
Mortgagees and Receivers. A Duty of Care Resurrected and Extended
Author(s): L. S. Sealy
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MORTGAGEES AND RECEIVERS—A DUTY OF CARE RESURRECTED AND EXTENDED

WHEN a chargee (a term which we can take for present purposes to include a mortgagee) appoints a receiver or takes other steps to enforce his security, the general rule is that self-interest prevails, so that neither he nor his receiver is required by the law to have any great concern for the interests of the chargor or any other person interested in the equity of redemption (such as the holder of a junior-ranking security) or a guarantor of the chargor's obligations. This is well illustrated by *Shamji* v. *Johnson Matthey Bankers Ltd.* [1991] B.C.L.C. 36, C.A. (a chargee is under no duty towards the chargor in deciding whether to appoint a receiver), and *Gomba Holdings U.K. Ltd.* v. *Homan* [1986] 1 W.L.R. 1301 (a receiver's duty of confidentiality vis-à-vis the chargee prevails over his duty to give information to the chargor).

The decision of the Privy Council in *Downsview Nominees Ltd.* v. *First City Corporation Ltd.* [1993] A.C. 295 is generally understood to have buttressed this view by restricting the duties of a chargee and his receiver to an obligation to act in good faith and a duty to use their powers for proper purposes—both duties being equitable in origin. The Privy Council categorically denied that this

was an area where any common-law duty of care based on *Donoghue* v. *Stevenson* [1932] A.C. 562, H.L., or *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, H.L., could be owed. Their Lordships were obliged, however, to add one qualification: the case of *Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.* [1971] Ch. 949, C.A., they said, "is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price, but is no authority for any wider proposition".

The Court of Appeal in *Medforth* v. *Blake* [1999] B.C.C. 771 has now shown itself in no mood to follow the Privy Council down this road. The duty of care is alive and well, and is not confined to the conduct of the sale of the charged property.

Mr. Medforth was a pig-farmer in a substantial way of business, with an annual turnover of over £2 million. He had given charges over the business assets to his bank under the Agricultural Credits Act 1928, which we can regard as being all in all material respects equivalent to floating charges created by a company. In 1984 the bank put in receivers, who ran the business (at first at a profit, but later less successfully) until 1988, when Medforth was able to make new financing arrangements and the receivers were discharged. A year later, he brought these proceedings against the receivers alleging various breaches of duty, but by the time of the hearing only one remained in issue. This was an allegation that they had failed to request or obtain discounts on the feedstuffs bought for the pigs (which, as Medforth had frequently reminded them, was normal commercial practice). As the annual feed bill was some £1.2 million and the discounts available were between 7 and 10 per cent, the amount involved was substantial. He claimed that in failing to seek and obtain the discounts the receivers had been in breach of a duty of care owed to him, either at common law or in equity.

Both the trial judge and the Court of Appeal, on a preliminary point of law, held that there was a such a duty, over and above the duty of good faith (and/or proper purposes) which was central to the *Downsview* ruling. The judge had treated this duty—to manage the business with the standard of care of a reasonably competent receiver—as being incidental to the *Cuckmere* duty to use care in exercising a power of sale; but the Court of Appeal held that it was an independent duty, and said also that other duties might be owed in the circumstances of any particular case. The door is thus open—although maybe not the floodgates—to the extension of such a duty in a wider range of circumstances than was contemplated in *Downsview*. Scott V.-C. (who gave the only judgment) suggested that a failure to feed and water the pigs properly, or to inoculate

them in accordance with normal farming practice, might also give rise to liability, as no doubt would careless conduct which led to insurance on the charged property being invalid (*Re D'Jan of London Ltd.* [1993] B.C.C. 646).

Few would dispute that the receivers were rightly held to owe a duty of care on these facts. (An alternative case might, however, have been made that to have acted in reckless disregard of the chargor's interests, as the receivers seem to have done, was inconsistent with a duty of good faith.) It is not easy, however, to accept the rather casual reasoning upon which their Lordships' conclusion is based. Anything based on the common law having been given the thumbs-down by *Downsview*, Scott V.-C. was content to say that the duty of care "might as well ... be referred to as a duty in equity". On the strength of this, an award of damages could be decreed, without so much as blinking an eyelid. A duty of care, owed in equity, between parties not in a fiduciary relationship, leading to an award of damages? This is unfamiliar territory for those of us brought up on *Maitland* and *Ashburner*. One awaits the acerbic comments in the next edition of *Meagher, Gummow & Lehane* with eager anticipation. Equity, we now acknowledge, does recognise a duty on the part of a fiduciary to pay compensation to his beneficiary in limited circumstances, and it does, of course, have power to award damages in lieu of specific performance, etc.; but a self standing equitable duty of care remediable in damages is a novelty—surely, tort masquerading under a false label.

It would have been entirely appropriate to use (and, if necessary, develop) the familiar concepts of common-law negligence to deal with this situation, building on *Cuckmere* and reviving *Standard Chartered Bank* v. *Walker* [1992] 1 W.L.R. 1410, C.A. (where Lord Denning M.R. spelt out the duty of a receiver towards the debtor's guarantor entirely on a common-law basis). Even so, there could be pitfalls ahead. A duty of care towards these other parties sits easily enough alongside a primary duty to the chargee where there is no potential conflict between the two. But (to return to the theme in our first paragraph), if there is even a hint of such a clash, the interests of the chargee have always to be paramount.

L.S. SEALY