty to cease acting does not come into play so long as there remains a contingent liability secured by the debenture.[96] However it has been said that the performance of this duty may cause great difficulty in practice. This is particularly so where the company is not in liquidation and yet is insolvent.[97] A receiver who continues in possession of the company's assets thereafter would be regarded by the courts as wrongful because his appointment is for the purpose of enabling the encumbrancers entitled to the benefit of the instrument under which he was appointed to recover their debt. A receiver would then be considered as a trespasser with respect to the company.[98]

A receiver, upon ceasing to act, is required to render accounts and to give the Registrar of Companies notice thereof.[99] The Registrar enters this notice in the register.

---

[94][1913] 2 Ch D 303.
[95]Walton, *Kerr on the Law and Practice as to Receivers and Administrators*, 17th ed (Sweet & Maxwell, 1989) 437.
[96]Re *Foster & Rudd* (CA) Times 22 January 1986.
[97]Lightman and Moss, *supra* n 3 at 224.
[98]Walton *supra* n 95 at 437.
[99]S 190(1)(iii) Malaysian Companies Act 1965, English Companies Act 1985 s 405(2).

A receiver who makes default in complying with the section will have to pay a default fine of $1000.00.

XI. DUTY TO REPORT UNFIT DIRECTORS

A receiver in Malaysia has no statutory duty to report unfit directors to the Minister of Domestic Trade and Consumer Affairs in order to enable the authorities to take the necessary actions to disqualify him from becoming the director of the company. In England an administrative receiver has a duty under the English Company Directors Disqualification Act 1986[1] (hereinafter the "CDDA 1986") to report in detail to the Secretary of State for Trade and Industry where he is satisfied that certain directors or shadow directors of the company are unfit to be concerned in the management of the company.[2] Should Malaysia adopt this law reform in her Companies Act 1965? Malaysia should not introduce this reform because it does not facilitate the efficiency of the receivership process.

Section 7(3) of the Company Directors Disqualification Act 1986 provides that if it appears to the administrative receiver that the conditions mentioned in section 6 of CDDA 1986 are satisfied, the administrative receiver should submit an adverse report to the Secretary of State.[3] Following a report from the administrative receiver, the Secretary of State may apply for a disqualification order if it appears to him expedient in the public interest that an order should be made against any person.[4] An application by the Secretary of State shall not be made more than two years after the day on which the company became insolvent[5] without the leave of the court. If the Secretary of State does decide to apply to the court, then section 6 provides that the court shall make a disqualification order if it is satisfied

[1]Formerly s 12(5) of the Insolvency Act 1985.
[2]Company Directors Disqualification Act 1986 ss 6,7, & 22(5).
[3]CDDA s 7(3).
[4]CDDA 1986 s 7(1).
[5]CDDA 1986 s 7(2).

that the person is unfit to be concerned in the management of a company. The disadvantage of this procedure is that it is time consuming for the administrative receiver. He is obliged by law to take the role of policing the conduct of the company directors and he is not paid any consideration for the extra work done for the government. The duty of the administrative receiver is to report 'forthwith' when it appears to him that the relevant conditions are satisfied.

The imposition of the new duty on the receiver to report unfit directors would broaden his role. Receivership thus becomes a less private matter with public interest now intruding. This reform is good especially in the case of company directors of public companies because they must be responsible to the public for their wrongful deeds and mismanagement and must be removed from the directorship or cautioned as soon as possible in the form of disqualification from being company directors.

However, Malaysia should not introduce this reform because it does not facilitate the receivership process as the energy of the receiver is diverted from concentrating on the loan recovery for his principal, the debenture holder. It is for the state to enforce the company law; it should not expect the insolvency practitioner to do it on its behalf.

XII. DUTY TO REPORT TO CREDITORS

In Malaysia,[6] a receiver is required to lodge with the Registrar of Companies a detailed account showing: (i) his receipts and his payments during each period of six months from the date of his appointment (ii) the aggregate amount of those receipts and payments and (iii) where he has been appointed pursuant to the powers contained in any instrument, the amount owing under that instrument at the time of his appointment. However, the receiver is not required by the Malaysian Companies Act 1965 to make a report to the creditors about the likely outcome of the

[6]Companies Act 1965 s 190.

receivership and how long it will take. Thus the creditors of the company have no information to evaluate whether their debts from the company have any chance of recovery.

In England, on the other hand, the Cork Report[7] recommended that the receiver should be required to present a brief report and a copy of this report be filed with the Registrar of Companies and copies should be sent or distributed to all known creditors. The Cork Report also specified that the report must give certain information in it.[8] This proposal was accepted and is now enacted in section 48 of the English Insolvency Act 1986.

Section 48 of the Insolvency Act 1986 contains provisions requiring an administrative receiver to produce a written report for the creditors. The report has to be produced within three months of his appointment, or longer if the court allows.[9] It has to be sent to the Registrar of Companies, the trustees for secured creditors, and the secured creditors.[10] The report has to cover the events leading up to the receiver's appointment to the extent that he knows about them, his carrying on of the business of the company or disposals or proposed disposals of assets or property, the sums standing to his appointor, the amounts payable to preferential creditors and an estimate of any surplus funds likely to be available for unsecured creditors.[11]

The report is also available to the unsecured creditors. The receiver, within three months of his appointment,(or

---

[7]Cmnd 8558 para 480.

[8]The following information should be included : (a) a summary of events leading up to his appointment (b) an outline of his policy, information about realisation to date and his intentions about future trading and disposals (c) a statement of the amount due to the holder of floating charge in respect of principal and interest, and to the preferential creditors (d) an estimate of the amount likely to be available for creditors other than the preferential creditors and the holder of the floating charge; and (e) a summary of the preliminary Statement of Affairs submitted by the directors and his comments on it.

[9]Insolvency Act 1986 s 48(1).

[10]Insolvency Act 1986 s 48(1).

[11]Insolvency Act 1986 s 48(1) (a)-(d).

a longer period if allowed by the court) can either send a copy to all unsecured creditors to the extent he is aware of their addresses or he can publish an address to which unsecured creditors can write for a free copy of the report.[12]

The administrative receiver[13] has to call a meeting of the unsecured creditors (on 14-days notice) to consider his report. A copy of this report may be sent to all the creditors or by giving them the opportunity to write in for one. A court, on the application by the receiver, may give an order that the receiver need not hold a meeting of the unsecured creditors. However, there are three points to take note of.

The receiver's report should include a summary of the statement of affairs submitted to him and any comments he may have on it. A copy of the statement of affairs and any affidavits of concurrence must be attached to the copy of the report sent to the Registrar of Companies.[14] The administrative receiver is liable to a fine if he fails. without reasonable excuse, to comply with his obligations in respect of the report.[15]

There are no similar elaborate provisions like the English Insolvency Act 1986 as discussed above in the Australian, Irish and New Zealand companies legislation on this matter.

Malaysia should adopt this reform of the duty of the receiver to provide information. In Malaysia, the creditors to a company in receivership are kept in the dark as to the purpose and functions of the appointment of a receiver to the company. By imposing a duty on the receiver to produce a written report[16] this will make the creditors aware of the

---

[12]Insolvency Act 1986 s 48(2).

[13]S 48(2) of the Insolvency Act 1986.

[14]Insolvency Act 1986 s 48(5) and Insolvency Rules 1986 r 3.8(3).

[15]S 48(8).

[16]The report should cover the events leading up to the receiver's appointment, his carrying on of the business of the company or disposals or proposed disposals of assets or property, the sums outstanding to his appointor, the amounts payable to preferential creditors, and an estimate of any surplus funds likely to be available for unsecured creditors to the creditors.

extent that their debts may be recovered from the company. The creditors may then plan alternative methods to recover their debts from the company. This will also encourage the other creditors to suggest ways to maximise the recovery. Therefore, it will facilitate the efficiency of the receivership process.

XIII. ENFORCEMENT OF DUTIES

The proper plaintiff to bring an action against the receiver for a breach of duty is the company, and it may properly bring such an action during the receivership. In *Watts* v *Midland Bank*,[17] the court held that although a company in receivership could not interfere with the receiver in the proper exercise of his powers, a company could maintain an action against a receiver for the improper discharge of his duties. Peter Gibson J was not convinced that a company in receivership could not sue its receiver in respect of the improper discharge by the receiver of his duties. The judge said that there must be some redress obtainable by a company in receivership against a receiver who acted improperly and in breach of his duties to the company to the detriment of the company. In the opinion of the judge, the liquidator of a company in receivership could sue the receiver. Peter Gibson J questioned the necessity why a company in receivership had to go into liquidation before the receiver could be sued by the company. The judge concluded by saying that:

> Why should not a mortgagor company in receivership sue the receiver appointed by the mortgagee to realise the security so as to repay the mortgage if the receiver acts improperly and to the detriment of the company? ... I can see no reason in principle why the court should not allow the company to sue the receiver in respect of an improper exercise of his powers.[18]

---

[17][1986] BCLC 15.
[18]*Ibid* p 22.

XIV. CONCLUSION

Malaysia should consider imposing a statutory duty on the receiver when he sells the property of the company to exercise all reasonable care to obtain the best price reasonably obtainable for the property at the time of sale. Malaysia should adopt similar provision to the Australian section 420A(1) of the Corporations Law because it is clearer and perhaps wider than the New Zealand section 19 of the Receiverships Act 1993. The decision in *Downsview Nominee* should not be followed in Malaysia because it does not facilitate the efficiency of the receivership process.

A receiver in Malaysia should have the statutory power and duty to carry on business if in his opinion that by carrying on the business he will be able to sell the company as an entity more profitably.

However, Malaysia should not adopt the reform that has been made in England which imposes on the receiver to report unfit directors to the Minister of Domestic Trade and Consumer Affairs because this will increase the burden of the receiver. It also does not facilitate towards the efficiency of the receivership process in Malaysia.

Samsar Kamar bin Hj Ab Latif*

* Assistant Professor
Kulliyah of Laws
International Islamic University Malaysia