THE DUTIES AND LIABILITIES OF A RECEIVER AND MANAGER APPOINTED OUT OF COURT

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[This article follows on from a recent study by Dr O'Donovan published in (1978) 6 Australian Business Law Review *203 of the circumstances surrounding the appointment of a receiver and manager out of court. Here he begins by outlining the duties of a receiver and manager as developed by the courts with respect to the power of sale and the power to carry on the business. Having examined general law contractual and tortious liabilities, the author proceeds to a detailed study of the duties and liabilities imposed by statute concerning carrying on the business, distribution of assets in receivership and the duty to account. He discusses the remedies available for breach of duty and finally the Uniform Companies Acts' provision for relief and indemnity for receivers and managers. This study points out the complex and intricate nature of the task of the receiver and manager and the need for the legal adviser to provide particularly careful guidance in this area.]*

I INTRODUCTION†

The law governing the duties and liabilities of a receiver and manager appointed out of court ignores the biblical dictum that a man cannot serve two masters.[1] The standard form of debenture invariably states that the appointee is to be an agent of the debtor company. Yet within this special and limited agency[2] he is primarily responsible to his appointers, the debenture holders. Sometimes this schizophrenic status presents no problem: what is good for the debenture holders may be good for the company. Often, however, the interests of the secured creditors, the general creditors and the shareholders do not coincide. For example, the debenture holders might be better served by an immediate sale of a substantial part of the company's plant and equipment; on the other hand, the unsecured creditors and shareholders might prefer the company to retain this property with a view to a later sale of the business as a going concern. This article considers how a receiver and manager can rationalize the competing claims that are made upon him. It also explores the scope of his duties and liabilities both under the general law and under statutory provisions.

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† In this article reference to 'he', 'his' *etc.* should be read as including 'she', 'hers' *etc.*

[1] For an excellent analysis of this topic see McPherson B. H., Q.C., 'Receivers: Their Duties and Liabilities', a paper presented at the Symposium on Commercial Law held at the University of Queensland on 17 September 1977.

[2] *R. v. Board of Trade, Ex parte St. Martins Preserving Co. Ltd* [1965] 1 Q.B. 603, 617, *per* Winn J. (D.C.).

II DUTIES AT GENERAL LAW

Given that a privately appointed receiver and manager owes his primary duty to the debenture holders, what is the extent of this obligation? His first concern must be to gather in, manage and realize the assets charged with a view to liquidating the secured creditors' debt.[3] Unlike a receiver and manager appointed by the court, he is not an officer of the court and cannot be called to account as such.[4] On the other hand, he must not sacrifice the interests of the company, its shareholders or the general creditors.[5] It is possible to gain some insight into the nature of his ill-defined secondary duties by considering his obligations in two situations: when he exercises a power of sale and when he carries on the company's business.

A Duties with respect to his power of sale

In this context the courts have tended to apply the analogy of a mortgagee exercising a power of sale.[6] Thus, a receiver and manager exercising a power of sale is expected to act in good faith; he must not act fraudulently, dishonestly or recklessly; and he must not disregard the interests of the company.[7] Although he is entitled to give first consideration to the interests of the secured creditors, he must take reasonable steps to determine the value of the property to be sold.[8] It seems that he should also advertise the property drawing attention to its actual and potential value in such a way as to bring it to the notice of prospective buyers.[9] Indeed, he is permitted to take whatever steps he considers necessary to realize the assets charged. He will be liable only if he abuses his powers. Thus, in *Re Neon Signs (Australasia) Ltd*[10] Adam J. allowed a receiver of certain companies to disclose to a competitor details of business contracts made with the companies' clients for the hiring of illuminated signs and lighting appliances. The receiver proposed to divulge

[3] *In re B. Johnson & Co. (Builders) Ltd* [1955] Ch. 634 (C.A.); *Gosling v. Gaskell* [1897] A.C. 575 (H.L. (E.)).

[4] In *Visbord v. Federal Commissioner of Taxation* (1943) 68 C.L.R. 354, 384, Williams J. suggested that a privately appointed receiver is a fiduciary. With respect, it seems preferable to discard this much abused label and to concentrate upon the duties which attend the office. While it is true that a private appointee is subject to fiduciary obligations in some contexts it is misleading to classify him as a fiduciary lest it be thought that all the usual fiduciary obligations apply to him.

[5] *Lawson (Inspector of Taxes) v. Hosemaster Co. Ltd* [1966] 1 W.L.R. 1300, 1314 (C.A.).

[6] For example, in *In re B. Johnson & Co. (Builders) Ltd* [1955] Ch. 634, 662, Jenkins L.J., referring to a receiver's power of sale, stated: 'his power of sale is, in effect, that of a mortgagee'. See also *Re Neon Signs (Australasia) Ltd* [1965] V.R. 125, 129.

[7] *Kennedy v. De Trafford* [1897] A.C. 180 (H.L. (E.)); *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 C.L.R. 676; *Barns v. Queensland National Bank Ltd* (1906) 3 C.L.R. 925. These were cases dealing with mortgagees.

[8] *Pendlebury's* case (1912) 13 C.L.R. 676, 683.

[9] *Ibid.* 683-5 and *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd* [1971] Ch. 949 (C.A.).

[10] [1965] V.R. 125.

this information when the rival company entered into negotiations for the purchase of the companies' undertakings. The applicants argued that this action should not be taken because the competitor would be able to poach the business represented by the hiring contracts if the proposed sale did not eventuate. Adam J. answered this objection in the following terms:

> No ground appears for concluding that the receiver in proposing to disclose to a potential purchaser of the companies' undertakings, perhaps the only potential purchaser, the information necessary for the purchaser to have before it could reasonably be expected to purchase is acting otherwise than bona fide in an effort to make a proper sale within his powers as receiver.[11]

A receiver is entitled to sell at the time of his choice and he need not delay the sale in order to secure the optimum price.[12] On the other hand, it appears that, in general, he may not embark upon a precipitate sale at a gross undervalue even if it means that the debenture holders will be paid promptly.[13]

Whether he must go further and exercise reasonable care in disposing of the property charged is a moot point. In *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd*[14] the Court of Appeal unanimously held that a mortgagee exercising a power of sale was under a duty not merely to act in good faith but also to exercise reasonable care to obtain a proper price or, to use Lord Justice Salmon's words, 'the true market value'[15] of the property. Further support for this proposition can be drawn from *McHugh v. Union Bank of Canada*.[16] In that case the mortgagee was negligent in the course of driving to market certain horses included in his security. As a result, their sale realized less than fair value. He was held liable for the difference between the sale price and the price which might have been obtained but for his negligence. It might be possible to argue that this case dealt not with a negligent exercise of the power of sale but rather with negligence in the custody of the mortgaged property. On the other hand, delivery is part of a sale. Moreover, it is clearly established that a mortgagee's duties in exercising a power of sale apply equally to steps which are preliminary to the sale such as advertising and the employment of reputable brokers or agents. In any event, the Judicial Committee of the Privy Council founded its decision on the broader ground, not upon negligence in the custody of the mortgaged property prior to the sale. Thus, Lord Moulton, in delivering the opinion of the Committee, declared:

> It is well-settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable

[11] *Ibid.* 127.

[12] *Pendlebury's* case (1912) 13 C.L.R. 676, 701; *Farrar v. Farrars Ltd* (1888) 40 Ch.D. 395, 398 (C.A.); *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd* [1971] Ch. 949 (C.A.); *Barns v. Queensland National Bank Ltd* (1906) 3 C.L.R. 925, 942.

[13] *Henry Roach (Petroleum) Pty Ltd v. Credit House (Vic.) Pty Ltd* [1976] V.R. 309, 313; *Pendlebury's* case (1912) 13 C.L.R. 676, 701.

[14] [1971] Ch. 949.

[15] *Ibid.* 966.

[16] [1913] A.C. 299 (P.C.).

> man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.[17]

In Australia there are lingering doubts about the scope of a mortgagee's general law duties in exercising his power of sale. Two years after *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd*[18] the High Court was invited in *Forsyth v. Blundell*[19] to reassess the legal obligations of a mortgagee invoking such a power. There the mortgagee purported to exercise his statutory power of sale by arranging an auction of the secured property with a reserve price of $120,000, the amount due under the mortgage. Prior to the date fixed for the auction X.L. Petroleum Pty Ltd approached the mortgagee and expressed its interest in discharging the mortgage debt or in bidding up to $150,000 at the auction. Notwithstanding this approach, the mortgagee later sold the land privately to the Shell Oil Company of Australia Ltd for $120,000. X.L. Petroleum Pty Ltd was not informed of Shell's offer, nor was Shell advised of its rival's interest in the property. The High Court held that the mortgagee could be restrained from completing the sale because he had not acted in good faith. He was guilty of gross carelessness or at least calculated indifference to the mortgagor's interests and it was not therefore strictly necessary to consider whether a mortgagee would be liable for mere negligence. Nevertheless, both Walsh and Mason JJ. admitted that there was a dichotomy of opinion upon the standard to be applied in these cases. Unfortunately, they refrained from expressing any views as to which approach should prevail. Walsh J. cited three cases in support of the proposition that a mortgagee is merely obliged to act in good faith: *Kennedy v. De Trafford*;[20] *Pendlebury v. Colonial Mutual Life Assurance Society Ltd*;[21] and *Barns v. Queensland National Bank Ltd.*[22] In *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd*[23] the Court of Appeal cast some doubt upon the first case, a decision of the House of Lords, by pointing out that their Lordships did not reserve their judgments[24] and that a then recent case, *Tomlin v. Luce*,[25] had not been mentioned therein. The other cases cited by Walsh J., *Pendlebury's* case[26] and *Barns v. Queensland National Bank Ltd*,[27] were decided by the High Court before the Privy Council decision in *McHugh v. Union Bank of Canada*[28] and must be viewed in the light of that case.

[17] *Ibid.* 311.
[18] [1971] Ch. 949 (C.A.).
[19] (1973) 129 C.L.R. 477. See also *Australian and New Zealand Banking Group Ltd v. Bangadilly Pastoral Co. Pty Ltd* (1978) 52 A.L.J.R. 529.
[20] [1897] A.C. 180 (H.L. (E.)).
[21] (1912) 13 C.L.R. 676.
[22] (1906) 3 C.L.R. 925.
[23] [1971] Ch. 949.
[24] This point does not, of course, detract from the persuasive force of the decision.
[25] (1890) 43 Ch.D. 191 (C.A.).
[26] (1912) 13 C.L.R. 676.
[27] (1906) 3 C.L.R. 925.
[28] [1913] A.C. 299.

There are statutory provisions in most States regulating a mortgagee's power of sale in relation to both realty and personalty.[29] Some of these provisions reinforce the argument that the mortgagee is subject to a duty of care when exercising this power. In Queensland, for example, s. 85 of the Property Law Act 1974-1978 obliges a mortgagee to take 'reasonable care to ensure that the property is sold at the market value'.[30] In a similar vein, in s. 77 of the Transfer of Land Act 1958 Victoria requires a mortgagee exercising his statutory power of sale to act 'in good faith' and to have regard to 'the interests of the mortgagor grantor or other persons'. At first glance the obligations imposed by the Queensland provisions appear to be much more stringent. However, in *Henry Roach (Petroleum) Pty Ltd v. Credit House (Vic.) Pty Ltd*[31] Lush J. held that the effect of s. 77 was 'to bring together the concepts of an obligation to act in good faith and an obligation akin to an obligation to exercise care' to protect the interests of the mortgagor. These sections do not detract from the general law governing the mortgagee's power of sale[32] and would probably be equally useful to a court in determining the scope of a receiver and manager's duties when exercising his power of sale. In the other States the relevant statutory provisions give no indication that the mortgagee is expected to exercise reasonable care or act in good faith when he invokes his statutory power of sale.

It remains to be seen whether this duty of care with its origin in equitable principles and the statutory provisions applies where the power of sale is exercised not by a mortgagee but by a receiver and manager. *Nelson Bros Ltd v. Nagle*[33] is a rare example of an extension of this stricter standard to receivers. There the defendant was appointed receiver and manager of the plaintiff company. He sold part of the company's stock to two wholesale merchants at prices which were slightly above the landed cost of the stock. Myers C.J. of the Supreme Court of New Zealand held that

> the duty which the defendant owed to the plaintiff was to exercise due care, skill and judgment in selling the goods and getting the best results reasonably possible in the circumstances. . . . If he unnecessarily and negligently sacrificed the goods, he would be liable in damages.[34]

The learned Chief Justice based this conclusion upon the ordinary principles of agency: since the appointee was expressed to be an agent of

[29] Property Law Act 1974-1978 (Qld), s. 85; Conveyancing Act 1919 (N.S.W.), ss. 109(1)(a), 111, 109(5) and Real Property Act 1900 (N.S.W.), s. 58; Property Law Act 1958 (Vic.), ss. 101(1)(a), 103 and Transfer of Land Act 1958 (Vic.), s. 77; Law of Property Act 1936-1975 (S.A.), ss. 47(1)(a), 48 and Real Property Act 1886-1978 (S.A.), s. 133; Property Law Act 1969-1973 (W.A.), ss. 57, 59 and Transfer of Land Act 1893-1972 (W.A.), s. 108; Conveyancing and Law of Property Act 1884 (Tas.), ss. 21(1)(a), 23 and Real Property Act 1862 (Tas.), s. 54.

[30] The statutory power of sale conferred by the Property Law Act 1974-1978 (Qld) does not apply to personal property. See s. 83(4).

[31] [1976] V.R. 309, 312.

[32] *Ibid.* 313.

[33] [1940] *Gazette Law Reports* 507.

[34] *Ibid.* 508.

the mortgagor, he was liable if he failed to exercise reasonable care and skill in discharging his duties in the circumstances of the case.

Nelson Bros Ltd v. Nagle[35] is inconsistent with the subsequent authorities of *In re B. Johnson & Co. (Builders) Ltd*[36] and *Re Neon Signs (Australasia) Ltd*[37] which suggest that it is necessary to prove fraud, *mala fides* or recklessness before a receiver and manager can be held liable. Nevertheless, the result produced by Myers C.J. in the New Zealand case is not dissimilar to that which would be achieved by an application of the mortgagee analogy based upon *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd.*[38] In this sense it lends support to the argument that a receiver exercising a power of sale must not act negligently. It matters little that Myers C.J. reached his conclusion by an application of the ordinary principles of agency rather than the mortgagee analogy.

There are however difficulties with the agency approach. It is true that a receiver or receiver and manager is normally an agent of the company, but his agency is a special and limited one with peculiar incidents. It could almost be described as a fiction devised to protect the debenture holders from liability for the appointee's acts and omissions.[39] Moreover, the agency is terminated upon the commencement of the winding up of the company.[40] Beyond that point either the receiver and manager himself or the debenture holders will be liable for his acts or defaults.[41]

To sum up, there are divergent views upon whether a mortgagee can be held liable for negligence in the exercise of his power of sale. Unless one resorts to a jejune distinction[42] to dispose of *McHugh v. Union Bank of Canada*, there is Privy Council authority to suggest that a mortgagee is under a duty to exercise reasonable care. Against this must be pitted two early decisions of the High Court[43] which indicate that mere negligence is not enough to render the mortgagee liable. In view of the High Court's recent announcement[44] that it no longer considers itself bound to follow the decisions of the Privy Council, these early authorities might well prevail. On the other hand, the statutory provisions which either expressly or by implication require a mortgagee to exercise reasonable care may influence courts to impose similar obligations upon receivers and managers. While the law on this topic remains shrouded in confusion receivers and managers

[35] [1940] *Gazette Law Reports* 507.
[36] [1955] Ch. 634 (C.A.).
[37] [1965] V.R. 125.
[38] [1971] Ch. 949 (C.A.).
[39] See the dissenting judgment of Rigby L.J. in *Gaskell v. Gosling* [1896] 1 Q.B. 669 which was subsequently endorsed by the House of Lords [1897] A.C. 575 (H.L. (E.)).
[40] *Gosling v. Gaskell* [1897] A.C. 575 (H.L. (E.)); *Thomas v. Todd* [1926] 2 K.B. 511.
[41] *Thomas v. Todd* [1926] 2 K.B. 511.
[42] *I.e.* that there is a difference between the obligations imposed upon a mortgagee in delivering the property to the place of sale and the duties imposed upon him when he exercises his power of sale.
[43] *Pendlebury's* case (1912) 13 C.L.R. 676; *Barns v. Queensland National Bank Ltd* (1906) 3 C.L.R. 925.
[44] *Viro v. The Queen* (1978) 52 A.L.J.R. 418.

would be well advised to take reasonable precautions to ensure that they do not unduly prejudice the interests of the debtor company and its unsecured creditors when exercising a power of sale.

B Duties with respect to the power to carry on the business

Curiously, the duties imposed upon a private receiver and manager carrying on the business of a debtor company do not seem to be as stringent as those which attend an exercise of his power of sale. He can of course complete trading or commercial contracts entered into by the company prior to his appointment, although he will not be personally liable on these contracts.[45] Indeed he may well be under a duty to honour these agreements where his failure to do so would damage the company's goodwill.[46] However, if the company's business reputation is not at stake he may repudiate the contracts with impunity.[47]

Airlines Airspares Ltd v. Handley Page Ltd[48] is a controversial illustration of this principle. There the receiver and manager planned to dispose of the most valuable part of a company's business, namely the manufacture and sale of 'Jetstream' aircraft, through a subsidiary formed specifically for that purpose. As a result of the transaction the company incurred a considerable liability to certain parties for breach of an agreement to pay commission. The amount of the commission to be paid was based upon the number of 'Jetstream' aircraft sold by the company. Mr Justice Graham held that the appointee was free to disregard the commission contract since his repudiation would not, on the evidence before him, adversely affect the realization of the company's assets or seriously impair its trading prospects. In retrospect it appears that his Lordship allowed the receiver and manager considerable latitude in attending to the interests of the secured creditor. By contrast, the interests of the unsecured creditors received scant attention. Moreover, while it could not be said that the appointee acted in bad faith, it seems that he spared little thought for the debtor company.

Although the receiver and manager in *Handley Page*[49] was absolved of liability in contract, doubts remain about his tortious liability. It may well be that where a receiver deliberately causes a company to repudiate a contract with a third party he will be liable in tort.[50] In *Re Botibol*[51] this issue was left unresolved. Evershed J. remarked:

> There is a further ground that, even if the receiver could not be sued *ex contractu*, it would not follow that he could not be sued in tort if he had taken steps which effectively prohibited the completion of the contract.[52]

[45] *Bissell v. Ariel Motors (1906) Ltd* (1910) 27 T.L.R. 73.
[46] See *George Barker Ltd v. Eynon* [1974] 1 W.L.R. 462, 471, *per* Stamp L.J.
[47] *Husey v. London Electric Supply Corporation* [1902] 1 Ch. 411 (C.A.).
[48] [1970] Ch. 193.
[49] *Ibid.*
[50] See generally Heuston R. F. V., *Salmond on Torts* (16th ed. 1973) 373-81.
[51] [1947] 1 All E.R. 26.
[52] *Ibid.* 28.

This proposition was argued in *Handley Page*[53] but it received no support from Mr Justice Graham. Moreover, even if such a cause of action could be established, the receiver's defence would be that he had a legal justification for the inducement.[54] The exact nature of this defence awaits definition but the key factors include the relation of the person procuring the breach to the person who breaks the contract and the object of the person in procuring the breach.[55] Since in most cases the receiver's motives would be to carry out the purpose of his appointment in a reasonable manner consistent with his limited and special agency he should have nothing to fear from the spectre of tortious liability. In any event there is some doubt whether an injunction would be available to restrain the receiver committing the tort of inducement.[56] If the plaintiff's remedy were restricted to damages the receiver and manager could fall back upon the indemnity usually granted by the debenture holders prior to his appointment.

A receiver and manager has a general duty to exercise his powers to serve the purposes for which he was appointed. In *McKendrick Glass Manufacturing Company Limited v. Wilkinson*[57] this obligation was considered with respect to a receiver and manager's power to carry on the company's business. In the course of his judgment Richmond J. intimated that if a third party without lawful justification induced the receiver to use this power for an improper purpose, then that party would be liable to the company for any losses caused by the breach of duty.[58] However his Honour declined to express a view whether an action lay against the receiver himself in this situation. But if the receiver exercises a power conferred by the debenture for a purpose foreign to the power he should be liable. Further, there would appear to be no reason why he should be entitled to an indemnity out of the assets of the company in respect of the losses incurred.

III LIABILITIES AT GENERAL LAW

It remains to consider a receiver and manager's liabilities under general law. But for s. 188 of the Uniform Companies Acts 1961-1962 (hereinafter referred to as U.C.A.) he would not be personally liable upon any contracts he entered within the scope of his agency during the course of

[53] [1970] Ch. 193.
[54] Heuston, *op. cit.* 379.
[55] *Ibid.*
[56] *Ibid.* 381. An injunction may be granted to restrain the tortious interference where it induces a continuing breach of contract. See *Hivac Ltd v. Park Royal Scientific Instruments Ltd* [1946] Ch. 169 (C.A.). The repudiation in *Handley Page* [1970] Ch. 193 clearly involved a continuing breach of the commission contract, but some breaches induced by the receiver and manager will not be of this nature. In any event, the fact that the breach in *Handley Page* had continuing repercussions did not persuade Mr Justice Graham to give judgment for the plaintiff.
[57] [1965] N.Z.L.R. 717.
[58] *Ibid.* 722.

the receivership. His principal (either the company itself or the debenture holders) would be liable on such contracts.[59] On the other hand, a receiver who executes a bill of exchange without disclosing his agency, for example by signing 'for and on behalf of' the company, may be sued in his personal capacity as acceptor of the instrument.[60] Moreover, a receiver may be personally liable upon any contracts he enters after his agency is terminated by the winding up of the company.[61] He is not however personally liable to refund moneys which he has paid into the receivership account without notice of a claim against the company.[62] Nor is he to be treated as a debtor from time to time of the sum which might ultimately be available after the payment of the amounts due to the preferential debtors and the debenture holders.[63]

A receiver and manager's general tortious liability is affected by the fact that he is invariably the agent of the company or the debenture holders. In either case his principal will be responsible for any torts he commits within the scope of his authority. Even where he acts beyond his powers, the principal will be liable if his actions are subsequently ratified or adopted.[64] Any employees continued in employment after the appointment are engaged, in effect, by the principal[65] and it is the principal who is vicariously liable for the torts of these servants. Nevertheless, in exceptional cases the receiver himself may incur a similar liability to third parties injured by the employees where he expressly or impliedly authorized the commission of the tort or where he is in some other way a party thereto.[66] It is of course also possible for a receiver and manager to become liable in trespass where, for example, he wrongfully interferes with the property of a third party.[67] As an alternative the plaintiff may sue for an account of any profits gained by the receiver as a result of such interference.[68]

Fenton Textile Association Ltd v. Lodge[69] did not directly consider the question of the tortious liability of receivers and managers. Rather it involved an action in tort against a person who happened to be a receiver and manager at the time the proceedings were instituted. Wildsmith Carter & Co. Ltd and Lodge were sued on the basis of an alleged fraudulent conspiracy entered into while Lodge was managing director of the company and before he was appointed as its receiver and manager. He

[59] See *Gosling v. Gaskell* [1897] A.C. 575 (H.L. (E.)) and *In re Vimbos Ltd* [1900] 1 Ch. 470.
[60] See *Kettle v. Dunster* (1927) 43 T.L.R. 770.
[61] *Thomas v. Todd* [1926] 2 K.B. 511; *In re Henry Pound, Son & Hutchins* (1889) 42 Ch.D. 402 (C.A.).
[62] *Owen & Co. v. Cronk* [1895] 1 Q.B. 265 (C.A.).
[63] *Seabrook Estate Co. Ltd v. Ford* [1949] 2 All E.R. 94.
[64] See *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716 (H.L. (E.)).
[65] *Owen & Co. v. Cronk* [1895] 1 Q.B. 265, 272 (C.A.); O'Donovan J., 'Corporate Redundancy' (1976) 4 *Australian Business Law Review* 257.
[66] *Kerr on the Law and Practice as to Receivers* (15th ed. 1978) 324.
[67] *In re Goldburg* (No. 2) [1912] 1 K.B. 606.
[68] *In re Simms* [1934] Ch. 1 (C.A.).
[69] [1928] 1 K.B. 1 (C.A.).

refused to produce certain documents and records of the company relevant to the proceedings, arguing that he now held them as an agent of the debenture holders. The Court of Appeal ordered discovery. As receiver and manager for the secured creditors Lodge held the documents subject to the company's right to redeem them. This right carried with it a right to inspect documents material to the company's defence.

IV STATUTORY DUTIES AND LIABILITIES

A Duties upon appointment

A number of statutory duties devolve on a receiver and manager soon after his appointment. First, he is immediately required to notify the company of his appointment.[70] Secondly, s. 215 of the Income Tax Assessment Act 1936 (Cth) demands that a 'receiver for any debenture holders' notify the Commissioner of Taxation within fourteen days after he takes possession of *any assets* of the company. A receiver and manager appointed out of court as an agent of the company is nevertheless, in a sense, a receiver 'for . . . debenture holders'.[71] He must therefore comply with the section. It may also be noted that the section applies to a receiver even if he does not seize the whole or substantially the whole of the company's property. Once notified, the Commissioner may require the receiver to set aside out of the assets available for the payment of the company's tax an amount which appears to the Commissioner to be sufficient to provide for any tax which is then or will thereafter become payable.[72] A receiver who fails to comply with s. 215 will be personally liable to the extent of the value of the assets of which he has taken possession and which were available for the payment of tax.[73] He will also be guilty of an offence.[74]

The section does not give the Commissioner the right to receive the sum set aside,[75] nor does it create a charge over any such sum.[76] It is still incumbent on the Commissioner to establish the amount and the validity of his claim to the fund.[77] Furthermore, s. 215 does not determine the priority of debts payable by a receiver and it has no effect upon the rights of secured creditors.[78] This can be seen in the fact that the amount to be set aside in pursuance of the section is merely an estimate of the tax which is payable or which will thereafter become payable. It is thought that this

[70] U.C.A., s. 193(1)(a).
[71] Compare *In re Barnby's Ltd; Fallows v. Barnby's Ltd* [1899] W.N. 103 where North J. held that the possession of a receiver appointed out of court was taken either 'by' or 'on behalf of' the debenture holders within the meaning of s. 3 of the Preferential Payments in Bankruptcy (Amendment) Act 1897 (60 & 61 Vict., c. 19).
[72] Income Tax Assessment Act 1936 (Cth), s. 215(3).
[73] *Ibid.* s. 215(4).
[74] *Ibid.*
[75] *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd* (1940) 63 C.L.R. 278, 289, *per* Latham C.J.
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid. passim.*

section is directed primarily at arrears of company tax and taxation which has not yet been assessed upon the taxable income of the company earned prior to the appointment. This interpretation is reinforced by s. 215(2), which requires the Commissioner to notify the receiver of the amount to be set aside 'as soon as practicable' after the appointee notifies him that he has taken possession of the assets of the company. If the section were intended to cover the company's continuing liability to income tax as a result of the management of its business in receivership it seems unlikely that the Commissioner would be able to make a realistic estimate of the tax payable as he would not be in a position to predict the duration of the receivership or the receiver's plans in relation to the business.

Section 292 of the U.C.A. attempts to give the Commonwealth's claim to income tax payable by a company in liquidation a relatively low priority. In addition it purports to restrict this priority to the amount of one whole year's assessment.[79] In the United Kingdom a similar provision enables the Inland Revenue Commissioners to claim the priority in respect of the year in which the company's income tax liability was greatest.[80] In Australia it is not possible for the State legislatures to displace the Commonwealth Crown's prerogative.[81] Thus, it appears that s. 292 of the U.C.A. is no bar to a claim by the Commonwealth for an unlimited amount of income tax under s. 215 of the Income Tax Assessment Act 1936 (Cth).

B Duties and liabilities in carrying on the business

If the appointee elects to carry on the business of the company, further duties and liabilities descend upon him. At the outset he may be guilty of an offence under U.C.A., s. 192 if he wilfully authorizes or permits the issue of any invoice, order for goods or business letter containing the name of the corporation by or on behalf of the company, its liquidator or himself unless that document contains a statement immediately following the name of the company indicating that a receiver or manager has been appointed. A breach of this statutory duty might also expose the appointee to a civil action by a third party for damages.[82]

In carrying on the business a receiver and manager inevitably incurs certain debts. If he were absolved of all liability for these debts he might be tempted to abuse his position to the detriment of the company. For example, he could order a large quantity of goods from a supplier, thereby supplementing the assets subject to the debenture holders' charge, and then refuse to pay for the goods, leaving the supplier to pursue his remedy

[79] U.C.A., s. 292(1)(e).

[80] *In re Prat* [1951] Ch. 225 (C.A.); *In re Cockell* [1932] W.N. 172; *Commercial Bank of Scotland v. Campbell* (1923) 10 T.C. 585.

[81] *Commonwealth v. Cigamatic Pty Ltd (in liq.)* (1962) 108 C.L.R. 372.

[82] Compare *Lietzke (Installations) Pty Ltd v. E.M.J. Morgan Pty Ltd* (1973) 5 S.A.S.R. 88, 115 (F.C.). See also *Inland Revenue Commissioners v. Goldblatt* [1972] Ch. 498, where Goff J. held that a receiver and manager was liable in damages for a breach of the statutory duty imposed by the equivalent of U.C.A., s. 196.

against the company along with the other general creditors. The supplier would be entitled to apply for a winding up of the company on the just and equitable ground[83] but this might be a futile exercise. It was against this background that U.C.A., s. 188(1) was introduced. Under this provision a receiver or other authorized person entering into possession of *any assets* of a company for the purpose of enforcing any charge will be liable for debts incurred by him in the course of the receivership or possession for services rendered, goods purchased or property hired, leased, used or occupied. It is not possible to contract out of s. 188(1) but the receiver is entitled to fall back upon any indemnity granted by the company or any other person.[84] Yet even if the appointee is covered by an indemnity, he remains primarily liable for the specified debts.

In *Associated Newspapers Ltd v. Grinston*[85] the plaintiff alleged that the receivers and managers of a company were personally liable upon printing contracts it had entered into prior to their appointment. Street J. (as he then was) found that a section equivalent to U.C.A., s. 188(1) had no application to this situation. His Honour remarked:

> None of . . . [the words of the section] . . . are very apt in the circumstances of the present case. 'Services rendered' rather suggests the ordinary master and servant account for work done where a claim is made by the servant. One construction of the section might limit those words to the obligation to pay something in the nature of wages and salary to a staff employed by the receiver after his appointment and in the course of his receivership. In the same way it seems to me that the words 'goods purchased' are not very applicable to the claim of the present company. The plaintiff's claim is not for goods sold, it is for work done. The third category is 'property hired, leased, used or occupied'. While the word 'used' is, in one sense, of the widest meaning, in the setting in which it is found, I think it refers to something analogous to hire, leasing or occupation, which of course may apply to real property or personal property which was hired or used.[86]

It appears that s. 188(1) is given a more limited operation than its United Kingdom counterpart, which imposes personal liability upon receivers or managers who enter certain 'contracts' during the course of their receivership.[87] In particular it only catches contracts to which the receiver was a party.[88] Moreover, a receiver will not be liable under U.C.A., s. 188(1) for costs awarded against the company even if the receiver himself initiated the proceedings.[89]

[83] *In re Alfred Melson & Co. Ltd* [1906] 1 Ch. 841; *In re Clandown Colliery Co.* [1915] 1 Ch. 369.

[84] U.C.A., s. 188(1).

[85] (1949) 66 W.N. (N.S.W.) 211.

[86] *Ibid.* 212 f.

[87] In *In re Mack Trucks (Britain) Ltd* [1967] 1 W.L.R. 780 it was held that a receiver was liable under the United Kingdom's counterpart of s. 188 for wrongfully dismissing an employee he had engaged. A similar decision might not be possible under the terms of s. 188.

[88] *Lawson (Inspector of Taxes) v. Hosemaster Co. Ltd* [1966] 1 W.L.R. 1300 (C.A.).

[89] Such costs are not 'debts' incurred by the receiver or manager for services rendered, goods purchased or property hired, leased, used or occupied. It is therefore imperative for a defendant sued by a company in receivership to obtain an order for security for costs of the proceedings.

One of the debts not covered by U.C.A., s. 188 is income tax. As we have seen, the company's liability prior to the appointment of the receiver is covered by s. 215 of the Income Tax Assessment Act 1936 (Cth). If the company makes a profit through the receiver's management further tax may be assessed. Since the receiver is normally the agent of the company he will not be personally liable for the additional tax. His appointment should have no effect upon the company's income tax liability and it will be assessed on the basis which applied prior to the appointment. Nor will the appointment prevent the company from carrying forward taxation losses of previous years, as it should still be able to satisfy either the continuity of ownership test or the continuing business test.[90]

As agent of the company the receiver is answerable as taxpayer for the doing of all things required to be done under the Income Tax Assessment Act 1936 (Cth) in respect of the income derived by him in his representative capacity or derived by the company through his agency.[91] In general he is answerable, but not personally liable, for the payment of tax on such income.[92] He incurs a personal liability only in respect of the amount he retains or should have retained for the payment of income tax out of the money which comes to him in his representative capacity.[93] One of his obligations as agent is to make the income tax returns on behalf of the company and to be assessed thereon in his representative capacity.[94] Difficulties often arise with this requirement where the receiver is appointed after the start of the company's income year. Strictly speaking, the appointee is only obliged to submit a return for the period after his appointment. Though it may be difficult to extract a separate assessment from the Commissioner covering this period, the receiver should simply calculate the company's income tax liability since his appointment and, if possible, set aside sufficient funds to meet it.

C Distribution of assets in receivership

(i) Liability for group taxation instalments

The most important statutory duties imposed upon a receiver and manager relate to the distribution of the company assets which come under his control. Paramount among these is the obligation created by s. 221 P(1) of the Income Tax Assessment Act 1936 (Cth). It provides that where a group employer has deducted taxation instalments from the salary or wages paid to his employees but has not remitted the amounts deducted to the Commissioner of Taxation in accordance with s. 221 F(5) and where his property has become vested in or where the control of his property has passed to a trustee, the trustee shall be liable to pay those

[90] *Wadsworth Morton Ltd v. Jenkinson (Inspector of Taxes)* [1967] 1 W.L.R. 79.
[91] Income Tax Assessment Act 1936 (Cth), s. 254.
[92] *Ibid.*
[93] *Ibid.*
[94] *Ibid.*

amounts to the Commissioner. Section 221 P(2) makes it clear that the amount payable to the Commissioner in pursuance of sub-section (1) takes precedence over all other debts whether preferential, secured or unsecured.

The application of s. 221 P is contingent upon control of the employer's property passing to a trustee. This condition is satisfied not when the trustee has authority to pay all the employer's debts out of the funds in his hands[95] but rather when he has the right to hold and realize the employer's property.[96] On this criterion a privately appointed receiver and manager has control of the company property within the meaning of the section.

In *Federal Commissioner of Taxation v. Card*[97] the High Court held that a receiver (or, more correctly, his executrix) was not liable under s. 221 P because on the evidence it was not established that he obtained control of any assets of a company which had defaulted under s. 221 F. In that case however the company's equity of redemption was clearly worthless and there was never any real prospect that the secured creditor who appointed the receiver would be paid in full. Card would only have been liable in these circumstances if the section required a receiver to discharge the company's debt to the Commissioner out of his own assets. The High Court held that the section created no such personal liability.

Card's case[98] also raised some doubts as to whether a receiver is a 'trustee' within s. 221 P. Section 6 of the Income Tax Assessment Act 1936 (Cth) defines 'trustee' to include a receiver. Nevertheless, a majority of the High Court in *Card's* case[99] tended to the view that a receiver appointed by a bank under the provisions of an equitable mortgage creating a floating charge was not a 'trustee' for the purposes of s. 221 P.[1] Menzies J. was the only member of the Court to decide that a privately appointed receiver fell within the section.[2]

In *Commissioner of Taxation v. Barnes*[3] the scope of s. 221 P was considered more directly and some of the doubts surrounding the section were dispelled. The High Court held that where a receiver and manager obtains control of all the debtor company's property he is liable to pay unremitted taxation instalments to the Commissioner out of the assets in his hands. This was so even though the company's interest in the property held by its receiver — its equity of redemption — was worthless. The High Court expressly decided that a privately appointed receiver and manager was a 'trustee' within s. 221 P.[4] Here it departed from the majority view in

[95] *In re Carapark Industries Pty Ltd* [1967] 1 N.S.W.R. 337.
[96] *Commissioner of Taxation v. Barnes* (1976) 50 A.L.J.R. 382.
[97] (1963) 109 C.L.R. 177.
[98] *Ibid.*
[99] *Ibid.*
[1] *Ibid.* 184, 190, 197.
[2] *Ibid.* 191 f.
[3] (1976) 50 A.L.J.R. 382.
[4] *Ibid.* 385.

Card's case[5] in the belief that the earlier case did not decide this issue. In his dissenting judgment Stephen J. drew attention to the implications of this very important decision. He suggested that if the appointment of a receiver and manager of a company registered as a group employer attracts the operation of s. 221 P 'recourse to this convenient aid to the enforcement of security will tend to be studiously avoided'.[6]

There is however a way of maintaining the efficacy of the secured creditors' remedy notwithstanding the decision in *Barnes*.[7] If a receiver and manager were appointed over only part of the assets and undertaking of the debtor company s. 221 P would, on the majority view, have no application. Thus, if some specific assets, for example book debts, were excluded from the charge, the secured creditors' chances of obtaining a discharge of their debt would not be eroded by the Commonwealth's statutory priority in respect of unpaid taxation instalments. But Gibbs J. sounded a note of caution when he remarked:

> it is difficult to accept that the section is intended only to apply if literally every item of property belonging to the employer vests in, or passes under the control of, the trustee.[8]

None of the other members of the majority in *Barnes*[9] expressed similar reservations. Indeed Barwick C.J., Mason and Jacobs JJ. in their joint judgment stressed that s. 221 P

> provides especially for the case where the whole of the property of a defaulting employer has vested in a trustee. It provides that *in that case alone* the debt due to the Crown shall have priority over secured debts.[10]

Unless the debenture holders' security restricts the scope of the receivership, s. 221 P will override their priority. This means that lending money to a company registered as a group employer can be a hazardous exercise. It would seem fairer to limit the Commissioner's priority under s. 221 P to unremitted instalments deducted in the period of, say, twelve months before the appointment of the receiver. The priority would then be forfeited in respect of instalments deducted in an earlier period. This would encourage the Taxation Department to press group employers to comply with their obligation to account monthly for these deductions.[11] Moreover, it would allow the debenture holder a reasonable chance of realizing his security and discharging the company's debt.

Only withholding tax deducted by a company from dividends and interest payable to non-residents enjoys the absolute priority conferred

[5] (1963) 109 C.L.R. 177.
[6] (1976) 50 A.L.J.R. 382, 391.
[7] *Ibid.*
[8] *Ibid.* 388. See also *Federal Commissioner of Taxation v. Card* (1963) 109 C.L.R. 177, 193 f., *per* Menzies J.
[9] (1976) 50 A.L.J.R. 382. See also *In re John Wiper Ltd* (1972) 22 F.L.R. 206, 226 (S.A.).
[10] *Ibid.* 386 (emphasis added).
[11] See Income Tax Assessment Act 1936 (Cth), s. 221F (5).

upon group taxation deductions.[12] Neither arrears of income tax due from the company nor tax due from the receiver in his representative capacity enjoys such a status.[13] Like sales tax due from the company, these debts yield to the interests of the secured creditor in a receivership.[14] The Commonwealth Crown prerogative, which dictates that in certain circumstances the rights of the Crown prevail over those of its subjects, only applies where there are competing debts of equal degree.[15] Thus, if the Commonwealth's claim depends upon an unsecured debt given no special statutory priority it will not transcend the debenture holders' security.[16] Moreover, where the unsecured debt is not due to the Crown but rather to a statutory commission the prerogative does not apply. On this basis the prerogative no longer embraces postal,[17] telegraphic and telephonic charges.[18] In practice however a receiver and manager will be compelled to pay these charges under the threat of withdrawal of postal and telephonic services from the company.

In *In re John Wiper Ltd*[19] the South Australian Supreme Court was asked to consider whether the Commonwealth Crown prerogative compelled a privately appointed receiver and manager to pay unsecured debts owing to the Commonwealth for pay-roll tax and telephone charges in preference to certain preferential debts claimed under s. 196 of the Companies Act 1962 (S.A.). Hogarth and Bright JJ. held that the Commonwealth was entitled to priority over the preferential creditors and other unsecured creditors. The debt due to the debenture holder had already been discharged out of the proceeds of sale of the debtor's land, so no question arose as to the Commonwealth prerogative right to payment ahead of the debt owing

[12] *Ibid.* s. 221YU.

[13] Once the Commissioner of Taxation advises the receiver of the amount necessary to provide for any tax payable by the company the receiver is obliged to set aside *'out of the assets available for the payment of'* income tax assets to the value of the specified amount: *ibid.* s. 215(3). Property caught by the debenture holder's charge is not 'available for the payment' of income tax because s. 215 does not create a special statutory priority overriding secured debts. As to the receiver's liability to pay tax upon income derived by him in his representative capacity see *ibid.* s. 254.

[14] Section 32 of the Sales Tax Assessment Act (No. 1) 1930 (Cth) does not confer any statutory right of priority upon the Commonwealth in respect of sales tax due from a company in the course of receivership: *Cigamatic* (1962) 108 C.L.R. 372. See generally Hampton L. F., 'Priority of Sales Tax in Company Liquidations and Receiverships; Contrasting Approaches Across the Tasman' (1977) 51 *Australian Law Journal* 173 and Hodgins J. E., *Sales Tax in Australia* (1976) 172.

[15] *In re Henley & Co.* (1878) 9 Ch.D. 469, 481 (C.A.). Business debts due to the Crown are included within the ambit of the prerogative: *In re K. L. Tractors Ltd* (1961) 106 C.L.R. 318.

[16] See *In re H. J. Webb and Co. (Smithfield, London) Ltd* [1922] 2 Ch. 369, 404 (C.A.) and *Re United Pacific Transport Pty Ltd* [1968] Qd.R. 517, 521, which suggest that assets subject to a fixed or floating charge are immune from the prerogative rights of the Commonwealth. See generally McNairn C. H. H., *Governmental and Intergovernmental Immunity in Australia and Canada* (1978) Chapter 5.

[17] The Postal Services Act 1975 (Cth) does not state that charges due under that Act shall be a debt payable to the Crown.

[18] See Post and Telegraph Act 1901 (Cth), s. 3, the definition of 'telegraphic', and s. 93. Compare Telecommunications Act 1975 (Cth) which contains no provision similar to s. 93.

[19] (1972) 22 F.L.R. 206 (S.A.).

to the secured creditor. Nevertheless, it was implicit in the majority's judgments that the prerogative would not allow the debenture holder's security to be displaced by an unsecured debt owing to the Commonwealth, for in such a case the competing debts would not be of equal degree.

(ii) The preferential debts

State Crown prerogative is waived by s. 196(4) of the U.C.A. where the company is not in the course of being wound up, and by s. 217 where the company is in this predicament. The main practical impact of these provisions is that State pay-roll tax is not protected by royal prerogative. Apart from abrogating this prerogative s. 196 obliges receivers to pay certain preferential debts out of any assets subject to a floating charge in priority to the principal and interest secured thereby.[20] A number of points must be noted about this provision. In the first place, it only applies where a receiver is appointed on behalf of the holders of any debentures secured by a floating charge or where possession is taken by or on behalf of debenture holders of any property comprised in or subject to such a charge. Even then the section has no application if the company is at that time in liquidation. If there is a defect in the appointment of the receiver the appointee would not be subject to the section.[21] He would however incur other liabilities if he took possession of the company's assets in reliance upon an invalid appointment.[22]

The term 'debenture' in s. 196 is broadly construed. In *Re Tarjan Construction Co. Pty Ltd (in liquidation) and the Companies Act 1936*[23] it was held to include an equitable mortgage. The term 'floating charge' in s. 196 is more difficult to define. In *In re Yorkshire Woolcombers Association Ltd*[24] Romer L.J. gave a tentative description of a floating security:

> I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerns the particular class of assets I am dealing with.[25]

When this case went on appeal to the House of Lords Lord Macnaghten contrasted a specific charge with a floating charge in the following terms:

[20] U.C.A., s. 196(1).

[21] This follows from *In re Destone Fabrics Ltd* [1941] Ch. 319 (C.A.), where a debenture holder was required to account to the company's liquidator for property he had received under a floating charge which was invalidated by U.C.A., s. 294. An invalidly appointed receiver and manager would seem to be equally liable to account to the company or to its liquidator.

[22] See *In re Goldburg* (No. 2) [1912] 1 K.B. 606 and *In re Simms* [1934] Ch. 1 (C.A.).

[23] [1964] N.S.W.R. 1054.

[24] [1903] 2 Ch. 284 (C.A.).

[25] *Ibid.* 295.

> A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.[26]

The priority given to the preferential creditors by s. 196 applies only in respect of assets subject to a floating charge; it does not affect assets subject to a fixed charge.[27] Yet one of the events which causes a floating charge to crystallize into a fixed security in terms of the usual form of debenture is the appointment of a receiver. The legislature has resolved this difficulty[28] by defining a 'floating charge' for the purposes of s. 196 so as to include 'a charge conferring a floating security at the time of its creation which has become a fixed or specific charge'.[29] Thus a charge which originally created a floating security does not cease to be a floating charge within s. 196 simply because a receiver is appointed.

A receiver must observe the following order of priority in complying with s. 196:

(1) any amounts received by the company under a third party insurance contract less any incidental expenses incurred in collecting the payment from the insurer must be paid to the third party in respect of whom liability was incurred;[30]

(2) wages or salary of company employees up to a certain maximum amount must be paid to them;[31] and

(3) all amounts due to company employees under their contracts of employment or statutory provisions in respect of long service leave, annual leave, recreation leave or sick leave must be paid to them.[32]

Moreover, where the company has paid its employees amounts on account of wages or salary or by virtue of one of the above leave entitlements out of money advanced for that purpose the lender is subrogated to the priority which would otherwise have been enjoyed by the company employees who received the payments.[33] It is also provided that any amounts paid out in pursuance of the section shall be recouped as far as possible out of the assets of the company available for payment of the general creditors.[34]

Section 196 obliges the receiver to pay the preferred debts out of any assets coming to his hands. As mentioned earlier, 'any assets' in this

[26] *Sub. nom. Illingworth v. Houldsworth* [1904] A.C. 355, 358 (H.L. (E.)).
[27] *In re Lewis Merthyr Consolidated Collieries Ltd* [1929] 1 Ch. 498 (C.A.).
[28] This difficulty appeared in *Australian Hairdressers, Wigmakers and Hairworkers Employees' Federation v. Brisbane Salons Pty Ltd* (1937) 31 Q.J.P. 59.
[29] Section 196(2) of the U.C.A. defines the term 'floating charge' to include a floating charge within the meaning of s. 292. Under that section a charge conferring a floating security at the time of its creation which later becomes a fixed or specific security is a floating charge: U.C.A., s. 292(11).
[30] *Ibid.* ss. 196(1) and 292(5).
[31] *Ibid.* ss. 196(1) and 292(1)(b) ($1,500 maximum).
[32] *Ibid.* ss. 196(1) and 292(1)(d).
[33] *Ibid.* ss. 196(1) and 292(3).
[34] *Ibid.* s. 196(3).

context means those assets subject to a floating charge which the appointee receives in his capacity as receiver. Money paid to a receiver for work done by the company prior to his appointment falls within the section.[35] Moreover, *Costain Australia Ltd v. Superior Pipe Installations Pty Ltd (Receiver Appointed)*[36] suggests that money will not be caught by s. 196 unless it is owing to the company at the time of the appointment. In that case, a sub-subcontractor obtained from a sub-contractor an assignment of certain moneys which would later accrue due to the sub-contractor from the main contractor. At the time of the appointment of a receiver of the sub-contractor's property the main contractor had not incurred the debt. Yeldham J. held that s. 196 had no application to these facts, on the ground that the debt was not due to the sub-contractor at the time of the appointment of the receiver. With respect to the learned judge, this factor alone should not displace s. 196. When a receiver was appointed the floating charge became fixed but it would still apply to any assets the sub-contractor might later acquire in the course of the receivership.[37] Since the debt was in fact paid into court Yeldham J. would have been on firmer ground if he had held that s. 196 had no application because the moneys did not pass into the hands of the receiver.

The fact that the preferred creditors must be paid out of the assets coming into the receiver's hands is an inherent weakness in the scheme of s. 196. In *In re John Wiper Ltd*[38] realty subject to a fixed charge in favour of a bank was sold by a receiver and manager and the proceeds were paid direct to the bank as a term of the settlement. Where the receiver requires, say, book debts or amounts payable in respect of work completed by the company prior to his appointment to be paid direct to the debenture holders s. 196 would not catch those assets. If this strategem were adopted in relation to assets subject to a floating charge the policy underlying the section would be frustrated: a secured creditor of a company not in the course of liquidation would receive payment out of assets subject to a floating security ahead of the preferred creditors.

To sum up, what can be said about a receiver and manager's obligations in relation to the distribution of assets subject to the debenture holder's security? First, if he is a receiver and manager of all the company's property he must pay to the Commissioner of Taxation all unremitted taxation instalments deducted from the salary and wages of the company's employees. This is so whether the assets coming under his control are subject to a fixed or a floating security. In the normal situation, where both types of security are held by the debenture holder, the receiver would be well advised to attend to this payment out of assets caught by the

[35] *In re Tarjan Construction Co. Pty Ltd* [1964] N.S.W.R. 1054.
[36] [1975] 1 N.S.W.L.R. 491.
[37] See *Ferrier v. Bottomer* (1972) 126 C.L.R. 597.
[38] (1972) 22 F.L.R. 206 (S.A.).

floating charge, thereby minimizing the impact of s. 196, which only applies to such assets. Once the obligations created by s. 221 P and s. 221 YU (which confers a similar priority upon withholding tax deducted from dividends or interest) have been satisfied the receiver and manager may attend to the payment of the secured creditor's debt by realizing the assets subject to either the fixed security or the floating charge. However, if he discharges the debt out of the assets caught by the floating charge without first paying certain preferred debts he will offend s. 196 of the U.C.A. Moreover, by virtue of Crown prerogative unsecured debts owed to the Commonwealth take precedence over these preferred debts.[39]

Where there is no need to resort to the assets subject to the floating charge in order to pay out the debenture holder the position is relatively clear: the secured creditor's debt can be liquidated with the proceeds of sale of the fixed assets, leaving the receiver to attend to unsecured debts owed to the Crown in the right of the Commonwealth and then the preferred debts out of the assets subject to the floating charge. On the other hand, if the fixed assets are not sufficient to discharge the debenture holders debt or if for some other reason recourse to the floating assets is necessary the receiver and manager is placed in a dilemma. Here there is a collision between the interests of the secured creditor, the Commonwealth Crown prerogative and the preferred debts. In this situation a prudent receiver would apply to the court for directions.[40]

But what guidance can the court offer? It might reason that the prerogative debts due to the Commonwealth must prevail over the preferred debts but that because the secured debt is of a higher degree than the Crown debts it should enjoy the first priority. On this approach the order of payment would be as follows: first, the debenture holders; secondly, the Commonwealth; thirdly, the preferred creditors. But this ranking ignores the fact that s. 196 reverses the normal order of priorities by expressly subordinating the interests of the secured creditors to those of the preferred creditors so far as the assets subject to the floating charge are concerned. The better view would appear to be that such assets should be applied in the first place towards liquidating the prerogative debts owed

[39] This proposition draws support from *Cigamatic* (1962) 108 C.L.R. 372. Although the *Cigamatic* principle has been widely criticized it remains intact. Recently in *Maguire v. Simpson* (1977) 52 A.L.J.R. 125 both Mason and Jacobs JJ. remarked that it was curious that there was no mention of s. 64 of the Judiciary Act 1903 (Cth) in *Cigamatic*. That section provides as follows: 'In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject'. Jacobs J. cast further doubts upon the *Cigamatic* principle by suggesting that it might involve a revival of the doctrine of implied immunity of instrumentalities and might be inconsistent with *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129. Despite these reservations it remains true that the Commonwealth can invoke its Crown prerogative to override a competing unsecured debt owed to one of its subjects.

[40] A receiver or manager appointed out of court may apply for judicial directions in relation to any matter arising in connection with the performance of his functions: U.C.A., s. 188(3).

to the Commonwealth. A provision in a State Act such as s. 196 of the U.C.A. cannot interfere with this prerogative entitlement. It can however affect the priority of a subject and it clearly evinces such an intention by providing that the preferred debts must be paid out of the floating assets coming into the receiver's hands before he accounts to the secured creditor for the outstanding principal and interest. On this basis it appears that the competing debts should be discharged in the following order:

(1) Commonwealth Crown prerogative debts;

(2) preferred debts;

(3) the secured debt.

Given that it is advisable for a receiver to seek judicial directions whenever he is faced with this problem there appears to be an urgent need for rationalizing the law dealing with the rival claims of the secured creditors. A simple amendment to s. 196 clearly recognizing the ranking discussed above would dispel the doubts surrounding the section and avoid the expense and inconvenience associated with an application for directions.

The final point to be noted about s. 196 relates to the nature of the obligation it creates. An offence under the section attracts the general penalty provisions.[41] In addition, while s. 196 does not make the receiver a trustee for the preferred creditors,[42] he is under a positive obligation to pay them in priority to the debt secured by the floating charge and unsecured debts of which he has notice.[43] It is not enough for him to account to the company for the assets he receives. Nor will he be protected if he merely declines to hand over the assets to the debenture holders.[44] If he fails to satisfy the requirements of s. 196 he may be liable to the preferred creditors in tort for a breach of his statutory duty.[45] The fact that there are insufficient assets to discharge the secured debt does not absolve him of his liability. Moreover, if the original appointee is removed and replaced he nevertheless remains liable to perform his statutory duty.[46]

D The duty to account

In addition to the obligation imposed by s. 196 a receiver or manager is required to lodge accounts containing the details specified in U.C.A., s. 195 within certain periods. The first account must be submitted within one month after the expiration of six months from the date of his appointment; further accounts must be filed within a similar period after every subsequent interval of six months; a final account is due within one

[41] *Ibid.* s. 379.
[42] *Visbord v. Federal Commissioner of Taxation* (1943) 68 C.L.R. 354, 369, *per* Latham C.J. (dissenting).
[43] *Goldblatt's* case [1972] Ch. 498.
[44] *Westminster Corporation v. Haste* [1950] Ch. 442, 447.
[45] *Goldblatt's* case [1972] Ch. 498.
[46] *Ibid.* 505.

month after the appointee ceases to act as receiver or manager.[47] Alternative time limits may be prescribed so long as accounts are lodged at least twice a year.[48] The appointee must verify all accounts by a statutory declaration.[49] As an added precaution the Commissioner may on his own initiative or on an application by the company or one of its creditors require an audit of the accounts by a registered company auditor chosen by him.[50] An applicant for such an audit may be required by the Commissioner to give security for the costs of the exercise.[51]

If a receiver or manager fails to lodge the necessary accounts he may be served by a member or creditor of the company or by the trustee for debenture holders with a notice requiring him to comply with his statutory obligations.[52] Further, the court may on application direct the receiver or manager to account if he fails to make good his default within fourteen days after service of the notice upon him.[53] The company's liquidator may also require a privately appointed receiver and manager to render proper accounts of his receipts and payments, to verify these accounts and, finally, to pay to the liquidator 'the amount properly payable to him'.[54] Once again, the liquidator may apply to the court in the event of default for an order directing the receiver or manager to accede to his demand for an account.

The receiver or manager's accounts will be kept on the file and will therefore be available for inspection by the company's creditors and the trustee for debenture holders. But there is no statutory requirement that regular accounts be sent to those parties. In *Nelson Bros Ltd v. Nagle*[55] Myers C.J. found that a receiver and manager who had merely lodged an abstract of receipts and expenditure with the Registrar of Companies had not discharged his duty to account as an agent of the company. Moreover, the Chief Justice considered that the defendant had erred in not giving the plaintiff company a copy of the abstract he had filed.[56] In view of this approach, a receiver or manager would be well advised to forward a copy of his accounts to the company itself and to the debenture holders or their trustee. This requirement is enshrined in the companies legislation in the United Kingdom[57] and a similar obligation should be introduced into the local Companies Acts.

[47] U.C.A., s. 195(1).
[48] *Ibid.* s. 195(1)(a).
[49] *Ibid.* s. 195(1)(b).
[50] *Ibid.* s. 195(2).
[51] *Ibid.* s. 195(3).
[52] *Ibid.* s. 197(1)(a).
[53] *Ibid.* s. 197.
[54] *Ibid.* s. 197(1)(b).
[55] [1940] *Gazette Law Reports* 507.
[56] *Ibid.* 510.
[57] Companies Act 1948 (U.K.), s. 372(2).

E The remaining duties

Once a receiver and manager has paid out the secured debt, the preferred debts and any prerogative debts due to the Crown in the right of the Commonwealth and rendered his final account he is not *functus officio.* He must then hand over the funds and assets remaining in his hands to the company or its liquidator as the case may be.[58] But as noted earlier this does not mean that the appointee is indebted to the company from time to time for the amount which may eventually prove to be the balance in his hands after attending to the above payments.[59] Finally, within seven days after he completes his duties he is obliged to lodge a notice in a prescribed form with the Commissioner for Corporate Affairs advising him that he ceased to act as receiver or manager of the company on a certain date.[60] Indeed, such a notice is necessary if a receiver or manager ceases to act as such at any stage.

F Remedies for breaches of duty

Failure to observe the statutory duties imposed upon a receiver and manager usually attracts a criminal sanction. In addition, an aggrieved party may be able to sue for damages in a civil action for breach of a statutory duty.[61] Moreover, a creditor of the company or the trustee for debenture holders may apply to the court for a direction that a receiver or manager rectify any default he has made in making or lodging any return, account or other document or in giving any notice required by law.[62] A similar application may be made by the liquidator where a privately appointed receiver or manager fails to perform certain duties.[63] The members of the company are also given a limited remedy. If they are dissatisfied with a receiver or manager's administration they may apply to the Minister to appoint an inspector to investigate the affairs of the company in receivership.[64]

In *In re B. Johnson & Co. (Builders) Ltd*[65] the Court of Appeal held that the so-called 'misfeasance' provisions of the Companies Act 1948 (U.K.) do not apply to a receiver and manager of a company. In Australia s. 367 B of the U.C.A. allows the court to award damages for negligence, default, breach of duty or breach of trust against a person 'who has taken part in the . . . management . . . of a company' to which the section applies. Section 367 C states that the preceding section applies to companies

[58] *In re John Wiper Ltd* (1972) 22 F.L.R. 206, 225 (S.A.). See also U.C.A., s. 197(1)(b).
[59] *Seabrook Estate Co. Ltd v. Ford* [1949] 2 All E.R. 94.
[60] See U.C.A., s. 191(2).
[61] See *Goldblatt's* case [1972] Ch. 498 and compare *Lietzke (Installations) Pty Ltd v. E.M.J. Morgan Pty Ltd* (1973) 5 S.A.S.R. 88, 115 (F.C.).
[62] U.C.A., s. 197(1)(a).
[63] *Ibid.* s. 197(1)(b).
[64] *Ibid.* s. 169 and *R. v. Board of Trade, Ex parte St. Martins Preserving Co. Ltd* [1965] 1 Q.B. 603 (D.C.).
[65] [1955] Ch. 634.

in respect of which a receiver or manager has been appointed either by the court or pursuant to the powers contained in any instrument. But does the reasoning in *In re B. Johnson & Co. (Builders) Ltd*[66] apply to s. 367 B? The 'misfeasance' provision of the United Kingdom Act[67] is directed to 'any person who has taken part in the formation or promotion of the company, or any past or present . . . manager . . . or any officer of the company'. The Court of Appeal held that a receiver and manager appointed out of court was not a manager of the company but rather a receiver and manager of *the property of the company*. Nor was the appointee an 'officer' within the section, because the statutory definition of that term which includes a 'director, manager or secretary' was not intended to give these words a broader connotation than they had previously carried. By contrast, s. 367 B of the U.C.A. is directed to 'any . . . person who has taken part in the . . . management' of certain companies. On the basis of *In re B. Johnson & Co. (Builders) Ltd*[68] it might be possible to argue that a receiver and manager is not involved in the management of a company but rather in the management of the *property* of the company, but this appears to be a specious distinction. The receivership provisions in the U.C.A. refer throughout to a 'receiver or manager' and the term manager is defined as 'the principal executive officer of the company for the time being by whatever name called and whether or not he is a director'.[69] It appears therefore that the Acts themselves recognize that a privately appointed receiver and manager may be the principal executive officer of a company and not merely a manager of *the property of the company*. On this reasoning such a person would seem to fall within the scope of s. 367 B.

Certain comments by Bray C.J. in *Harris v. S*[70] fortify this conclusion. His Honour remarked that the definition of 'officer' in the Companies Act 1962-1972 (S.A.) showed

> an intention to include all those controllers who hold office according to the normal working of the company's constitution and *to add those imposed on the company from outside as the result of something done by the company itself, as, for example, the execution of a debenture deed* or a voluntary resolution for winding up, but to exclude outside controllers imposed on the company from some external source, for example the court or the creditors.[71]

It is implicit in this statement that a receiver and manager imposed upon a company by the holders of a debenture granted by the company in the ordinary course of its business while it retained full control of its own destiny may be an 'officer'.[72]

[66] *Ibid.*
[67] Companies Act 1948 (U.K.), s. 333.
[68] [1955] Ch. 634 (C.A.).
[69] See U.C.A., ss. 187-97 and the statutory definition of 'manager' in s. 5.
[70] (1976) 2 A.C.L.R. 51 (S.A.).
[71] *Ibid.* 55 (emphasis added).
[72] *Ibid.*

By contrast, the Victorian Supreme Court in *Re High Crest Motors Pty Ltd (in liq.)*[73] held that privately appointed receivers and managers were not 'receivers of the company' or 'officers of the company' within U.C.A., s. 263(3). That sub-section provides:

> The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer forthwith or within such time as the Court directs to the liquidator any money, property or books and papers in his hands to which the company is *prima facie* entitled.

Since the receivers and managers did not owe duties directly to the company they were not included in the class of 'insiders' to whom the section applied. In this context the terms 'receiver' and 'officer' referred to persons appointed *by the company* over the assets and undertaking of one of its debtors. Moreover, the fact that they held the assets subject to the charge adversely to the company placed them beyond the section. Only Harris J. considered whether the definition of 'officer' in s. 5 of the Act brought the appointees within s. 263(3). His Honour noted that the statutory definition applied 'unless the contrary intention appears' and concluded that the sub-section's context showed it was not intended to apply to a receiver and manager appointed by a debenture holder.

It remains to consider whether s. 367 B evinces a similar intention. Unlike s. 263(3), there is no clearly established judicial policy against applying s. 367 B to privately appointed receivers and managers.[74] In addition, to include such persons within the purview of s. 367 B would not curtail the rights of the mortgagee who appointed the receiver or manager, nor would it do violence to the words of the section. Thus it appears that *Re High Crest Motors Pty Ltd (in liq.)*[75] presents no serious challenge to the view that a privately appointed receiver and manager is an 'officer' within s. 367 B.

G Relief and indemnity

The court is empowered by U.C.A., s. 365 to relieve an 'officer' of a corporation from liability for negligence, default, breach of duty or breach of trust where it appears that he has acted honestly and reasonably and that having regard to all the surrounding circumstances he ought fairly to be excused for his improper act or omission. This jurisdiction can be invoked by a. privately appointed receiver and manager because the definition of 'officer' in U.C.A., s. 5 includes a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument. It also extends to receivers and managers appointed or directed by the court to carry out any duty under the Act in

[73] (1978) A.C.L.C. 29,994 (Vic.).

[74] In relation to s. 263(3) this judicial policy can be seen in the following cases: *In re Imperial Land Co. of Marseilles* (1870) L.R. 10 Eq. 298; *Re The Northfield Iron and Steel Co.* (1866) 14 L.T. 695; *In re Capital Fire Insurance Association* (1883) 24 Ch.D. 408 (C.A.); *Sowman v. David Samuel Trust Ltd* [1978] 1 W.L.R. 22.

[75] (1978) A.C.L.C. 29,994 (Vic. F.C.).

relation to a corporation.[76] It will not however save an appointee guilty of an offence for which the Companies Act imposes a criminal sanction.[77] Moreover, the general test applied by the court in exercising its discretion under s. 365 is what could reasonably be expected of a man of affairs in similar circumstances dealing with his own business with reasonable care and prudence.[78] On this criterion the receiver or receiver and manager may be expected to seek legal advice in some situations.[79] Certainly the applicant will be in a much stronger position to seek relief under the section if he has acted upon counsel's opinion.[80] In some cases the court will even consider whether he has consulted the members of the company and its creditors.[81]

Section 365 is not construed liberally and a person applying for relief under the section must make out a compelling case. For this reason a receiver or a receiver and manager would be unwise to rely heavily upon the court's absolution. As an alternative he might consider seeking an exemption or indemnity from the company itself in respect of any negligence, default, breach of duty or breach of trust during his receivership. However, any provision in the articles or in any contract with the company or otherwise which grants such an exemption or indemnity is rendered void by s. 133 of the U.C.A. But a receiver or a receiver and manager can still invoke an indemnity granted by the debenture holders who secured his appointment.

In the absence of such an indemnity he may rely upon the protection afforded by U.C.A., s. 188(3). Under that provision a private appointee may apply by summons to the court for directions in relation to any matter arising in connection with the performance of his functions. Unfortunately, this procedure may not properly be used to test the validity of a receiver and manager's appointment.[82] More importantly, any directions given by the court in pursuance of s. 188(3) are not binding on the parties even if they are represented upon the hearing of the application.[83]

[76] U.C.A., s. 365(4)(d).

[77] *Lawson v. Mitchell* [1975] V.R. 579 (F.C.). See also Baxt R., 'Relief of Officers of Breaches of Duty' (1975) 46 *The Chartered Accountant in Australia* 42.

[78] See *In re Duomatic Ltd* [1969] 2 Ch. 365.

[79] *Ibid.*

[80] *In re Claridge's Patent Asphalte Co. Ltd* [1921] 1 Ch. 543.

[81] *In re Barry and Staines Linoleum Ltd* [1934] Ch. 227, 234; *In re Gilt Edge Safety Glass Ltd* [1940] Ch. 495, 502.

[82] The terms 'receiver or manager' within s. 188(3) presumably refer to a properly appointed receiver or manager. See *In re Wood & Martin Ltd* [1971] 1 W.L.R. 293 and *R. v. Drysdale* (1978) A.C.L.C. 30,066 (N.S.W.). Moreover, the validity of the appointment is not a 'matter arising in connexion with the performance of his functions' within s. 188(3).

[83] In *In re Blackbird Pies (Management) Pty Ltd* (No. 2) [1970] Q.W.N. 33 Hanger J., referring to a similar provision, s. 237 of the Companies Act 1961 (Qld), observed: 'That subsection does not, in my opinion, enable the Court to make binding orders on persons in the nature of judgments. The directions which a Court may give on an application under it are more like the directions or advice which may be given under s. 45 of the *Trustees and Executors Acts*. Such directions are not, in my opinion, subject to appeal. (*In re Tooth's Trusts* (1877) 5 Q.S.C.R. 10)'.

Thus it would still be possible for the company or its liquidator to sue a receiver and manager appointed by the debenture holders even if the appointee followed the court's instructions. While the appointee would probably qualify for relief under U.C.A., s. 365, it would seem preferable to amend s. 188(3) so as to provide a complete indemnity for a receiver or manager who acts in pursuance of the court's directions.[84] It might also be useful to require an application under s. 188(3) to be served upon all persons interested in the application or such of them as the court considers expedient.[85] If interested persons were duly served with the application and allowed to present submissions at the hearing there would seem to be no objection to accepting the court's directions as binding on the parties.

V CONCLUSION

This survey of the duties and liabilities imposed upon a receiver and manager appointed out of court highlights the complexity of his task. Unfortunately, some appointees tend to stumble along in the day-to-day management of the company without an adequate understanding of their responsibilities. Often lawyers become involved in the exercise after the damage is done. They must endeavour to become involved from the beginning and continue to guide the receiver or receiver and manager upon the scope of his duties and liabilities throughout his administration.

[84] *Cf.* Trusts Act 1973 (Qld), s. 108.

[85] *Cf.* Trusts Act 1973 (Qld), s. 96 and U.C.A., s. 274(1)(a). See *Re Evers Motor Co. Ltd* [1962] Q.W.N. 12, which decided that a summons under s. 274(1)(a) must be served on all interested parties.