

Insolvency

Multiple receivers: a recipe for chaos?

by Lisa Linklater

A 1980s farming project to develop a cotton and wheat farm in Zambia has given rise to extensive litigation both in Zambia and, more recently, in this jurisdiction. The most recent episode is the decision of Rimer J in *Gwembe Valley Development Co Ltd (in receivership) v Koshy & Ors* (*The Times*, 8 February 2000). Rimer J there considered:

- (1) an application by Mr Koshy to strike out a claim brought against him by receivers of a company known as Gwembe Valley Development Company Limited ('GVDC'), appointed by DEG-Deutsche Investitions-und-Entwicklungsgesellschaft MBH ('DEG'); and
- (2) an application by DEG for a variation of a costs order made against Mr Koshy.

This case-note proposes to concentrate on the first of these applications, which raises an issue of significant interest for debenture holders, receivers and their advisors alike, namely Rimer J's findings that:

- (1) multiple receivers may be appointed by different lenders; and
- (2) such receivers may exercise their powers severally.

BACKGROUND

The facts are as follows.

The appointment of the receivers

The farming project was to be carried out by GVDC, a Zambian company. Finance was provided by three lenders:

- DEG, a development company, owned by the German Government, which finances the development of the private sector in the Third World;
- Lummus Agricultural Services Company Limited ('Lasco'), an English company; and
- the International Finance Corporation ('IFC').

At all material times Lasco was controlled and substantially owned by Mr

Koshy, who was also the managing director of GVDC from 1987.

The loans of DEG, GVDC and IFC were secured first by a mortgage of GVDC's land, dated 5 January 1988, and secondly by a debenture executed on 7 January 1988. The debenture was entitled 'joint debenture' and stated to secure 'all moneys respectively advanced' by the three lenders.

IFC's loan was repaid at some stage. It was not disputed before Rimer J that GVDC defaulted on its obligations to DEG and that DEG became entitled to enforce the mortgage and the debenture and to appoint a receiver. However, DEG disputed whether GVDC ever similarly defaulted as regards Lasco and therefore whether Lasco was ever entitled to appoint a receiver.

DEG executed a written instrument appointing John Ward and Elmo Jayetileke to be receivers and managers of the property, assets and rights charged by the mortgage and the debenture on 28 September 1993. On 18 August 1994, Lasco purported to appoint Mr Gadsden as a receiver and manager of GVDC under both the mortgage and the debenture. DEG's receivers successfully applied without notice on 19 August 1994 to restrain Lasco from appointing a receiver or restraining such receiver from acting. This order was continued to trial by order of 11 October 1994. The principal ground relied upon by DEG in its application was that the appointment of its receivers in September 1993 had exhausted the power to appoint receivers under the mortgage and debenture so that Lasco had no right to appoint a receiver.

Lasco's response was to apply for a declaration that DEG's receivers' appointments were null and void by reason of a failure to follow the provisions of the Zambian Authentication of Documents Act. Before such application was in fact heard, DEG authenticated the appointment of its receivers on 28 March 1996.

The primary issue on Lasco's application therefore became whether

the authentication of DEG's appointment was of retrospective effect. Silomba J held that it was at first instance on 10 September 1996. Lasco successfully appealed this decision. The Zambian Supreme Court held on 10 December 1998 that the judge was wrong to hold that the 1996 authentication of the appointment in 1996 was of retrospective effect. The Zambian Supreme Court therefore discharged the injunction against Mr Gadsden.

The primary litigation

After Silomba J's decision, DEG commenced proceedings for damages against Mr Koshy and Lasco on 8 November 1996. DEG claimed that Mr Koshy fraudulently deceived it as to the nature of his own interests in the farming project and in Lasco and that it would not have provided its funding to GVDC if it had known the truth and had not been deceived by Mr Koshy. After the decision of the Zambian Supreme Court, to the effect that DEG's receivers were first purportedly appointed in 1996, Mr Koshy addressed his mind to the authority of DEG's receivers to bring such litigation.

APPLICATION TO STRIKE OUT PRIMARY LITIGATION

I propose to focus on the arguments advanced on, first, the construction of the debenture and, secondly, whether the powers of receivers appointed successively under the debenture were exercisable only jointly, or jointly and severally.

(1) Construction of the debenture

The construction of the mortgage and debenture were governed by Zambian law. However, the judge accepted that the expert evidence indicated that Zambian law was (subject to one point) in all relevant respects the same as English law.

The three principal questions that Rimer J considered in construing the debenture were:

- (1) who is empowered to appoint a receiver?
- (2) can any such appointor appoint (a) a single receiver or (b) more than one receiver?
- (3) does the appointment of a single receiver by one of the lawful appointors exhaust the power of appointment?

Condition 5 of the debenture provided that:

'At any time after the principal moneys hereby secured have become immediately payable, the Senior Lenders or other [sic] the Registered Holder may appoint by writing a Receiver of the Mortgaged Premises and may from time to time remove any Receiver so appointed and appoint another in his stead.'

The debenture defined 'The Senior Lenders' as 'IFC, DEG and Lasco' and 'the Registered Holder' as 'the person for the time being entered in the register provided for in Condition 12 endorsed hereon as the person entitled to the benefit of this Debenture'. Condition 12 provided for the keeping of a register of debentures for the entry into it of the name and address of 'the person entitled to the benefit of this Debenture'. It is not apparent from the judgment which of the lenders were entered in the register of debentures.

Counsel for each party agreed that the mortgage and the debenture formed part of one transaction. Clause 7 of the mortgage provided that:

'At any time after the security hereby created shall have become enforceable, the Lenders jointly or IFC, DEG or Lasco individually may by writing under the hand of any director or manager or other duly authorised officer of IFC, DEG or Lasco as the case may be appoint any person or persons to be receiver or receivers of the property comprised in this security upon such terms as to remuneration or otherwise as such appointor shall think fit and may in like manner remove any receiver so appointed and appoint another or others in his or their place.'

Who is empowered to appoint a receiver?

Clause 7 of the mortgage is more clearly worded than Condition 5 of the debenture. The learned judge concluded that in order to harmonise Clause 7 with Condition 5, 'the Senior Lenders or other the Registered Holder' should be

construed as meaning IFC, DEG and GVDC jointly or individually. Neither party suggested that the power of appointment could only be exercised jointly, although the learned judge indicated that he had initially been attracted by such an argument.

Can any such appointor appoint (i) a single receiver or (ii) more than one receiver?

However, the learned judge determined that he would effectively re-write (as opposed to interpret) Condition 5 of the debenture if he sought to harmonise it with Clause 7 of the mortgage on this point. Accordingly, he accepted the argument that the debenture conferred a power upon each creditor to appoint a single receiver only. DEG's appointment of Messrs Ward and Jayetileke was therefore invalid, quite apart from the point under the Zambian Authentication of Documents Act. Mr Allen's later appointment by DEG was accepted by Rimer J as valid, so that there were multiple receivers appointed under the debenture, namely Mr Gadsden on behalf of Lasco and Mr Allen on behalf of DEG.

Does the appointment of a single receiver by one of the lawful appointors exhaust the power to make appointments under Condition 5?

Counsel for Mr Koshy, Michael Briggs QC, argued that the appointment of a receiver by Lasco had exhausted the power of appointment. Ironically, DEG were therefore faced with the proposition which they themselves had asserted before the Zambian courts when seeking an injunction in respect of Lasco's receiver.

Rimer J, concerned that 'there might be an unseemly rush by each [creditor] to make the first appointment so as to shut out the possibility of appointments by others', concluded that the power of appointment had not been exhausted by the appointment of Lasco's receiver. Broadly, his reasoning was that, having accepted that the power to appoint was several, it followed that *each* creditor could appoint a receiver. He was of the opinion that 'as the receivers would usually be professional men, I cannot see why it should be assumed to be likely to lead to difficulty in practice'.

(2) Powers of receivers appointed successively

Although the learned judge reached his conclusion that the successive receivers *could* exercise their powers severally on the construction of *this particular* debenture, he was referred in the course of argument to a number of Commonwealth authorities, namely *DFC Financial Services Ltd v Samuel* [1990] 3 NZLR 156, *NEC Information Systems Australia Pty Ltd v Lockhart* [1991] 22 NSWLR 518 and *Kendle & Anor v Melsom & Anor* [1997] 16 ACLC 466. In each of these authorities a *single* lender had appointed a number of receivers. The tension in this line of authorities is between those who believe that powers are exercisable jointly *and* severally by multiple receivers (*DFC v Samuel*, followed in *NEC v Lockhart*) and those who consider that such powers are exercisable *only* jointly (*Kendle v Melsom*), lest chaos result.

LIKELY CONFLICT

... where multiple receivers are appointed by *different* lenders, there is an inherent likelihood of conflict, which arises from the special nature of receivership.

COMMENTARY

Rimer J found support for the conclusion that multiple receivers could in principle exercise their powers severally from the Commonwealth authorities cited above, although he recognised that each debenture raised its own questions of construction. He further acknowledged that such authorities did not provide direct assistance as to whether multiple receivers appointed by different creditors could exercise their powers severally. It is submitted that the limited assistance of the Commonwealth authorities flows from the fact that where a single lender appoints multiple receivers, the receivers have a *common* interest. This is acknowledged by the following dictum of Kirby P in *NEC v Lockhart* (above, at 526), supporting his view that multiple receivers could exercise their powers severally:

'As the debt said to be outstanding (nearly \$8 million) indicates, the task of receiving and managing the property of the company, the subject of the charge, could be a

substantial one. In the practical commercial context in which the debenture charge was drawn, the parties should be taken to have envisaged the possible need of a number of receivers and managers, any one of whom could not be expected to have done everything for himself. In the large company collapses which have so marked the Australian corporate scene in recent years, it has not been unusual for the Supreme Court to appoint a number of receivers empowered to act severally, pursuant to the power provided under the Companies (New South Wales Code) 1982 s. 373(8). Signing cheques, executing documents and otherwise managing the affairs of the company may be performed more expeditiously if those functions may, where appropriate, be performed severally. A requirement that they should all be done jointly, no matter how trivial, mechanical or routine would impose upon multiple receivers an unwieldy necessity of undivided common action which would wholly (or substantially) frustrate the very purpose apparently contemplated by the provision of the power to appoint a multiplicity of receivers and managers. In

practical terms, the receivers and managers will generally be members of a single firm of accountants. They will decide amongst themselves an efficient and economic way of dividing responsibility acting severally where that is suitable and jointly where that is thought to be appropriate.'

However, where multiple receivers are appointed by different lenders, there is an inherent likelihood of conflict, which arises from the special nature of receivership. In particular, the administrative receiver owes duties to a wide range of parties, including a primary duty to his appointor. Further, the receiver's appointor is not required to consider the interests of rival creditors in making an appointment, subject to some qualification in the debenture, provided that he acts in good faith (*Shamji v Johnson Matthey Bankers Ltd* [1991] BCLC 36 and *Re Potters Oils Ltd (No 2)* [1986] 1 WLR 201).

It may be argued that the judge's findings relating to multiple receivers are

decisions on foreign law and are therefore findings of fact not binding on English courts (see, e.g. *Lazard Bros & Co v Midland Bank* [1933] AC 289). Further, there will be those who argue that Rimer J's decision is based on a particular debenture, which itself raised a number of points on construction. Nevertheless, there will be some who argue that, given that Rimer J accepted that Zambian law was essentially the same as English law, the effect of this decision is that English law recognises that:

- (1) multiple receivers may be appointed by different lenders; and
- (2) such receivers may exercise their powers severally.

The full effects of this decision remain to be seen. 

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