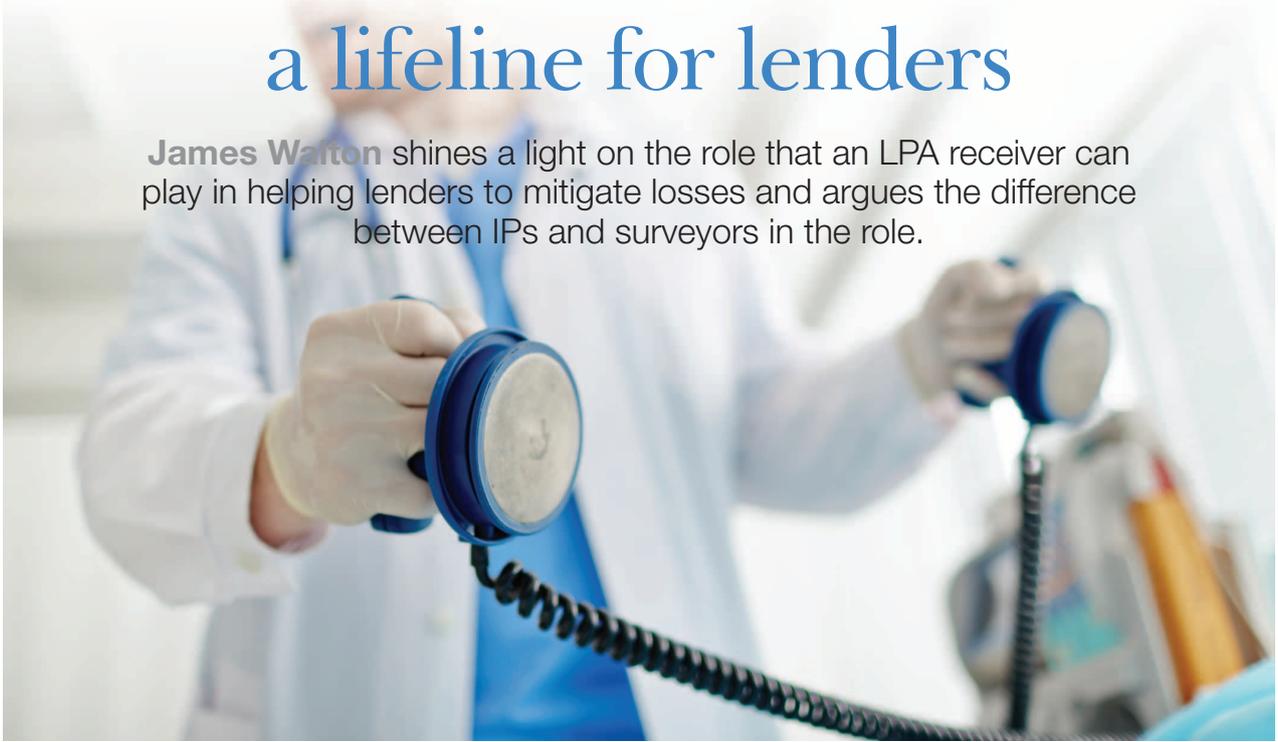


The LPA receiver: a lifeline for lenders

James Walton shines a light on the role that an LPA receiver can play in helping lenders to mitigate losses and argues the difference between IPs and surveyors in the role.



The genesis of this article was conceived a long time before the *annus horribilis* of 2020. Like many lawyers working in the world of real estate debt, my caseload was no longer spent working on shiny new loans; I was starting to see a number of defaulting loans and distressed situations hit my desk and it was becoming clear that certain real estate lenders were heading for some choppy waters. The number of lenders in the market, chasing both volume and margin, was unprecedented. It was impossible to keep up with the number of bridging lenders launching into the market. Some lenders had already failed, and a busy few years lay ahead for restructuring lawyers, IPs and other professionals working in the 'distressed' real estate loan space. An idea emerged to write an article on the role of the LPA receiver, both to remind and educate on this useful tool for lenders as they faced an interesting few years ahead. And then Covid-19 hit.

What happens to the real estate finance market from here on is anyone's guess, but what is clear is that, as was the case following the 2008 financial crisis, LPA receivers will have a huge role to play in helping lenders to mitigate their losses.

The role of the LPA receiver

An LPA receiver is a receiver appointed either under the Law of Property Act 1925 or under an express power contained in a mortgage (in the latter case, the receiver is

in fact a fixed charge receiver rather than an LPA receiver but in practice is often still referred to as an LPA receiver). The concept was introduced as a remedy for lenders where a borrower falls into arrears or is otherwise in breach of their loan terms. Where the borrower is so in default, the lender, provided it has been granted a valid fixed charge over the property, is able to appoint an LPA receiver to manage the property, sell it and apply the realisations towards the repayment of the sums secured under the charge.

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The legal nature of the LPA receiver's role is a curious one. Although appointed by the mortgagee/chargee, and despite the receiver owing its main duties to, and being required to act in the best interests of, the appointing lender/mortgagee, the LPA receiver does in fact act as an agent of the borrower. This agency position allows an LPA receiver to exercise control of a property without incurring any personal

liability. This creates a powerful tool for lenders. Provided the LPA receiver acts within the scope of the powers given either under the Act or in the legal charge, the LPA receiver will not be personally liable for any actions taken and it is the LPA receiver's principal (ie the borrower) who is accountable. This is preferable to the lender itself taking possession and assuming unwanted liabilities, for example, environmental liabilities or maintenance and repair obligations under a lease.

Appointing an LPA receiver effectively creates a protective buffer between a lender and these risks. Alongside this obvious attraction, appointing a receiver can be a quick and cost-effective way to enforce security. It is not a court process and formal insolvency proceedings are not required.

Who to appoint?

Rather unusually, there are no special requirements imposed by law with regard to who can act. Subject to a few exceptions, anybody can act as an LPA receiver, but that person is usually either an IP or surveyor with receivership experience. Although not essential, lenders usually require their appointees to be registered property receivers (under the Registered Property Receivers Scheme) and fellows of Nara, the Association of Property and Fixed Charge Receivers.

So are there any advantages to appointing an IP as an LPA receiver, rather than a surveyor; and vice versa?

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Unsurprisingly, the view changes depending upon who you ask. Those in the ‘IP as receiver’ camp argue that they provide a more independent and transparent solution for lenders that will leave them less open to challenges from their borrowers. In particular, when it comes to selling the property and being seen to achieve best price (which unsurprisingly is the most common challenge made by a borrower), the IP-receiver can competitively tender for the role of the selling agent; they are not duty bound to use an in-house agency team (often, but not always, the case when a surveyor-receiver is appointed) and they can therefore challenge the agent in a way that ensures that best price for the asset is obtained. As David Shambrook, partner at FRP Advisory, explains: *‘There are a number of benefits to a lender of appointing an IP as a receiver, rather than a surveyor, but a key one for me is ensuring that the right team is in place for creating and then implementing the workout strategy; the independence that an IP brings to the table is vital.’*

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Those in the ‘surveyor as receiver’ camp argue that they provide a more cost-effective solution, generally charging lower fees than IPs, and being less reliant upon having to outsource property-specific advice to third-party property professionals. They argue that where the workout strategy is a purely property-focused one, that should be dealt with by

an experienced property professional, not an insolvency professional. James Bannister, head of CRE financial solutions at loan servicer Mount Street, believes that a receiver having a real estate or surveying background is key: *‘An IP will only ultimately have to seek the advice of a real estate professional and so runs the risk of adding time and costs to a process that a chartered surveyor can provide a lot quicker. For a lender, in my experience, it makes sense to appoint a receiver with a surveying background in order to ensure that all the possible avenues of recovery from the hard real estate assets are optimised.’*

On the thorny issue of whether a surveyor-receiver can prove to be a more cost-effective solution than an IP-receiver, Daniel Richardson, partner at CG&Co and joint administrator of failed peer-to-peer lender Funding Secure observes: *‘I think it is a misconception that IPs acting as receivers are more costly than surveyors acting as receivers. On the Funding Secure loan portfolio, through a combination of pre-existing surveyor-receiver appointments and post-administration IP-receiver appointments, there is no marked difference in the cost of one professional versus the other. The key is getting the right professional for the right job.’*

When challenged on the question of independence in engaging other members of the same surveying practice to provide necessary services, whether it be planning, letting, valuation or sales, the surveyor-receiver will argue that, provided that they can demonstrate that the ‘team’ engaged is best in class, it matters not if that team comprises other professionals within the same practice as the surveyor-receiver.

There are many other arguments both for and against engaging each type of professional, but what is clear is that there is no ‘one-size-fits-all’ approach; each situation needs to be assessed on its own facts and the lender should carefully consider what skills sets are required to best maximise their recoveries. This is never truer than when considering whether to engage an administrator to operate alongside an LPA receiver.

Administration or LPA receivership – or both?

Where a lender has the benefit of both a qualifying floating charge and a fixed charge, and it has been decided that enforcement action is the necessary (perhaps only) option, the question arises as to whether the lender should appoint an administrator or LPA receiver. Depending upon the particular situation faced, the answer could quite conceivably be both.

There are many differences between the role of the administrator and the role of the LPA receiver, the key difference being that an administrator is empowered with taking full control of the company’s assets, while an LPA receiver will only be appointed in respect of a specific charged asset. Where a lender’s security comprises a floating charge over the company’s assets as well as a fixed charge over a property,

engaging an administrator to sit alongside an LPA receiver (which is legally possible, if the administrator consents to the appointment of the LPA receiver) can provide an effective solution for a lender. The LPA receiver can be left to focus on managing the property asset, collecting rents and ultimately disposing of the asset, in the knowledge that the moratorium created by this ‘administration wrapper’ is in place. The administrator will then have a more limited role insofar as the property is concerned but is able to focus on any other recovery routes that may exist in order to maximise the returns for the creditors as a whole (including the secured lender), which could include utilising the administrator’s powers to investigate antecedent transactions, misfeasance actions or wrongful trading claims. Even if the administrator did want to realise the property asset, there could be circumstances where it is beneficial for an LPA receiver to do so. For example, the receiver will usually be entitled to sell the asset free of any interest or security created over the asset in breach of the terms of the legal charge (called overreaching).

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There is clearly a place for both surveyors and insolvency practitioners to work together in many situations. As Fergus Jack, a surveyor-receiver and partner at CBD Urban explains: *‘In situations where lenders can look for recoveries outside of the primary property enforcement route, we have seen good use of a two-pronged approach, where an IP can pursue “corporate recoveries” utilising their powers under the Insolvency Act, allowing the fixed charge receiver to work out the real estate. As surveyors who have worked with IPs regularly, we’ve never felt hindered by working with another adviser to create this two-pronged approach and provide the best solution for the client.’*

I will leave the last word to Fergus, who hits the nail on the head as to a crucial element that I have hitherto not touched on in this article: *‘Regardless of who is appointed, what is critical is having clear, timely and, most importantly, commercial legal advice to steer home the workout.’* I concur. □



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