Clerk's Stamp:

COURT FILE NUMBER	1303 15731
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	RIDGE DEVELOPMENT CORPORATION
DEFENDANT	1324206 ALBERTA LTD.
DOCUMENT	**BRIEF OF LAW OF ROYAL BANK OF CANADA**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Ray C. Rutman Dentons Canada LLP 2900 Manulife Place 10180-101 Street Edmonton, AB T5J 3V5 Ph. (780) 423-7100 Fx. (780) 423-7276 File No.: 125665-8128/RCR

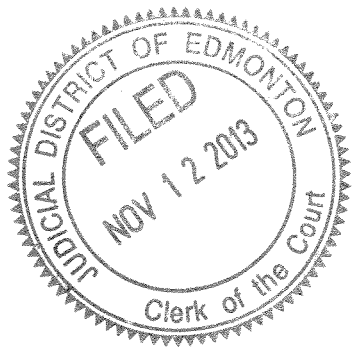

TABLE OF CONTENTS

I. INTRODUCTION

1. The defendant, 1324206 Alberta Ltd. ("132") is indebted to Ridge Development Corporation ("Ridge"), the applicant in these proceedings. Ridge applies to appoint Alvarez & Marsal Canada Inc. ("Alvarez & Marsal") as receiver and manager over the property, assets and undertakings of 132 including the Project (defined below) (the "Receiver").

2. Ridge owns one-third of the outstanding voting shares of 132 and is a creditor of 132.

   - Affidavit of John Barath sworn on November 4, 2013 (the "Barath Affidavit"), paras. 6, 17, 37 - 38.

3. 132 is indebted to Royal Bank of Canada ("RBC") on account of funds advanced by RBC as at October 6, 2013 in the amount of $28,026,326.59, plus interest, plus costs on a solicitor and his own client basis (the "RBC Indebtedness").

4. The RBC Indebtedness is secured and RBC has a first ranking priority position over all present and after acquired personal property and real property owned by 132.

   - The Barath Affidavit, para. 24

5. RBC supports Ridge's application to appoint Alvarez & Marsal as Receiver.

6. RBC understands that Prairie Western Development Corp., Academy Painting and Decorating Ltd., and Stratosphere Realty Group Ltd. (the "Unsecured Claimants") support Ridge's application to appoint a Receiver but object to the appointment of Alvarez & Marsal.

II. ISSUES

A. If this Honourable Court exercises its discretion to appoint a Receiver, should Alvarez & Marsal be appointed?

III. RBC'S POSITION

7. RBC respectfully agrees with Ridge that:

   (a) Alvarez & Marsal ought to be appointed as Receiver as it is extremely familiar with 132's financial circumstances, has the support of 132, is aware of all the complexities of the subject Project (defined below) and affairs of 132, is a well-recognized and respected insolvency firm and is able to deal with the rights of all interested parties in a fair and professional manner;

   (b) RBC is the overwhelming priority creditor and any costs that would be incurred in having a different firm familiarize itself with the circumstances and complex issues associated with 132 and the subject Project (defined below) will at first instance be borne by RBC and RBC is not amenable to incurring such costs; and

   (c) No facts have ever been presented to RBC which suggests to RBC that Alvarez & Marsal would not be able to fulfill the role of Receiver in a professional and impartial manner.

IV. FACTUAL BACKGROUND

8. 132 was incorporated to develop, construct and sell 123 residential units in a project located on the Stony Plain Indian Reserve No. 135 (being the lands occupied by the Enoch Cree Nation 440 ("Enoch")) (the "Project"), which lands are legally described as:

> Canada Lands Survey System Plan No. 96507
> Within Lot 186, Plan 92619 CLSP
> Within the NE ¼ 23-52-26 W4M
>
> (the "Project Lands")

- The Barath Affidavit, paras. 9, 12.

9. On March 13, 2008, 132 entered into a commercial lease with Her Majesty the Queen in right of Canada, as represented by the Minister of Indian Affairs and Northern Development (the "Crown") with respect to the Project Lands effective February 21, 2008 for a term of 49 years.

- The Barath Affidavit, para. 13 and Exhibit "F"

10. The lease is registered against title to the Project Lands in the Indian Lands Registry System by registration number 355152 (the "Lease").

- The Barath Affidavit, para. 15 and Exhibit "H"

11. By a collateral mortgage dated January 16, 2008, 132 granted to RBC a mortgage securing its interest in the Lease for the principal sum of $20,000,000.00, plus interest and costs on a solicitor and his own client basis (the "Collateral Mortgage").

- The Barath Affidavit, paras. 18 - 19 and Exhibit "I"

12. On April 8, 2008, the Collateral Mortgage was registered against title to the Project Lands in the Indian Lands Registry System as registration number 355504.

- The Barath Affidavit, para. 15 and Exhibit "H"

13. On or about January 16, 2008, 132 granted to RBC a General Security Agreement and floating charge on land, securing to RBC all of 132's present and after acquired personal and real property (the "GSA"). The GSA was perfected by way of registration in Alberta's personal property registry on October 25, 2007. RBC's registration is first in time.

- The Barath Affidavit, paras. 18, 20 - 21 and Exhibit "K"

14. At all material times, RBC has had a perfected security interest in all of 132's present and after acquired property and is overwhelmingly 132's largest creditor.

15. Ridge, Prairie Western Development Corp. ("Prairie"), and Whitecastle Realty Investments Ltd. ("Whitecastle") each own one-third of the outstanding shares of 132.

- The Barath Affidavit, para. 4

16. Ridge is the applicant in these proceedings and RBC has been informed that Prairie, along with two other unsecured creditors object to the appointment of Alvarez & Marsal as Receiver of 132, although RBC understands that they consent to the appointment of a Receiver generally.

17. 132, by its sole director, consents to Ridge's application for the appointment of Alvarez & Marsal as Receiver.

- The Barath Affidavit, para. 44

18. The principals of 2/3 of the shareholders of 132 (John Barath, Manjinder Dhinsa ("Dhinsa") and George Shen ("Shen")) have guaranteed the indebtedness of 132 to RBC in the amount of $20,000,000.00 plus interest and costs on a solicitor and his own client basis.

- The Barath Affidavit, para. 22

19. There are no other guarantors of 132 to RBC and in particular, Derek Prue (sole director and shareholder of Prairie) is not a guarantor of 132 to RBC. Effectively, the persons with the largest and most direct economic interest in these proceedings support the application of Ridge.

- The Barath Affidavit, para. 22

20. In 2009, 132 appointed KPMG Inc. as monitor to monitor the business, property and affairs of 132 and the Project (the "Monitor"). The individual primarily responsible for the monitoring engagement at KPMG Inc. was Mr. Tim Reid. Mr. Reid left KPMG Inc. and joined Alvarez and Marsal Canada in 2011. Effective September 1, 2011, KPMG Inc. was replaced by Alvarez & Marsal Canada.

21. RBC supports the application of Ridge's for requesting the appointment of Alvarez & Marsal to act as Receiver.

22. The claims of the Unsecured Claimants against 132 and its property are clearly subordinate to that of RBC.

V. LAW AND ARGUMENT

A. If this Honourable Court exercises its discretion to appoint a Receiver, Alvarez & Marsal ought to be appointed.

23. A receiver ought to be disinterested, impartial, competent and act in the interest of all interested persons:

- Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011) at page 203 [Tab 1].

24. When appointing a receiver, generally the creditor seeking the appointment nominates a candidate. The security holder's opinion in selecting an appropriate candidate is an important factor. A person raising an objection to the proposed nominee bears the onus of proving that the nominee is partial:

> In court appointments, the security holder appoints its nominee in practice. However, there is no rule of law or practice that the security holder's nominee should always be accepted or even usually accepted as a receiver. The court has an obligation to appoint a receiver who is reasonably competent to perform the duties, as well as being and perceived to be disinterested and impartial in order to deal fairly with the rights of all persons having an interest in the assets of the debtor. The court always gives careful consideration to the person nominated by the security holder and usually appoints the receiver proposed by the applicant security holder if such receiver possesses similar qualities proposed by the other parties or already has a working relationship with the debtor. But the court will reject the security holder's nominee if it

> appears that such person may not deal with the debtor's assets in a fair and even-handed manner. The onus of establishing that the nominee is partial rests upon the person making the objection. If the court rejects the objection, it may nonetheless impose terms on the receiver.
>
> [Emphasis added]

- *Supra* at 209. [TAB 1]

25. Where candidates proposed by either party have similar qualities, generally the receiver supported by the primary secured creditor should be appointed:

> 2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking he [*sic*] receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

- *Confederation Trust Co. v. Dentbram Developments Ltd.*, 1992 CarswellOnt 474 ("*Confederation Trust*") at para. 2 [Tab 2]

26. Simply because a particular person or firm already has a working relationship with the debtor corporation does not disqualify them to act as receiver. Rather, it is considered an advantage where a firm has knowledge and experience with the debtor's operation:

> 9 In any event PricewaterhouseCoopers has the edge over Deloitte + Touche in this particular contest since it has had experience in the case for several months and established a working relationship with the operational and financial persons at the Applicant's mines. While it appears that PricewaterhouseCoopers would be somewhat further along as to the marketing aspect of 10 days versus up to 4 weeks. It appears as well that PricewaterhouseCoopers has a leg up as to valuation, work and sale models and Deloitte + Touche has not had the advantage of working on the file to date. Trilon submits PricewaterhouseCoopers has spent more time with the others in reviewing its recommendations than it has spent with Trilon. I do not see this quantitative measure as indicative of anything qualitative since Trilon has been consistently opposed to any tax loss model for some time.

- *Royal Oak Mines Inc., Re*, 1999 CarswellOnt 1068 ("*Royal Oak*") at paras. 8-9. [TAB 3]

27. Where the proposed receiver has been involved with the debtor company and acquired familiarity with its affairs and where the appointment of an alternate firm as receiver would cause a duplication of costs already incurred in becoming familiar with the file, it would be appropriate to appoint the proposed person who is already familiar with the affairs of the debtor company:

- *A. Farber & Partners Inc. v. Penta TMR Inc.*, 2007 CarswellOnt 10041 ("*A. Faber & Partners*") at para. 5 [Tab 4]

28. To suggest that an inference can be drawn that a receiver is partial towards the party who supports their appointment is specious. A receiver is an officer of the Court and, moreover the receiver's actions are supervised by the Court:

> 7 If an inference could be drawn that a receiver might be partial toward the party who supported their appointment, that inference could equally apply to disqualify Libro's candidate as well. 1 am not persuaded that such an inference should be drawn. Farbers, in the five weeks that it has acted as Trustee in Bankruptcy, has conducted itself in an entirely proper manner,

> and this gives the court confidence that it will continue to do so if it is appointed as receiver. It also goes without saying that any sale of assets that occurs in the future must be approved by the court, so that the court will, at all times, retain a supervisory role over the actions of the receiver.

- *A. Faber & Partners* at para. 7 [Tab 4]

29. RBC, 132's largest creditor and first ranking secured creditor, supports the application of Ridge's for the appointment of Alvarez & Marsal as Receiver of 132. 132, by its sole director, supports the appointment of Alvarez & Marsal as Receiver.

30. Mr. Barath, Shen and Dhinsa have all personally guaranteed the obligations of 132 to RBC. Indeed, the guarantors have more to lose than the Unsecured Claimants and two of them support the appointment of the Receiver and of Alvarez & Marsal. As at the date of filing this brief, RBC is not aware of the position of Dhinsa.

31. The majority of those persons with the largest and most direct economic interest in 132 and its property support the appointment of Alvarez & Marsal as the Receiver of 132.

32. The onus is on the Unsecured Claimants to prove why Alvarez & Marsal would not deal with 132's assets in a fair and professional manner.

33. While at first instance there appears to be a number of legal and factual concerns with respect to the claims of the Unsecured Claimants, even if such claims are valid, they are clearly subordinate to the overwhelmingly larger secured claim of RBC.

34. A principal at Alvarez & Marsal is familiar with the complexities of 132's situation having acted as monitor of the debtor company for four years. The experience and knowledge gained over those four years has come at a significant cost and is very valuable. The matters in this case are particularly complex having regard to:

    (a) the Crown lease and the unique issues arising as a result of the Project Lands being lands located on the Stony Plain Indian Reserve# 135;

    (b) over 30 actions have been commenced against 132; and

    (c) water and sanitary services are not yet connected to the project and the provision of those services is and will be the subject of a number of complex agreements.

35. There would be significant duplication in costs if an alternate firm was appointed as Receiver having regard to the complexities of this matter.

36. Given that RBC is the dominant secured creditor and is owed in excess of $28,000,000.00, it will at first instance ultimately bear the costs of the receivership and at first instance stands to be significantly prejudiced in having another firm appointed as Receiver.

37. RBC as the dominant creditor and dominant secured creditor supports the application of Ridge to appoint Alvarez & Marsal as Receiver and has not agreed to the appointment of any other firm to act as Receiver of 132.

VI. CONCLUSION

38. RBC respectfully submits that:

(a) If this Honourable Court exercises its discretion to appoint a receiver on the application of Ridge, Alvarez & Marsal ought to be appointed as it is familiar with 132's financial circumstances, the complexities of the Project, is a well-recognized and respected insolvency firm, is able to deal with the rights of all interested parties in a fair and professional manner, and such appointment is supported by those persons with the primary legal and economic interest in the proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12TH DAY OF NOVEMBER, 2013

DENTONS CANADA LLP

Ray C. Rutman
Solicitors for Royal Bank of Canada

INDEX OF AUTHORITIES

TAB 1

BENNETT

on

RECEIVERSHIPS

Third Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL®

6

Status of the Receiver and Manager

1. OFFICE OF RECEIVER AND MANAGER

(a) Who May Be Receiver and Manager

Historically, there were no statutory provisions setting out the type of person or corporation who could become the receiver and manager. Theoretically, the receiver ought to be a person or corporation who is totally disinterested and impartial from the security holder and the debtor and one who will treat all interested persons in a fair and even-handed manner.[1] The receiver ought to have the ability and competence to manage the operations impartially and in the best interests of all stakeholders.

As a result of recent amendments to the *Bankruptcy and Insolvency Act* in 2009, a receiver must be a licensed trustee in bankruptcy if Part XI of the Act dealing with

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1 *Re Fed. Trust Co. and Frisina et al.* (1976), 20 O.R. (2d) 32, 28 C.B.R. (N.S.) 201, 86 D.L.R. (3d) 591 (Ont. H.C.).

See also *Re Ravelston Corp.* (2007), 29 C.B.R. (5th) 1, [2007] O.J. No. 414 at para. 67, 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]), appeal dismissed (2007), 85 O.R. (3d) 175, 29 C.B.R. (5th) 45, 2007 ONCA 135 (CanLII) (Ont. C.A.); *Re Forest & Marine Financial Corp.* (2009), 61 C.B.R. (5th) 283, 2009 BCSC 1554 (CanLII), 2009 CarswellBC 3061 (B.C. S.C. [In Chambers]).

employees of the one had access to the files of the other, there was no law prohibiting this apparent conflict and the receivership was upheld. Technically, a security holder may appoint another receiver who may in turn demand the files and working papers of the debtor's auditor as properly secured under the security instrument. In this case, the appointment smacked of immorality where the auditor's own account had not been paid when its other arm took over the receivership. The court concluded that such a relationship does not lend itself favourably to a client, when its own auditor can turn around and become the liquidator.[24]

(ii) Proposed Receiver

In court appointments, the security holder appoints its nomineee in practice. However, there is no rule of law or practice that the security holder's nominee should always be accepted or even usually accepted as a receiver. The court has an obligation to appoint a receiver who is reasonably competent to perform the duties, as well as being and perceived to be disinterested and impartial in order to deal fairly with the rights of all persons having an interest in the assets of the debtor. The court always gives careful consideration to the person nominated by the security holder and usually appoints the receiver proposed by the applicant security holder if such receiver possesses similar qualities proposed by the other parties[25] or already has a working relationship with the debtor.[26] But the court will reject the security holder's nominee if it appears that such person may not deal with the debtor's assets in a fair and even-handed manner. The onus of establishing that the nominee is partial rests upon the person making the objection. If the court rejects the objection, it may nonetheless impose terms on the receiver.[27]

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24 See also *Re Ferguson and Imax Systems Corp. et al.* (1984), 47 O.R. (2d) 225, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249 (Ont. Div. Ct.). In this case, the court held that it was improper to appoint an accounting firm as an inspector under section 222 of the *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33 where the same accounting firm advised the complainant in prior proceedings and filed an affidavit which appeared to be one-sided.

25 *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399, 1992 CarswellOnt 474 (Ont. Gen. Div.).

See also *Re Forest & Marine Financial Corp.* (2009), 61 C.B.R. (5th) 283, 2009 BCSC 1554 (CanLII), 2009 CarswellBC 3061 (B.C. S.C. [In Chambers).

26 *Re Royal Oak Mines Inc.* (1999), 11 C.B.R. (4th) 122, 1999 CarswellOnt 1068 (Ont. Gen. Div. [Commercial List]).

27 See Rule 41.03 of the Ontario *Rules of Civil Procedure* where the court has the authority to refer this issue to a referee under Rule 54.

The court will not disqualify a proposed interim receiver where the interim receiver has a prior association with one of the potential purchasers of the debtor's business unless there is a conflict of interest: *Re SLMSoft Inc.* (2003), 4 C.B.R. (5th) 102, 2003 CanLII 31612, 2003 CarswellOnt 4402 (Ont. S.C.J.).

See also *Prince Albert Fashion Bin Ltd. et al. v. Prince Albert Credit Union Ltd. et al.* (1980), 37 C.B.R. (N.S.) 160, 1980 CarswellSask 30 (Sask. Q.B.) where the debtor alleged that the receiver was selling the debtor's assets at below cost. Rather than replacing the receiver, the court imposed a term on the receiver not to sell below the debtor's costs without the debtor's consent or with court approval.

TAB 2

1992 CarswellOnt 474, 9 C.P.C. (3d) 399

C

1992 CarswellOnt 474, 9 C.P.C. (3d) 399

Confederation Trust Co. v. Dentbram Developments Ltd.

CONFEDERATION TRUST COMPANY v. DENTBRAM DEVELOPMENTS LTD., AMNON ALTSCHULER GORDON COBB, OAKBRUM INVESTMENTS LIMITED and THE TORONTO-DOMINION BANK

Ontario Court of Justice (General Division), Commercial List

Borins J.

Judgment: April 24, 1992
Docket: Doc. 92-CQ-8560CM

Counsel: *Michael McGowan* and *Kevin J. Zych*, for plaintiff.

Harvey M. Mandel, for defendants Dentbram Developments Ltd. and Amnon Altschuler.

Theodore Nemetz, for defendant Gordon Cobb.

Subject: Civil Practice and Procedure; Corporate and Commercial

Receivers --- Appointment — Application for appointment — General

Receivers --- Appointment — Application for appointment — Person entitled to make application — Creditor

Receivers — Application for appointment of receiver — Mortgage providing for appointment of receiver — Default occurring — Just and equitable to appoint receiver.

Receivers — Persons entitled to apply — Creditors — Default occurring under mortgage — Choice of receiver being choice of creditor.

Pursuant to a mortgage, the plaintiff was entitled to appoint a receiver in the event of default. After the defendant defaulted under the mortgage, the plaintiff unsuccessfully attempted to take steps to protect the property ad realize the debt owing. The plaintiff moved for the appointment of a receiver.

Held:

The motion was granted.

Although the appointment of a receiver was a discretionary remedy and one that ought not to be exercised lightly, in this case it would be just an equitable to appoint a receiver. Where receivers were suggested by both parties, an the receivers possessed similar qualities, generally the receiver suggested by the creditor, who had carriage of the proceedings, should be appointed.

Motion for appointment of receiver.

***Borins J.*:**

1 I appreciate that the appointment of a receiver is a discretionary remedy and that the court ought not lightly to exercise it discretion to appoint a receiver. However, on the evidence before me, I am satisfied that it is just and equitable that a receiver be appointed. The plaintiff has demonstrated that its right under the mortgage to take steps to preserve the property and to obtain the benefits of the property in the realization of its debt have proved to be ineffective. As well, in consideration what is fair and equitable, I have taken into consideration that the mortgage contract contains an express covenant in which the mortgagee agrees to the appointment of a receiver in the event of default, and default has, of course, occurred. I my view, the appointment of a receiver is required, inter alia, for the reasons contained in para. 20 of the plaintiff's original factum.

2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking he receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

3 In he result, a order is to issue pursuant to the order as amended contained in Sched. "A" to the notice of motion which I have placed my fiat.

Motion granted.

END OF DOCUMENT

TAB 3

1999 CarswellOnt 1068, 11 C.B.R. (4th) 122

C

1999 CarswellOnt 1068, 11 C.B.R. (4th) 122

Royal Oak Mines Inc., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36., as amended

In the Matter of the Courts of Justice Act, R.S.O. 1990, c C-43, as amended

In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines Inc., and the Applicants Listed on Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.-36, as amended and the Business Corporations Act, R.S.O. 1990, c. B.16, as amended

Ontario Court of Justice, General Division [Commercial List]

Farley J.

Oral reasons: April 16, 1999
Docket: 99-CL-3278

Subject: Insolvency

Bankruptcy --- Interim receiver — Appointment

Monitor recommended appointment of interim receiver to take possession of all assets and market assets — Application to appoint interim receiver granted — It was appropriate, just and reasonable in circumstances to appoint interim receiver pursuant to s. 101 of Courts of Justice Act and s. 47 of Bankruptcy and Insolvency Act — Monitor was preferable choice for receiver as it had experience in case and had established working relationship with operational and financial persons at bankrupt's mines — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47 — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101.

the measure of damages may be in such a circumstances as at present.

6 Trilon submits that the interim receiver should not be PricewaterhouseCoopers but rather Deloitte + Touche. In light of the fact that PricewaterhouseCoopers has been the Monitor - a capacity said to be different from that of the interim receiver - that is true but subject to the above observation regarding bleeding. Moreover I have no doubt that either firm (and many more) are able to accomplish both roles from time to time and have done so. I do not see that this is a question of automatic disqualification rather it is a question of becoming a chameleon. In its reports and in the submissions of the interested parties over the course of the last month or so, it would seem to me that PricewaterhouseCoopers has responsibly carried out its role as Court appointed Monitor in an independent way. It has not been a mouthpiece or surrogate for the Applicant - to the contrary it has smoked out and reported on serious errors of the Applicant. It presented the tax loss possibility and vehicle as an option - it is not wedded to it. I have no doubt that it recognizes its role is to be neutral and to act in the best interests of all concerned. See *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.)

7 Trilon has asked for a Court appointed interim receiver, it has not asked for the stay to be lifted so as to allow it to proceed with a private receiver who need only be responsible to Trilon. Therefore, it would not be appropriate for Trilon to require that the interim receiver not look at the tax loss option - that is not the perogative of Trilon.

8 Who would be better to assume the role of interim receiver PricewaterhouseCooper or Deloitte + Touche? Both are strong firms, well regarded to the industry - and particularly each of strength and experience in the relevant mining field. I do not think that Justice Borins' comment at p. 400 of *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) should be taken out of context:

> When receivers proposed by each party possess similar qualities, generally speaking the receiver proposed by the creditor who has carriage of the proceedings should be appointed.

9 In any event PricewaterhouseCoopers has the edge over Deloitte + Touche in this particular contest since it has had experience in the case for several months and established a working relationship with the operational and financial persons at the Applicant's mines. While it appears that PricewaterhouseCoopers would be somewhat further along as to the marketing aspect of 10 days versus up to 4 weeks. It appears as well that PricewaterhouseCoopers has a leg up as to valuation, work and sale models and Deloitte + Touche has not had the advantage of working on the file to date. Trilon submits PricewaterhouseCoopers has spent more time with the others in reviewing its recommendations than it has spent with Trilon. I do not see this quantitative measure as indicative of anything qualitative since Trilon has been consistently opposed to any tax loss model for some time.

10 The costs projected by PricewaterhouseCoopers as interim receiver appear to be in the same area as the borrowing limit contemplated by Trilon.

11 In the end result there is to be an appointment of an interim receiver over all the assets of the Applicant. The Applicant is fortunate to have two such well qualified firms put forward to be the interim receiver. I find that PricewaterhouseCoopers has the edge in this situation and I so appoint PricewaterhouseCoopers. It would seem to me to make good sense to have counsel discuss, and I would trust agree, on the form of order so they might see me on

TAB 4

2007 CarswellOnt 10041,

H

2007 CarswellOnt 10041

A. Farber & Partners Inc. v. Penta TMR Inc.

A. Farber & Partners Trustees v. Penta TMR et al

In the matter of the Bankruptcy of Penta Farm Systems Ltd. and Penta One Limited

Ontario Superior Court of Justice

T.A. Heeney J.

Judgment: August 1, 2007
Docket: 54921, 35-967558, 35-967561

Proceedings: additional reasons to *A. Farber & Partners Inc. v. Penta TMR Inc.* (2007), 2007 CarswellOnt 10044 (Ont. S.C.J.)

Counsel: Harvey Chaiton, for Trustee, A. Farber & Partners Inc. ("Farbers")

Harry Van Bavel, for Secured Creditor, Libro Credit Union Limited ("Libro")

Michael Crichton, for Unsecured Creditors, JAY-LOR International Inc., JAY-LOR Fabricating Inc. ("Jay-Lor")

Lianne Armstrong, for Penta TMR Incorporated, Glenn Buurma, Angela Buurma

Subject: Insolvency; Property

Bankruptcy and insolvency --- Receivers — Appointment

Cases considered by *T.A. Heeney J.*:

2007 CarswellOnt 10041,

s. 7(3)(c) — considered

Personal Property Security Act, R.S.O. 1990, c. P.10

s. 63(4) — referred to

T.A. Heeney J.:

1 All parties are agreed that there should be a receiver appointed pursuant to s. 101 of the *Courts of Justice Act* of all of the assets of Penta One Limited and Penta Farm Systems Ltd. The only issue is who that receiver should be.

2 Both companies made assignments in bankruptcy on June 8, 2007, and Jackson Carson Inc. was appointed as trustee of both estates. Farbers was substituted as the Trustee in Bankruptcy with respect to both companies at the first meeting of creditors on June 26, 2007, at the instance of Jay-Lor, who appears to be the largest unsecured creditor. Farbers now seeks to be appointed as receiver as well.

3 Libro initially sought to have the court appoint PricewaterhouseCoopers Inc. as the receiver, but now requests that BDO Dunwoody Limited be appointed. This change arose from the fact that Jay-Lor previously shared some confidential information with PricewaterhouseCoopers, which would create the potential for a conflict.

4 The test for the appointment of a receiver is succinctly set out in F. Bennett, *Bennett On Receiverships*, Second Edition, Carswell, at p. 163:

> In court appointments, the practice is to appoint the nominee proposed by the security holder. However, there is no rule of law or practice that a nominee of a security holder should always be accepted or even usually accepted as a receiver. The court has an obligation to appoint a receiver who is reasonably competent to perform the duties, as well as being disinterested and impartial in order to deal fairly with the rights of all persons having an interest in the assets of the debtor. The court always gives careful consideration to the person nominated by the security holder and usually appoints the receiver proposed by the applicant security holder if such receiver possesses similar qualities proposed by the other parties. But the court will reject the security holder's nominee if it appears that such person may not deal with the debtor's assets in a fair and even-handed manner. The onus of establishing that the nominee is partial rests upon the person making the objection. If the court rejects the objection, it may nonetheless impose terms on the receiver.

5 All parties agree that both Farbers and BDO Dunwoody are fully competent to carry out the duties of a receiver. In comparing the two candidates, however, there are certain factors that give the "edge" to Farbers (to use the words of Farley J. in ***Royal Oak Mines Inc., Re*** (Ont. Gen. Div. [Commercial List]):

> 1. Farbers has already been appointed as Trustee in Bankruptcy, and as such has an obligation to impartially represent the interests of all creditors, both secured and unsecured;
>
> 2. Farbers has been involved with both companies for approximately five weeks and has acquired familiarity with their

affairs;

3. The appointment of BDO Dunwoody would necessitate a duplication of costs already incurred in becoming familiar with the file. It would also add an additional layer of costs in the future, as the Trustee and receiver would be required to deal with each other on an ongoing basis and both would have independent counsel;

4. At present, the evidence indicates that there is likely to be a surplus realized from the sale of the assets such that a meaningful premium could be paid to the unsecured creditors. Thus, any additional costs incurred would, in effect, be paid entirely by the unsecured creditors, since those costs would serve to reduce the available surplus;

5. Farbers is in a position to avail itself of all of the remedies available to it as Trustee in Bankruptcy which, in combination with the rights of a receiver, would provide it with a full range of powers and remedies to ensure that the maximum value is received for all creditors.

6 Mr. Van Bavel objects to the appointment of Farbers on the basis of perceived conflict of interest. He concedes that there is no evidence of an actual conflict, but suggests that an appearance of conflict flows from the fact that Farbers was the Trustee of choice of Jay-Lor, who initiated their substitution as trustee at the first meeting of creditors.

7 If an inference could be drawn that a receiver might be partial toward the party who supported their appointment, that inference could equally apply to disqualify Libro's candidate as well. I am not persuaded that such an inference should be drawn. Farbers, in the five weeks that it has acted as Trustee in Bankruptcy, has conducted itself in an entirely proper manner, and this gives the court confidence that it will continue to do so if it is appointed as receiver. It also goes without saying that any sale of assets that occurs in the future must be approved by the court, so that the court will, at all times, retain a supervisory role over the actions of the receiver.

8 Accordingly, an order will go appointing Farbers as receiver, in the form of the pro forma order annexed hereto. The receiver shall not exercise its powers as receiver before August 7, 2007, to facilitate discussions with Penta TMR and Buurma with respect to the possible sale of the assets.

Appendix

Court File No. 54921

Ontario

Superior Court of Justice

THE HONOURABLE	)	WEDNESDAY, THE 1{st} DAY
	)	
JUSTICE	)	OF AUGUST, 2007