

Purchasing Property from a Receiver? Look before you leap!

Every now and then you may represent a client who seeks to purchase assets from a company under Receivership. It is usually a “good” deal because the price is often discounted. It is however a clear case for “buyer beware” and I am sure you know why. These assets may be landed property or plant/machinery or both. This article uses a case study of a particular transaction and highlighting some of the key issues as pointers for Solicitors in future transactions.

Facts:

The client (company X) was interested in purchasing property from a company under Receivership. The client was purchasing a built up factory premises covered by a Certificate of Occupancy together with the plant/machinery on the premises. The Receiver had been appointed by the Trustees under a Mortgage Trust Deed and the Receiver had made an offer for sale to the client.

How do we proceed?

1. Review the Trust Deed

Review the Trust Deed extensively to be abreast of the following: Does the Trust Deed cover the property up for sale? Is there provision for appointment of a Receiver? Who has Power to appoint the Receiver? Do any of the parties have a power to sell without appointing a Receiver? Are there other parties to the Trust Deed? Who are they what are their rights? Is consensus required by all the Lenders? Has the right to foreclosure been duly exercised?

2. Put an eye on the Receiver

Review a copy of the Deed of Appointment of the Receiver to see that: the appointment was valid; Appointers can validly appoint; Receiver is legally appointed; trust deed is complied with; the power to sell was duly granted and still valid and it covers the property in question. Do not forget to check that the Deed of appointment of the Receiver is duly executed and registered at the Corporate Affairs Commission.

3. Conduct Title Searches

The fact that the Receiver has power to sell and the appointment was legal does not mean that the property is free from encumbrance. The Receiver may be acting under a false impression that the company has legal title to these assets. You need to conduct the usual investigations on landed property at the relevant lands registry. Where the assets include plant and machinery check the asset register of the company, review the purchase documents or proof of ownership.

4. Conduct Corporate Searches at CAC

Always remember that the Receiver is dealing on behalf of the company. The company has not been liquidated but is only under Receivership. It would therefore be necessary to confirm the status of the company to ensure that nothing prejudicial to the sale is registered at the Corporate Affairs Commission. For example an existing debenture on the fixed and floating assets registered in favour of a third party should give cause for concern. Any limitation to the sale would not be cured by the Receivers appointment. The Receiver can only sell what the company could have rightfully sold.

5. Draft the necessary documents.

Typically you would be drafting a Deed of Sale for the plant/machinery and other tangible assets, whilst the land/buildings would be transferred by a Deed of Assignment. You may require other documents depending on the nature of the transaction and the protective mechanisms required.

What were the major issues and how were they tackled?

1. The Receivers appointment had expired.

We requested the Trustees to renew the appointment before we could proceed with the deal. To save time we simply requested for a Deed of Appointment and continued with the deal but being careful to ensure that the Deed of Appointment was dated and filed at the Corporate Affairs Commission before the other documents were dated.

2. How is the client protected in the interim before the Governors consent is obtained?

Legally a sale is not complete until the Governors consent has been obtained. In essence if the Mortgagor company challenges the sale before the consent is obtained it may be anybody's case if all the buyer has is a Deed of Assignment. However a contract for sale is a binding contract between the receiver and the purchaser which not only binds the receiver but forecloses the mortgagors' right of redemption. Therefore in addition to a Deed of Sale (for the plant/machinery and a Deed of Assignment (for the Land), a Contract for Sale of both the landed property and the other assets is of the essence.

3. Who are the proper parties to the agreement?

Are the Agreements between the Purchaser and the Receiver in his capacity as receiver or between the Purchaser and the company (with the Receiver signing in the stead of the company) or with the Trustees who are the actual principals of the Receiver. A tripartite agreement between the Purchaser, the Trustees and the Receiver is best suited in many circumstances. In this case the rationale was simply that it was better to have an excess of parties than make the mistake of choosing the wrong party. Also legally the Trust Deed empowered the Trustees to sell without recourse to a Receiver and provided for the appointment of a Receiver. Which meant any of them could sell.

Finally with an Indemnity clause in the purchase agreements you would be safer with the Trustees being a reputable Institution as a party to the Indemnity.

4. A search at the land's Registry revealed outstanding Ground Rent owed on the property. We negotiated that the outstanding of about N2 Million be deducted from the purchase price.
5. We discovered that the original title documents to the property were lost. The fear here was that the documents may have been used to create subsequent charges on the property or otherwise adversely affect our client's title to the property. The trustees confirmed that it got lost in their possession. We then requested for and got a sworn affidavit of loss from the Trustees as well as a separate indemnity to cover any eventualities that may arise from the loss of the title documents.

Other learning curves

1. It is not unusual that the company in Receivership would have been moribund for a while. In such a situation certain recurrent bills accumulate e.g ground rents, nepa bills, and other rates and charges. The Receiver would usually be more interested in the sale of the assets than these recurrent bills, particularly if he is not acting as a Receiver/Manager. If you spot these unpaid bills in good time you should negotiate a set off from the purchase price.
2. It is not unusual the assets being purchased may never have been insured or the Insurance may have expired. It is advisable to check the status of the insurance because the client should purchase a property with a valid insurance cover. Why? What if the night he signs the contract there is a fire outbreak that adversely affects the assets? Do not rule out sabotage - particularly if the Receivership was a hostile take over. After such a fire the issues will then be whether risk has passed and who suffers the loss. A valid insurance takes care of these issues one way or another.
3. Companies in receivership are usually subject of pilfering and side sales by different parties including the receiver. It would be in the purchaser's interest to have a physical all parties' inspection of the assets for any discrepancy with the list on offer. Often what you buy on paper may not be there when you get into the premises. Do not forget that the list is to be attached as a schedule to your Deed of Sale.

In conclusion all one can say is - Look before you leap!

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