NOVA SCOTIA REAL ESTATE LAWYERS ASSOCIATION
CONVEYANCING STANDARDS OF PRACTICE 3.11 AND 3.14

Speaking Notes of Robert G. MacKeigan, Q.C., and Paul E. Radford
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STANDARD 3.11 – BANKRUTPCY AND RECEIVERSHIP

BANKRUPTCY AND INSOLVENCY ACT ("BIA")

PROCEDURE

(a) Assignment by a debtor in favour of trustee – vests property in the trustee;

(b) Order of the court declaring the debtor bankrupt – vests property in a trustee; and

(c) a proposal to creditors may provide for vesting in a trustee.

REGISTRATION

See section 74(1) of the BIA – register:

(a) Original assignment or copy of assignment certified by the official receiver; or

(b) Certified court order.

If a proposal affects real property (such as vesting property in a trustee and/or releasing judgments), a copy of the order approving the proposal – the proposal is generally attached as Schedule "A" to the order.

Section 71(2) of BIA states that upon bankruptcy a bankrupt ceases to have capacity to dispose of his property which, subject to the rights of secured creditors, vests in the Trustee in the bankruptcy. However, there is still a race to the Registry as s. 75 provides that a bona fide purchaser or mortgagee for value who records his instrument in the Registry of Deeds prior to the registration of a receiving order or assignment in bankruptcy obtains title from the bankrupt as validly and effectively as if no receiving order or assignment had been made.

OTHER CONSENTS

Except with some summary administrations, the trustee acts only with the consent of the inspectors. They do not make an order of the court. Thus, with the permission of the inspectors the trustee may:

(a) sell property (section 30(1)(a) of the BIA);
(b) quit claim or disclaim under section 20(1);
(c) after the bankrupt's discharge, return the property to the bankrupt if it is unrealizable (section 40(1).

The approval of the inspectors is not necessary if a court order is obtained – which might occur in the event of any emergency or if the inspectors do not consent to a decision of the trustee.

Summary administration – inspectors need not be appointed and the trustee may act without approval of inspectors, subject to any directions received from the creditors' meeting (section 155).

In the case of a proposal, the terms of the proposal must be reviewed to determine whether there are any inspectors and if so, whether the inspectors consent' is required to the sale of any property.

If inspectors' consent is required under any of the foregoing provisions, such consent is typically evidenced by a recital on the deed together with a place for the inspectors' signatures or a recital on the deed together with a certified copy of the resolution of inspectors certified by the Trustee attached to the deed. In the case of a summary administration without inspectors, such document would typically refer to any directions received from meeting of creditors.

COVENANTS

The trustee receives only those rights and interests that the bankrupt had at the time of his bankruptcy pursuant to s. 71(2) BIA. Section 84 BIA further states that the sale by a trustee vests the interest the bankrupt has in a purchaser. A trustee's deed is equivalent to a quit claim deed as it conveys only the interest of the Trustee and does not contain any covenants other than the trustee has done nothing to encumber title.

JUDGMENTS

Most judgments registered against a bankrupt in the Registry of Deeds are released upon the bankruptcy of the bankrupt pursuant to s. 70(1) of the BIA. Exceptions are:

(a) judgments against a bankrupt who conveyed the property to a third party after the judgments and prior to bankruptcy (Starratt v. Turner (1989) 78 CBR (NS) 83 NSCA);

(b) judgments in favour of the federal or provincial crowns or Workers' Compensation Boards which are registered in the Registry of Deeds before a petition is filed against a debtor, a debtor makes an assignment, a debtor files a notice of intention to make a proposal or a debtor files a proposal if:

  (i) the judgment is for amounts owing under the Income Tax Act and registered on or after June 18th, 1998 (when s. 223(11.1) of the Income Tax Act was proclaimed);

  (ii) the judgment is for amounts owing under the Excise Tax Act and registered on or after October 20th, 2000, when s. 316(10.1) of the Excise Tax Act was proclaimed; or

  (iii) the judgment is for amounts owing under any other federal or provincial statutes that provides for the judgment to be a secured claim in accordance with s. 86(2) and 87 BIA – the presenters are not aware of others at this time except for the *Customs Act* (November 29, 2001)

MATRIMONIAL AFFIDAVITS

Definition of "matrimonial home" is defined in s. 3(1) of the Matrimonial Property Act as "the dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest."

Where a bankrupt's spouse holds sole title to property and becomes bankrupt, that spouse's trustee in bankruptcy may sell the property without consent of the non-bankrupt, non-titled spouse, unless the non-bankrupt spouse can establish some trust interest in the property. The rights of possession of the non-titled, non-bankrupt spouse are mere personal rights against the other spouse and are not enforceable against the trustee – see discussion in R.A. Klotz, *Bankruptcy, Insolvency and Family Law* (2nd ed., Scarborough, Ontario, 2001) c. 8.2. Thus, the trustee could swear an affidavit stating that the home is not a matrimonial home of the trustee. However, the trustee should be reluctant to sign such an affidavit where he has been put on notice of a trust claim being made the non-bankrupt's spouse against the property. That issue should be resolved by court application, if necessary.

An assignment in bankruptcy by a spouse is not a disposition of a matrimonial home in contravention s. 8(1) of the Matrimonial Property Act. – Klotz, supra c. 8.1.

In the event that a property was owned solely by the bankrupt spouse, the trustee may nevertheless seek to obtain the consent of the non-bankrupt, non-owning spouse. There is at least one case in Ontario where the court held that the consent should be obtained or an application made for a declaration that the consent is unreasonably withheld. See Royal Bank of Canada v. King (1991), 82 D.L.R. (4th) 225 (Ont.). The correctness of this decision has been questioned by Klotz, supra, who points out that it is contrary to other decisions.

RECEIVERSHIP

Generally, receivers can be appointed in one of two ways; either by a secured creditor under an instrument or by the court on application.

Historically most court appointed receivers were pursuant to the Civil Procedure Rules. Use is being made of the "interim" receiver under section 47 of the BIA on the motion of a secured creditor who has sent or is about to send out a notice of intention to enforce security. When this procedure is used, there is generally no appointment other than the appointment of the interim receiver.

Under the BIA, the court may also appoint an interim receiver after a petition for a receiving order is issued and, in some circumstances, when there is a proposal or a notice of intention to file a proposal. The interim receiver under section 47 often has the same powers as the normal court appointed receiver. The interim receiver appointed after a petition or in a proposal usually has a limited power to interfere with the business. In all cases, the exact terms of the order must be carefully examined.

In the case of an instrument appointed receiver, despite language in the security instrument giving the receiver the right to act as agent of the company, it is generally considered in Nova Scotia that such a receiver cannot by conveyance extinguish the debtor's equity of redemption. Thus, an instrument appointed receiver must in addition to its own signature on a deed conveying the property under the terms of the security also obtain the signature of the debtor granting such security. Likewise, the conveyance by an instrument appointed receiver does not foreclose off the interests of any subsequent encumbrancers' interest in real property. Thus, an instrument appointed receiver can only convey clear title to real estate if the debtor joins the conveyance and there are no unreleased subsequent encumbrances.

In most other Canadian provinces a statutory power of sale procedure is in place. In those jurisdictions subsequent encumbrancers are foreclosed as long as the procedure is followed.

A court appointed receiver normally has the power set out in the court order appointing him or her to "foreclose" the interest of all subsequent encumbrancers and of the debtor. Normally, this involves two court applications, although it can be combined into one. The first application is to appoint the receiver, which normally requires the receiver to re-apply to court with the details of the sale it proposes to make in order for the court to be satisfied that such sale is a provident sale. No later than the time of the order approving a sale subsequent encumbrances are made parties or at least given notice of the application to approve the sale. Both the order appointing the receiver and the order approving the sale are filed in the Registry of Deeds prior to the conveyance by the receiver. The purchaser's lawyer should ensure that the order appointing the receiver forecloses the interest of the debtor and of subsequent encumbrancers.

In some jurisdictions it is normal for there to be an order vesting the title in the purchaser. Partly due to the difference in the foreclosure procedure, it is more usual in Nova Scotia to use the foreclosure language in the orders approving sales.

A receiver's deed normally does not contain any covenants as to title other than that the receiver has the right to sell the lands and has not done anything to encumber them. Such conveyance is effectively a quit claim deed of the interest that the debtor had at the time it executed the security instrument under which the receiver is appointed and the process is effectively a foreclosure of any subsequent interests but not of any pre-existing interests.

MATRIMONIAL AFFIDAVITS

Typically the matrimonial affidavit attached to a receiver's deed would refer to the use of the lands by the receiver or its shareholders as a matrimonial home, as the disposition by a debtor spouse would already have been addressed in the security instrument giving rise to the receivership. In addition, it is to be noted that most of the security instruments that give rise to a receivership have been executed by a corporation. See Klotz, supra, at p. 8-11.

STANDARD 3.14 – PARTNERSHIPS

CONVEYANCE OF "PARTNERSHIP PROPERTY"

Unless the conveyance contains words of grant to the partners as "partnership property" or as "partnership land" or as "partners" or similar phrase, the land may be considered as being held by them as tenants in common. The mere fact that the parties are described as carrying on business under a firm name and style may not achieve the effect of conveying the lands to the individuals as partnership land." – *Lamont on Real Estate Conveyancing*, (Thompson Canada Limited, 1994 – release 2), page 17-8.

"A conveyance of partnership lands must be signed by all the partners of the firm. Thus, a deed from two out of three partners would be refused. There will be a statutory declaration from at least one of the partners that the lands were purchased as partnership lands and were held by them as such up to the date of the sale. The declaration should further set out the names of all the partners in the firm and state that there are no partners other than those mentioned." -- Lamont, supra, p. 17-8.

"If it appears from the information contained in the declaration that there has been a change in the Constitution of the Partnership since the land was conveyed to the members thereof, there should be a transfer from any ongoing (outgoing) partner to the remaining partners. If a new partner has been taken

into the firm, even though a new name may not appear on title, that partner should also sign the transfer." Lamont, supra, p. 17-8.

DEATH OF A PARTNER

"Where partners acquired land as part of their partnership assets, they were presumed to hold it as beneficial tenants in common. "Jus accrescendi inter mercatores locum non habet": pro beneficio commercii, the right of survivorship has no place in business." – Megarry & Wade, *Law of Real Property* (4th ed., Stevens & Sons Limited, London, 1975) p 402.

It has been decided in Ontario that lands held as partnership property held in joint tenancy are not affected by s. 13 (Partnerships Act). It would appear that this position is unique to Ontario, and in principle is open to much criticism. Equity raises a presumption, quite apart from s. 13, in favour of a tenancy in common with respect to partnership property as the right of survivorship has no place in business. However, in those jurisdictions where the equitable presumption operates it is still open for the partners to agree that lands will be held in joint tenancy" Oosterhoff, A.H. and Rayner, W.B., *Anger and Honsberger Law of Real Property* (2nd ed., Canada Law Book Inc., 1985), p. 791

The Partnership Act, RSNS c. 334 s. 23(2) states: "The legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section".

"Where one of the partners named in a deed of land to the partners has died and the land is being purchased by the surviving partners, apparently a conveyance from the surviving partners may be accepted upon receiving a statutory

declaration or other satisfaction, as to the death of the deceased partner." Lamont, supra, p. 17-8.

The Partnership Act s. 25: states "Where land or any interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners, including the representative of a deceased partner, and also as between heirs of a deceased partner and his executors or administrators, as personal or moveable and not as real estate."

"It is often assumed that individual partners each own an undivided interest, along with the other partners, in the partnership property. However, this is not the case; the interest of each of the individual partners has is in a partnership and not in the property. The nature of such interest is personal property rather than real property. For this reason, the traditional taking of land as a partnership excluded the possibility of a wife of one of the partners claiming a dower interest in the property." Lamont, supra, p. 17-9.

GENERAL COMMENTS

It does appear that an actual conveyance of lands is required by all of the partners who have been partners in the partnership during the time that the lands were partnership lands. Often, the partnership agreement will contain a power of attorney authorizing certain of the partners to convey on behalf of the other partners. Conveyancing documents should clearly indicate that the partners authorized under such power of attorney are signing on behalf of each of the partners and not just on behalf of the partnership. The power of attorney (or partnership agreement containing the authority) should be registered prior to the conveyancing document (Standard 4.1).

The usual requirement of an affidavit dealing with entitlement for use as a matrimonial home should be completed for each of the partners.

EXECUTION AGAINST PARTNERSHIP LANDS

"Where an execution has been filed against a firm for partnership debts the land may be sold by the Sheriff in the usual way. However, where an execution is filed against a partner for private debts, then the execution creditor is not entitled to apply under the Partition Act for a partition as would be the case if the lands were held by joint tenants or by tenants in common. The execution creditor may, however, attach the interest of the partner by proceeding under Rule 8.06(1) of the Rules of Civil Procedure (Ontario) which provides that an order may be made charging a partner's interest in the partnership property and by the same or subsequent order a Receiver may be appointed. The other partners may redeem the interest charged or, in the event of a sale, may purchase the same." Lamont, supra, p. 17-2 (See also J&V Investments Ltd. v. Clayton Developments Ltd. (1986) NSCA)

REFERENCES

McCrea, J. Craig, *Buying a Commercial Property from a Receiver or Trustee*, Real Estate Conference, The Continuing Legal Education Society of Nova Scotia, October 9th – 11th, 1992

W Mark Penfound, *Bankruptcy in the Chain of Title*, Practical Property II, The Continuing Legal Education Society of Nova Scotia, October 12th – 13th, 1994

Paul E. Radford, *Bankruptcy: Effects on Judgments and Priorities in a Title Search*, The Continuing Legal Education Society of Nova Scotia and Real Estate Lawyers Association of Nova Scotia, 1996 Real Estate Conference and Workshop, April 12th, 1996

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