

RECEIVERSHIPS AND LIQUIDATIONS

If you run a business then receivership and liquidation are two words you most probably don't want to hear. Mainzeal shareholders and its creditors have recently learnt this. But they are a fact of business life and the legal issues linked to them need to be explored.

A receivership is different than a liquidation.

In a receivership, the assets of the company are sold or realised for the benefit of the secured creditor who asked the receiver to step in.

Although it is common for the secured creditor to agree terms with its own receiver, receivers can be appointed by the Court.

The purpose of receivership is to repay the secured debt, so a receiver's obligations are primarily to that party alone. Receivers do not make distributions to unsecured creditors.

If a receiver holds surplus funds, these are returned to the company or paid to a liquidator to distribute.

Unsecured creditors in a receivership need to apply to the Court for a liquidator to be appointed. A liquidator cannot take control of secured assets until the secured party has been repaid under the receivership.

In a liquidation the assets are realised for the benefit of all creditors, secured and unsecured, in order of priority: secured creditors, employees and IRD get their money first.

A liquidation can be voluntary (i.e. through a shareholders' resolution) or compulsory, where a statutory demand served on the company by a creditor is not met, and the court then appoints a liquidator.

Although the liquidator has control of the assets, he/she holds them on trust for the creditors.

The liquidator will prepare a statement of the company's position and report to creditors. The liquidator will also decide whether or not to continue to trade. The liquidator will be personally liable for any debts incurred through trading whilst the company is in liquidation.

A liquidator can call a meeting of creditors. But this is not necessary if the liquidator determines the assets of the company do not require it. A creditor can ask for a meeting, if the liquidator doesn't call one.

Once the liquidation is complete, the company is removed from the register.

It is not unusual for a company in receivership, but not in liquidation, to keep trading once the secured debt is repaid.

A liquidator has the power to require a director or shareholder to deliver documents of the company as the liquidator requires. A liquidator also has the power to demand such persons to provide the liquidator with information about the company. It is an offence to refuse to do this.

A common issue in liquidations is voidable payments.

If the liquidator considers that a payment by the company to a creditor has given them preference over other creditors, then the liquidator may ask for it to be repaid.

To prevent a repayment, the creditor must be able to show that it acted in good faith; and could not reasonably have suspected that the company was or would become insolvent; and gave value for the property or altered its position in the reasonable belief that the transaction would not be set aside.