

Corporate Recovery

# Merrow Limited: Validity of Appointment of Receiver

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## Merrow Limited: Validity of Appointment of Receiver

A recent judgment of the High Court indicates that a narrow approach is being taken to the interpretation of security documents.

A strong message has been given this year to banks attempting to enforce their security by the appointment of a receiver.

### Strict Compliance Required

In *The Merrow Ltd v. Bank of Scotland Plc & Anor* [2013 IEHC 130] it was emphasised that a receiver's appointment may not be valid unless it is made in strict compliance with the terms of the underlying security documents.

Furthermore, where one deed of appointment is found to be void this case may serve as a precedent for any further appointments to the same premises and/or business being void if it is not possible for them to operate independently of each other.

### Main Points Highlighted

The principal findings made by Mr Justice Gilligan were:

1. The appointment of a receiver by writing under hand is only permissible under s. 24(1) of the Conveyancing and Law of Property Act 1881 if not expressly excluded by the security documents.
2. Where the appointment is expressly required to be made under seal (and the ability to make it by writing under hand is excluded) this must be complied with even if to do so would breach of the Memorandum and Articles of Association of the appointing institution.
3. Where two appointments are made over the same premises and/or business under separate security documents, and one of those appointments is found to be void, the second appointment may also be void on the basis it is "inextricably intertwined" with the other.
4. Failure to object to the appointment of a receiver is not alone sufficient to prevent a challenge to its validity at a later date for delay. This is particularly in circumstances where the debtor has taken no specific action to confirm its acquiescence and no irrevocable legal steps have been taken by the receiver.

### Potential Implications for Joint Receivers

Gilligan J. also made reference to an Australian case of *Wrights Hardware v. Evans* [1988 13 ACLR 631] where it was held that the appointment of more than one receiver "jointly and severally" was invalid as, despite the underlying security containing an express power to appoint two receivers, it did not provide for such appointments to proceed on a joint and several basis.

Accordingly, it appears that the Courts may favour a narrow approach to the interpretation of security documents. Banks should, therefore, be mindful to comply strictly with the terms of their existing security documents in effecting appointments and also be as specific as possible in drafting the provisions of new security documents concerning the appointment of joint receivers and the exercise of their powers.

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