

	SHARE APPROPRIATION	FIXED CHARGE RECEIVERSHIP
<i>Purpose of option</i>	Appropriate shares to reduce secured obligations owing (auto. £ for £ reduction)	Defend security taker's interests in shares (sale in open market / credit bid)
<i>Does security need to be registered?</i>	No	Yes
<i>Wider creditor approvals needed?</i>	Subject to finance documents / ICA	Subject to finance documents / ICA
<i>Proceeds waterfall</i>	Security taker only (subject to ICA) – surplus returned to borrower	Security taker, only (subject to ICA) – surplus returned to borrower
<i>Can shares move into immediate control of a delegate?</i>	Yes (if provided for in security document) <sup>1</sup>	Yes (that is the nature of receivership)
<i>Can security taker discharge valuation duty by appointing a third-party valuer / receiver?</i>	No <sup>2</sup> (duty is always the lender's, not their delegate)	Yes (duty shifts onto the Receiver appointed <sup>3</sup> )
<i>Power to enforce contained in security documents and legislation?</i>	Yes (must be specifically set out in the share charge)	Yes
<i>Court order / hearing required?</i>	No	No
<i>Filing / notice obligations?</i>	No <sup>4</sup>	Companies House (RM01)
<i>When does valuation occur?</i>	Post-enforcement, when receiver <i>in situ</i>	In practice: pre-arranged valuation, prior to enforcement <sup>5</sup> .

1 The security taker (or the security agent or trustee under the finance documents) do not have to themselves take ownership of the shares – that can be delegated to an SPV or third party if that is provided for in the security documents themselves.

2 The valuation must be carried out both: in accordance with the terms of the arrangement (i.e. the fixed charge over shares) and "in a commercially reasonable manner".

3 Receiver's primary duty in exercising their powers of management is to try and bring about a situation in which the secured debt is repaid.

4 Beware wider regime rules for publicly traded shares: takeover, market abuse, and other notice or filing obligations should be explored in advance.

5 Can also occur post appropriation. If valuation takes place post-appropriation, this should not affect the appropriation action itself – the shares are by then no longer in the ownership of the security provider but are subject to valuation and pound for pound debt reduction.

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<i>Content of valuation duty</i>	The lender's method of valuation itself must be "commercially reasonable", but not the outcome of that method <sup>6</sup> .	Act in good faith, for proper purposes, and take reasonable care to obtain best price reasonably obtainable .
<i>Basis / methodology for valuation</i>	See security document, but must always be "commercially reasonable" <sup>7</sup> .	
<i>Duty to wait for market to rise before sale?</i>	No	No
<i>Security taker must conduct good faith valuation?</i>	No <sup>8</sup>	Yes (Receiver's duty) <sup>9</sup>
<i>Result of defective valuation – is sale then unwound / reversed?</i>	No <sup>10</sup>	Very rarely
<i>Security taker (lender) gains control of shares and voting (aka. lender 'self-dealing' in shares)?</i>	Yes (or any receiver or other delegate or SPV nominated)	No (Receiver controls shares and voting as lender delegate pre-sale)
<i>Can affect shareholder's / members' rights?</i>	Yes (can vote shares and replace boards)	Yes (receiver can vote shares and replace boards)

6 Much will depend on the probity of the third party valuer and the information made available to and sourced by them in the market. If the process was followed, that should be enough as (unlike in a fixed charge receivership) the duty is not to obtain the best price reasonably obtainable – it is rather to run a "commercially reasonable" process. However, if the value produced was less than might have been reasonably expected, that could imply that the valuation process itself was defective. On the other hand, if a valuation was not carried out in a commercially reasonable manner but nonetheless produced the same result as would have been achieved with a proper approach, the Court is unlikely to set aside the original valuation just to substitute the same figure. The Court further decided in *ABT v Aapico* that: the requirement for the valuation to be carried out in a commercially reasonable manner is an objective standard, meaning the security taker's views on commercial reasonableness are not relevant; and the question of what is commercially reasonable in any given case is fact sensitive.

7 Many security documents in the market will not specify the methodology for how a valuation is to be conducted – and the fact that a valuation method is set out may not always be enough – simply agreeing in advance that whatever methodology is set out in the charge is deemed by the parties to be "commercially reasonable" will not, after *ABT v Aapico*, mean the Court cannot still scrutinise the process.

8 There is no separate and independent requirement for a secured lender to act in good faith. It only has to act in an objectively commercially reasonable manner. However, even in cases where there is a range of valuation approaches that could be considered to be commercially reasonable, the security taker cannot deliberately adopt the approach that produces the lowest valuation or which otherwise suits them best.

9 Receivers owe a duty to act in good faith and for proper purposes (i.e. to preserve, exploit and realise the assets comprised in the security. Further, they owe two distinct duties (these do not require proof of bad faith): 1) to take reasonable care to obtain the best price reasonably obtainable; and 2) a secondary duty (subordinate to the receivers' principal duty to manage the security for the benefit of the secured creditor) to exercise care to avoid preventable loss.

10 In *ABT v Aapico*, it was shown that non-compliance with the valuation requirements does not of itself invalidate the appropriation. It may lead to the non-compliant valuation being set aside, and a new valuation substituted – with the security taker being liable for the valuation delta / with the secured obligations being reduced further on a £ for £ basis to reflect the higher value of the shares. Any surplus value to be returned to the security provider.

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<i>Security taker indemnity for receiver / delegate</i>	Deal specific (n/a if appropriated to self)	Deal specific
<i>Need for appointment of qualified insolvency practitioner?</i>	n/a	No (but in practice likely)
<i>Applies to shares charged by people and corporates?</i>	No (doesn't apply to shares charged by an individual)	Yes
<i>Share enforcement stayed by Administration moratorium?</i>	No <sup>11</sup>	Yes
<i>Share enforcement stayed by the Part A1 'rescue' moratorium under CIGA 2020?</i>	No <sup>12</sup>	Yes
<i>Receiver must vacate office on security provider's Administration?</i>	No <sup>13</sup>	Yes
<i>Administrator appointed to security provider can deal with the secured shares?</i>	No	Yes (with Court order)
<i>How are fees of receiver or security taker paid?</i>	Indemnity for lender in security document	From enforcement proceeds
<i>Exit from process</i>	Terminated on security taker's consent (and ends on liquidation)	Security is appropriated with immediate effect on day-1

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<sup>11</sup> Para 43(2) of Schedule B1 to the Insolvency Act 1986 (IA86) does not apply.

<sup>12</sup> Para 70 and 71 of Schedule B1 to the IA 86.

<sup>13</sup> Para 41(2) of Schedule B1 IA86 disapplied in context.