

Creditors' Remedies

1. RECEIVERSHIPS	1
Introduction	1
Appointment of receivers	1
Challenge of appointment	2
<i>No default</i>	2
<i>Disqualification of appointee</i>	2
<i>Form of appointment</i>	3
<i>Non-compliance with appointment procedure</i>	4
<i>Appointment in bad faith</i>	6
<i>Oppression</i>	6
<i>Waiver</i>	7
<i>Set-off</i>	7
Removal of receiver	8
Consequences of invalidity of appointment	9
Powers of a receiver	9
Duties of receivers	10
<i>Good faith</i>	10
<i>Duty on realisation of assets</i>	10
<i>Duty when trading on</i>	11
Liabilities of receivers	11
<i>Contractual liabilities</i>	11
<i>Liability on sale of assets</i>	13
<i>Liability for reckless trading</i>	14
<i>Liability for detention or conversion of third party property</i>	15
<i>Other legal exposures</i>	15
Relationship with other creditors	17
<i>Retention of title creditors</i>	17
<i>Landlords exercising distraint</i>	17
<i>Execution creditors</i>	18
<i>Preferential creditors</i>	18
<i>Subsequent debenture holders</i>	19
<i>Liquidators</i>	19
<i>Custody of company property</i>	20
<i>Custody of books, records or documents</i>	20
Power to conduct legal proceedings	20
Hiving down	20
<i>Monopoly suppliers</i>	21
Court-appointed receivers	21
<i>Jurisdiction</i>	21
<i>Grounds of appointment</i>	22
<i>Applicants</i>	23

<i>Status</i>	23
<i>Powers</i>	24
2. MORTGAGEE REMEDIES	25
Introduction	25
Default by mortgagor	26
<i>Notice – s 92(1) of the Property Law Act 1952</i>	26
<i>Acceleration</i>	27
<i>Statutory time period allowed</i>	27
<i>Nature and extent of default: fully particularised notice</i>	28
<i>Service: On whom and how?</i>	29
<i>Conditional agreements and early advertising</i>	32
<i>Service of notice on subsequent mortgagees</i>	32
<i>Section 90 notices: calling up after mortgage has run overdue</i>	33
<i>Section 92(6): Restriction of mortgagee exercising rights against persons other than mortgagor</i>	33
<i>Waiver and estoppel</i>	34
<i>Receivers and debentures</i>	36
<i>Summary of s 92 issues</i>	37
Mortgagee in possession	38
<i>Notice</i>	38
<i>Obtaining physical possession</i>	39
<i>Receivers</i>	40
<i>Action for possession</i>	41
<i>Obligations of mortgagee in possession</i>	41
Mortgagee sales	44
<i>Modes of sale</i>	44
<i>Duty of care</i>	45
<i>GST</i>	51
<i>Particulars and conditions of sale</i>	53
3. INTERIM LIQUIDATION	55
Introduction	55
Jurisdiction	55
Principles relating to appointment	56
<i>Relevance of existing case law</i>	56
<i>Pre-conditions</i>	56
<i>Valid liquidation proceedings</i>	57
<i>Necessary or expedient</i>	57
<i>Preservation – the primary function</i>	59
<i>Urgency</i>	59
Applicants	59
Appointees	59
<i>Official Assignee</i>	59
<i>Independence</i>	60
<i>Remuneration</i>	60

<i>Agents</i>	60
<i>Powers of interim liquidator</i>	61
<i>Costs and remuneration of interim liquidator</i>	62
<i>Inter-relationship with secured creditors</i>	62
<i>Inter-relationship with directors</i>	63
4. PRE-JUDGMENT REMEDIES	65
Introduction	65
High Court	65
<i>Mareva injunctions</i>	65
<i>General</i>	65
<i>Procedure</i>	66
<i>Full and frank disclosure</i>	66
<i>Requirements for obtaining a Mareva injunction</i>	67
<i>Third parties</i>	70
<i>Living and legal expenses</i>	71
<i>Discharge and variation of a Mareva injunction</i>	71
<i>Comparison between Mareva injunction and other preserving orders</i>	71
<i>Summary – some practical points</i>	72
<i>Preservation of property orders – r 331</i>	73
<i>General</i>	73
<i>Procedure</i>	74
<i>Requirements</i>	74
<i>Meaning of "fund"</i>	76
<i>Third parties</i>	76
<i>Discretion</i>	77
<i>Anton Piller orders</i>	77
<i>Pre-judgment charging orders</i>	78
<i>General</i>	78
<i>Key principles</i>	78
<i>Procedure</i>	79
<i>Requirements</i>	80
<i>Recision</i>	81
<i>Pre-judgment charging order over land</i>	81
<i>Pre-judgment charging order over property other than land</i>	81
<i>Arrest of absconding debtors</i>	82
<i>Section 55 of the Judicature Act 1908</i>	82
Insolvency	82
<i>Section 63 of the Insolvency Act 1967 – Arrest of debtor</i>	83
<i>Section 64 of the Insolvency Act 1967 – Seizure of debtor's assets</i>	83
District Court	84
<i>Mareva injunctions</i>	84
<i>Section 109 of the District Courts Act 1947 – Arrest of debtor</i>	84
5. LIQUIDATION	85
Introduction	85

Grounds for liquidation	85
<i>Inability to pay debts</i>	86
<i>Presumptions</i>	86
<i>Other evidence</i>	86
Statutory demands	87
<i>Form and content</i>	87
<i>Service of a statutory demand</i>	88
Liquidation procedure	89
<i>Timing</i>	89
<i>Applicants</i>	89
<i>Pleadings</i>	89
<i>Place of filing</i>	90
<i>Service</i>	90
<i>Advertising</i>	91
<i>Proof of indebtedness</i>	92
<i>Parties in support/opposition</i>	92
<i>Addition/substitution</i>	92
<i>Interlocutories</i>	93
Applications to set aside statutory demands	94
<i>Debt disputed</i>	95
<i>Counterclaim/set-off</i>	95
<i>Demand set aside on other grounds</i>	96
<i>Additional powers of Court</i>	98
<i>Abuse of statutory demand procedure</i>	99
Opposition to liquidation proceedings	99
<i>Statement of defence</i>	99
<i>Appearance in opposition</i>	100
<i>Application for stay of proceedings</i>	100
<i>Beneficial to the general body of creditors</i>	101
Duties and liabilities of liquidators	103
<i>Duties of liquidator</i>	103
<i>Enforcement of liquidator's duties</i>	103
Liquidators' powers	104
<i>Power to obtain information and records</i>	104
<i>Powers regarding liabilities and obligations</i>	105
Voidable transactions	105
<i>Objective</i>	105
<i>Overview</i>	106
<i>Definitions</i>	106
<i>Defences</i>	107
<i>Proposed reforms</i>	107
Power of Court to require persons to repay money or return property	108
<i>Director defined</i>	108
<i>Shadow director</i>	109

<i>Exemption for professional advisers</i>	109
<i>Relevant statutory duties of directors</i>	110
<i>Reckless trading under s 135</i>	111
<i>Duty in relation to obligations – s 136</i>	112
<i>Potential claimants</i>	113
<i>Action by creditors</i>	113
<i>Relief against directors</i>	114
<i>Litigation funding</i>	115
Preferential claims	116
<i>Overview</i>	116
<i>Proposed reform</i>	117
<i>Set-off</i>	117
6. BANKRUPTCY	119
Introduction	119
Overview	119
When is bankruptcy available as a remedy?	120
<i>Acts of bankruptcy</i>	121
<i>Section 19(1)(d) – the bankruptcy notice</i>	122
<i>Attempting to defeat creditors – section 19(1)(b), (c), (e), (j)</i>	126
<i>Failed execution – section 19(1)(g), (h), (i)</i>	127
<i>Miscellaneous acts of bankruptcy – section 19(1)(a), (f) and (k)</i>	127
The bankruptcy petition	128
<i>General</i>	128
<i>Powers of Court on petition</i>	129
Effects of bankruptcy	131
<i>Loss of property</i>	132
<i>Loss of autonomy</i>	132
<i>Effect on third parties</i>	134
<i>Trust property</i>	135
<i>Annulment and discharge</i>	135
Alternatives to bankruptcy	135
<i>Summary instalment orders</i>	136
<i>Part XV proposals</i>	137
<i>Part XII compositions</i>	139
Voidable preferences and the doctrine of relation back	139
<i>The doctrine of relation back</i>	140
<i>Voidable preferences</i>	141
Ministry of economic development: key shortcomings of personal insolvency law and recommendations for reform	144
<i>Objectives</i>	144
<i>Defining bankruptcy</i>	144
<i>Incentives for early intervention</i>	145
<i>Existing regime not appropriate in all cases</i>	146
<i>Debtors with assets</i>	146

<i>Debtors without assets</i>	147
<i>Discharge</i>	147
<i>After discharge</i>	148
7. CORPORATE COMPROMISES	149
Introduction	149
Part XIV of the Act	149
<i>Compromise defined</i>	149
<i>Proponents</i>	150
<i>Procedure</i>	150
<i>Circumstances in which a creditor not bound</i>	151
<i>Effect of compromise if company in liquidation</i>	152
Part XV of the 1993 Act	152
<i>Definition of "arrangement"</i>	152
<i>Overriding jurisdiction of Part XV</i>	153
<i>Application for initial orders</i>	155
<i>Resolutions</i>	156
<i>Classes</i>	156
<i>Dissent rights</i>	157
<i>Audience rights at application for final orders</i>	158
<i>Application for final orders</i>	159
8. POST-JUDGMENT REMEDIES	163
Introduction	163
Enforcement in the High Court	163
<i>Charging orders</i>	163
<i>Writs of possession and writs of sale</i>	167
<i>Writs of arrest and writs of sequestration</i>	168
<i>Examination of debtor</i>	169
Enforcement in the High Court in accordance with the Insolvency Act 1967	170
Enforcement in the District Court	170
<i>Charging orders</i>	170
<i>Distress warrants</i>	171
<i>Examination of debtor</i>	171
<i>Arrest warrants</i>	172
<i>Attachment orders</i>	172
<i>Contempt procedure</i>	173