

BUYING COMMERCIAL PROPERTY
FROM
A RECEIVER OR TRUSTEE

INTRODUCTION

In today's economic climate many of us will receive enquiries from clients who are anxious to take advantage of the potential bargains associated with acquiring real estate from a receiver or trustee in bankruptcy. While many of the tasks which a solicitor must perform in completing such transactions are similar to those associated with a 'usual' real estate deal, there are a number of important considerations and potential pitfalls which are unique to the receiver / trustee transaction. It is the aim of this paper to set out some practical guidelines which, it is hoped, will assist the real estate practitioner in advising his or her client and aid in bringing such transactions to a successful conclusion.

I BUYING FROM A RECEIVER

1. Who or What is a Receiver?

A "receiver" is simply a person who has been appointed to take possession of property belonging to a third party.¹ Receivership law originated in the English Court of Chancery. The appointment of a receiver was an equitable remedy used in circumstances where the common law offered inadequate remedies. A receiver was appointed to safeguard property for the benefit of those entitled to it such as creditors, minors, mentally incompetents, shareholders of a corporation or the beneficiaries of a deceased's estate. The receiver would be empowered to collect debts and to sell assets and might even be empowered to manage or continue a business. All that was required for the appointment of a receiver was that the court be satisfied that it was necessary to protect the rights of the parties under a contract or to preserve property from some danger.

¹ Bennett, Frank. Receiverships (1985), the Carswell Company Limited, Toronto. P.1-2.

By virtue of the Judicature Act the Courts of Equity and Common Law have now been merged. The overall principles which govern the appointment of the receiver remain, however, the same. The key determinant to the appointment is whether or not it is "just and convenient" that a receiver be appointed.²

2. Method of Appointment

There are two means by which a receiver may be appointed. A receiver may be appointed by a secured party pursuant to the contractual terms of its security instrument or an appointment may be made by the court. The former is known as a "private receiver" while the latter is referred to as a "court appointed receiver".

In Nova Scotia you will, as a matter of practice, be dealing with a court appointed receiver in nearly all circumstances where real estate is involved. This is so because

² See SS. 49(2) of the Judicature Act and Civil Procedure rule 46.01.

Nova Scotia lacks legislation which lends certainty to the acquisition of title to real estate by the contractual power of sale contained in mortgages or debentures³ and it becomes necessary, therefore, for a secured lender to seek the Court's assistance in transferring title to real estate.

While the receiver is appointed pursuant to the authority of Civil Procedure Rule 46, the assistance of the court in transferring title is derived from Rule 47. In particular, Rule 47.16 is relied upon which provides:

- i) Where an order is made directing a property to be sold, the court may permit any party or person having the conduct of the sale to sell the property in such manner as he thinks fit, or as the court directs, for the best price that can be obtained;

³ cf. Millard v. Gregoire (1913), 47 N.S.R.78 at p.85.

(ii) The court may give such directions as it thinks fit for the purpose of effecting a sale, including, without restricting the generality of the foregoing directions:

- (a) appointing the party or person who is to have the conduct of the sale;
- (b) fixing the manner of sale, whether by contract conditional on the approval of the court, private treaty, public auction, sheriff's sale, tender or some other manner;
- (c) fixing a reserve or minimum price;
- (d) requiring payment of the purchase price into court or to trustees or other persons;
- (e) for settling the particulars or conditions of sale;
- (f) for obtaining evidence of the value of the property;

- (g) fixing the remuneration to be paid to the party or person having the conduct of the sale;
- (h) requiring an abstract of title to be prepared for the use of the court.

Thus, rather than selling the property through a sheriff at public auction under the foreclosure rules, the receiver is the 'person' appointed by the court to have conduct of the sale by whatever method the court may approve. The possibilities for methodology of sale are somewhat limitless under this Rule provided one can satisfy the court that the method chosen is the most prudent for disposition of the assets in question.

It is important to keep in mind, therefore, when purchasing real estate from a court appointed receiver that your client is simply acquiring title by a modified form of the foreclosure process.

A person may be appointed not only as "receiver" but also as "receiver-manager". In the former case the person has the authority to take possession of assets only while, in the latter case the person can also manage the business of a debtor. In this paper the term "receiver" includes a "receiver-manager" unless otherwise indicated.

3. Methods of Sale by Receiver

There are, broadly speaking, three accepted methods of disposition of assets by a receiver. They are:

- i) Sale by private contract;
- ii) Sale by public tender; and
- iii) Sale by auction.

In the case of real estate, the receiver will most often proceed by way of tender. A sale by tender is advantageous to a receiver because it represents a judicially accepted means of establishing the appropriate sale price for the property. It

also has the advantage of allowing the receiver to prescribe the terms of sale in advance. In addition, since the terms and conditions of sale are established prior to receipt of offers, it reduces the considerations on competing offers to predominately one of price.

While receivers will sometimes sell real estate by a negotiated private contract, there is a tendency by receivers to shy away from this type of sale due to the fact that there may not be enough competing offers to establish to a court's satisfaction that the best price is being obtained for the property. Generally, the price offered will be less than the appraised value and, therefore, it is often necessary to obtain a number of offers from which the offer which has a price closest to the appraised value is usually chosen.

In Nova Scotia you will almost never see real estate sold by a receiver at public auction. If the receiver chooses this

method of sale, the property might just as well be sold through the normal foreclosure process by the Sheriff.

4. Disadvantages of Purchasing from a Receiver

While there is an obvious advantage associated with purchasing real estate from a receiver in terms of price, there are certain disadvantages associated with the process as well.

i) Uncertainty of Sale

Because the sale of real estate by a receiver in Nova Scotia requires the aid of the court, any agreement of purchase and sale entered into with the receiver will contain a condition that the sale is subject to the court's prior review and approval. This creates a situation where parties who have been unsuccessful in their tender or negotiations have a second opportunity to acquire the property when the successful bidder's offer is taken to court

for approval by tendering a higher offer at that stage.

The receiver is obliged to bring the higher offer to the court's attention since he has a duty to ensure that the best possible price for the property is obtained. The court is then faced with a "balancing act" between considerations relating to the integrity of the receivership process and the interests of the creditors. Generally, the court will only interfere with the receiver's agreement if the second offer is 'substantially' higher such that it causes the court to question whether the receiver has properly carried out his function or whether there has been some defect in the sale process.⁴ Nonetheless, a risk does exist that the original

⁴ Crown Trust Company v. Rosenberg (1986), 60 O.R. (2d)87 (H.C.J.); Re Beauty Counsellors of Canada Limited (1986), 58 C.B.R. (N.S.) 237 (Ont.S.C.); Re Selkirk (1986), 58 C.B.R. (N.S.) 237 (Ont.S.C.); and Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1 (N.S.C.A.).

successful bidder may not be the ultimate purchaser from the receiver. This can be extremely frustrating to a purchaser who has expended considerable time and effort in the process of bidding and/or negotiating terms with the receiver. It is a contingency, however, of which a practitioner ought to make his client aware of prior to embarking on the purchase process.

ii) Representations and Warranties

A Receiver will rarely, if ever, give express representations or warranties on any matter other than the validity of his appointment and the fact that he has done nothing to encumber the assets since the date of his appointment. Tender terms and conditions usually expressly exclude representations and warranties of any kind and provide that the purchaser shall be deemed to have

relied upon his own investigations and inquiries with respect to quantity or quality of goods, their merchantability, fitness for purpose, etc.⁵ Aside from the fact that the receiver has no knowledge of the history of the assets, he is normally anxious to complete the terms of his appointment and to distribute the proceeds of sale as quickly as possible. He is generally not interested, therefore, in having any lingering warranties or potential post-closing obligations. A purchaser, on the other hand, knows that the company whose assets he is purchasing is insolvent with extensive unpaid liabilities and is looking for as much comfort as possible.

While you would have tremendous difficulty negotiating warranties from the receiver there are certain precautions that can be taken to protect

⁵ See Appendix I for sample tender conditions.

your client's position.

The first is to insure that any agreement entered into with the receiver allows you sufficient time to investigate and raise objections to title to the purchased assets. In this respect, any receiver prepared documentation should be examined very carefully. I have seen receiver's tender packages which allow no time whatsoever to investigate title and simply provide that the purchaser shall accept the assets "as is, where is" on the date of closing.

In those receiver prepared documents where title investigation is contemplated, the time frame is often too short to conduct a thorough examination with respect to such matters as potential statutory liens.

In instances where statutory claims cannot be confirmed prior to closing or where the priority of those claims is in doubt, purchasers can sometimes negotiate holdbacks from receivers. These and other title uncertainties may also be dealt with by way of indemnities. A purchaser should be aware, however, that an indemnity from a receiver in his capacity as receiver generally is limited to the assets within his control. In some circumstances, where large dollar amounts are involved, an indemnity can be negotiated from the lender who initiated the court action pursuant to which the receiver was appointed. All such indemnities will, however, always be limited as to time and amount.

5. Special Conveyancing Considerations

As indicated, the receiver will not generally warrant title to assets under conveyance and will offer for sale to prospective

purchasers only whatever the receiver's interest might be in the property. While, in the case of real property, title is relatively easy to trace through our registry system, the same is not the case with chattels and a lawyer is well advised to inform his client at the outset that he or she may be at some risk as to the title being acquired.

The searches and inquiries to be made by a solicitor acting for the purchaser of real property or other assets from a receiver are basically the same as those that would be made in a normal asset purchase transaction with the addition of the following:

- i) certified copies of the order or orders appointing the receiver and approving the sale ought to be obtained and examined to verify the authority of the receiver to conclude the proposed transaction; and

ii) since the court approved sale amounts to nothing more than a foreclosure of the interest of the debtor in and to his property, an examination of the court files should be made to ensure that all parties interested in the property have received proper notice of the receiver's application to approve the sale.

In examining the form of court orders you should expect to see, in addition to express approval and authorization of the contemplated sale, language authorizing the receiver to execute deeds or documents which shall be effective to convey all of the estate and interest of the defendant to the proceedings and all persons claiming from or under him in and to the property which you are purchasing. Normally the property will be described as the property charged by the plaintiff's security which means that you will also have to examine the secured

lender's security to insure that it encompasses the subject assets. (A sample order appointing a receiver is annexed as Appendix II.)

Another matter with which you ought to be concerned prior to accepting a conveyance from a receiver is whether or not appeals have expired. It is inadvisable to conclude a transaction prior to that time.

Once you are satisfied as to the receiver's capacity and as to formalities of the proceedings, you need to consider how you are going to evidence your client's title at the Registry. In practice, most receiver's deeds will contain recitals as to the receiver's authority and capacity to convey and will clearly set out the court proceedings from which the authority was derived. Additionally, the deed will set forth the full consideration paid for the property to evidence that the terms of the sale as approved by the court have been complied with.

(A sample of a receiver's deed appears as Appendix III.) If the deed contains no such recitals, or if they are incomplete, you may wish to record the relevant court orders prior to the deed into your client.

The operative part of the deed itself will normally convey only the receiver's interest in and to the property under conveyance. You should request, as well, a covenant from the receiver that he has done nothing to encumber the property while it was in his possession.

6. Leases

i) Receiver as Landlord

Most purchasers of commercial property will be concerned that existing tenants remain after closing. A receiver simply steps into the shoes of the landlord and is entitled to all of the rights and benefits under the lease without interference from

the tenant. In particular, the appointment of a receiver will not constitute a breach of the "quiet enjoyment" covenant so as to permit termination of a lease by a tenant.⁶ Therefore, aside from issues relating to whether or not the leases are in good standing, you simply need to insure that there are no unusual provisions in the lease which would prohibit a transfer of the lease by a landlord or which alter the tenant's rights in any way upon a change in ownership taking place. You also, of course, need to satisfy yourself that the lease constitutes property which the receiver is entitled to convey.

ii) Receiver as Tenant

A host of problems can arise when the receiver's interest in real property is leasehold only.

⁶ Moir v. Blacker (1890), 26 L.R.Ir. 375

Under the terms of most leases, the receivership appointment itself will be expressly stated to be an event of default which allows for termination by the landlord. Even if there is no receivership clause in the lease, it is possible for a landlord to take the position that a court appointed receiver is an unauthorized assignee of the lease and therefore not validly in possession of the leasehold premises.⁷ Moreover, in most instances of receivership the lease will be in arrears which will also entitle the landlord to terminate.

In such circumstances, if the leasehold interest is valuable, the receiver must negotiate with the landlord to maintain the lease and obtain his permission to assign the tenancy. Alternatively, the receiver can cause a bankruptcy and rely, as trustee,

⁷ Toronto Dominion Bank v. Almondgrove Holdings Ltd. (1977), 25 C.B.R. (N.S.) 170.

upon Section 20 of the Tenancies and Distress for Rent Act. That section allows the trustee to occupy premises for three months and to elect to retain them for the balance of the term of the lease upon the terms of the lease. This latter option really only works where the lease contains no express provision which automatically terminates the lease upon bankruptcy⁸ and where the lease expressly permits assignment.

Regardless of whether the receiver is conveying the leasehold interest as receiver or trustee, it is essential that the terms of the lease relating to assignment be complied with and that you receive the express written acknowledgement of the landlord that the lease is in good standing and that it will be honoured for the balance of its

⁸ Raymond, Chabot et al v. Hyatt Construction Corporation (1983), 47 C.B.R. (N.S.) 179.

term.

7. Contracts

A receiver's entitlement to assign contracts is completely dependant upon the terms and conditions of the contract in question. Often, contracts will contain termination provisions in the event of receivership which, if acted upon by the other party to the contract, will prevent the receiver from assigning the contract. Therefore, if the commercial property being purchased has ongoing service or maintenance contracts or any other contract of perceived value, inquiry must be made of the receiver's ability to assign and written confirmation should be had from the other party that the contract will continue to be honoured.

II BUYING FROM A TRUSTEE

1. Effect of Bankruptcy

The property of a bankrupt vests automatically in the

trustee upon bankruptcy, subject to the Bankruptcy Act, R.S.C. 1985, c.B-3 and subject to the rights of secured creditors.⁹ The bankrupt ceases to have any capacity to deal with his property and the trustee is empowered to take control of his assets, liquidate them and distribute the proceeds according to the statutory priorities set out in the Act.

The property of a bankrupt comprises all of his property wherever situate at the date of bankruptcy as well as any property that may be acquired or devolve on him before his discharge.¹⁰ Also, a bankrupt's property includes any powers in or over property as might be exercised by him for his own benefit.¹¹ A bankrupt's property does not include, however, any property held in trust for another person or property that is exempt from execution or seizure under provincial laws.¹² The

⁹ Bankruptcy Act, R.S.C. 1985, cB-3, s.71 (2).

¹⁰ s.67 (c)

¹¹ s.67 (d)

¹² s.67 (a) & (b)

term 'property' is defined in Section 1 of the Act. It includes all forms of real and personal property together with all rights incident thereto. It is to be noted that the trustee acquires no higher right in the property of the bankrupt than the bankrupt had himself. Subject to the Act, the trustee takes the bankrupt's property subject to whatever rights and equities it was subject to in the hands of the bankrupt.

Pursuant to Subsection 69 (1) of the Bankruptcy Act, at the time of bankruptcy all proceedings are stayed against the debtor, except those brought by secured creditors.

2. Evidence of Trustee's Title

Normally, one of the preliminary acts of a trustee is to record a copy of the receiving order or assignment in the registration district or districts where the bankrupt owns real property. This will evidence the trustee's title to the property.

If you are acting on behalf of a client purchasing real estate from a trustee and the receiving order or assignment has not been registered, it is useful to ask the trustee to do so in order that the chain of title is complete.

3. Acquiring the Property

In order to validly convey assets of a bankrupt, the trustee must first obtain the permission of the inspectors of the estate ¹³ except in circumstances where the property is perishable or likely to depreciate rapidly in value ¹⁴ or where there is a summary administration.¹⁵

In addition to conducting all of the usual searches that would be carried out when buying from a solvent purchaser, a solicitor whose client is purchasing from a trustee in bankruptcy will need to be satisfied of the following matters:

¹³ s.30 (1)

¹⁴ s.18 (a)

¹⁵ s.49 (6); also see s.155-157

- (a) details of registration of the trustee's authority to act on behalf of the bankrupt and that the trustee continues to act in such capacity;
- (b) the appointment of the trustee has been affirmed by the creditors;¹⁶
- (c) the property being transferred is beneficially owned by the bankrupt and is not trust property;
- (d) the due appointment of the inspectors;
- (e) the permission of a majority of the inspectors has been given to the sale;¹⁷
- (f) there is no change to the date of closing either in the trustee or in the inspectors.

Many of the foregoing matters ought to be confirmed in recitals contained in the deed of conveyance from the trustee.

¹⁶ s.102 (5)

¹⁷ s.116 (3)

As a minimum, confirmation of the following should be requested by way of recital in the trustee's deed;

- (a) the date and manner of appointment (ie. assignment or receiving order);
- (b) the affirmation of the trustee's appointment by the creditors; and
- (c) the permission of the inspectors or a majority of them to the conveyance.

A sample trustee's deed is attached as Appendix IV. In some jurisdictions it is the practice to have the inspectors execute the conveyancing document as 'Parties of the Third Part' to evidence their consent to the transaction. In many instances, however, this is somewhat impractical as the inspectors in a large insolvency can be situated all over the country.

With respect to the other matters which you should be confirming, you may obtain declarations or written acknowledgements from the trustee and/or the bankrupt himself.

The effect of the delivery of a deed from the trustee is to vest the legal and equitable estate of the bankrupt in the property in the purchaser.¹⁸

¹⁸ s.84

APPENDIX I

CONDITIONS OF SALE

OF ASSETS

OF

WE CAN'T PAY LIMITED

1. The Vendor of the assets referred to in the Tender Form attached is **XYZ Limited**, Receiver under a debenture held by a secured creditor.
2. Tenders must be submitted in a sealed envelope marked "**DO NOT OPEN - TENDER - WE CAN'T PAY LIMITED**" to **XYZ LIMITED**, Halifax, Nova Scotia, Attention: John Doe. Tenders will be received until noon, May 31, 1992 at which time tenders will be opened in private in the presence of representatives of the Vendor and its solicitors.
3. All tenders must be accompanied by a certified cheque or bank draft payable to "**XYZ LIMITED - IN TRUST**" for 15% of the tendered purchase price. If the tender is accepted, the deposit will be applied towards the purchase price on closing.
4. Every tender submitted shall be in writing, under seal, in the Tender Form attached but may contain proposals for amending the conditions of Sale. However, tenderers seeking to change the Conditions of Sale or tenders received that are not on the attached form may at the sole discretion of the Vendor be rejected.

5. In the event that some of the tenders submitted are substantially in the same terms and/or amounts, the Vendor may in its sole discretion call upon those tenderers to submit further tenders.
6. A tender must be for an entire parcel. However, tenders may be made for one or more parcels or en bloc. Tenders submitted for more than one parcel must specifically allocate a separate price for each parcel tendered on and will be considered as separate tenders for each parcel tendered on, unless the tenderer states specifically that the acceptance of one parcel is conditional upon the acceptance of another parcel.
7. The highest or any tender shall not necessarily be accepted. In consideration of the Vendor receiving any tender and upon receipt by the Vendor of any such tender, the tenderer shall not be entitled to retract, withdraw, revoke, vary or countermand his tender. The deposit of any Tenderer attempting to do so shall be forfeited. Any acceptance shall be subject to the approval of the Supreme court of Nova Scotia.
8. Cheques accompanying unsuccessful tenders will be forwarded not later than June 7, 1992, by prepaid certified or registered mail or by courier service addressed to the tenderer at the address stated on the tender form.
9. If any tender is accepted by the Vendor then the successful tenderer (the "Purchaser") shall be notified in writing by the Vendor of such acceptance no later than June 2, 1992.
10. The balance of the purchase price shall be due on closing, which closing shall occur at 11:00 a.m. on June 30, 1992 at the offices of the Vendor or at such other time and place as the Vendor may designate. The Purchaser shall be responsible for the removal of all assets acquired on the day of closing unless alternate

arrangements are made by the Purchaser which are satisfactory to the Vendor. At the closing, the Purchaser shall be entitled to such deeds, bills of sale or assignments as may be considered necessary by the Vendor to convey the assets being sold and all such deeds, bills of sale and other documents shall contain no covenants other than a covenant that the Vendor has done no act to encumber the assets.

11. The advertisement, the tender and the acceptance by the Vendor and these Conditions of Sale, which shall be deemed to form part of such tender, shall constitute a binding agreement of purchase and sale (the "Agreement") with respect to the parcel or parcels so accepted and time shall be of the essence of the Agreement.
12. Any lists, documentation and other material and information provided to prospective tenderers relating to the assets which are the subject matter of these Conditions of Sale, including without limitation all appendices hereto, has been prepared solely for the convenience of prospective tenderers and are not warranted to be complete or accurate and are not part of the Conditions of Sale. Every tenderer shall be deemed to have relied entirely on his own inspection and investigation of assets and the title thereto.
13. All assets will be sold on an "as is, where is" basis and by submitting a Tender, the tenderer is acknowledging that the tenderer has inspected the assets described. No representation, warranty, inducement or condition has been given or made or can be implied as to title, description, fitness for purpose or intended use, quantity, condition or quality thereof or in respect of any other matter or thing whatsoever, and each tenderer shall be deemed to have relied entirely upon his own inspection and investigation. Without limiting the generality of the foregoing, assets are specifically offered as they will exist on the closing date with no representation as to the condition or quantities. If, on or before closing, it is found that there are encumbrances or charges against any of the assets being offered for sale which the tenderer has not agreed to assume in addition to, or

as part of his tender price which the Vendor is not willing to discharge, the Vendor may rescind the agreement to sell the assets in question and the tenderer shall be entitled solely to the return of his deposit without interest and without any other compensation of any kind or nature whatsoever for any loss, damages or other costs.

14. The Purchaser shall be allowed twenty (20) days after notice of acceptance to examine the title to the assets at its own expense and any valid objections to title thereof shall be made in writing to the solicitors for the Vendor, Messrs. Barrister & Solicitor, Halifax, Nova Scotia to the attention of A. Barrister. Should no valid objection in writing be made within that time to the said solicitor, title shall be deemed to have been accepted. Should any valid objection in writing be made within that time, the Vendor shall have a reasonable time to rectify and answer the same. If the Vendor is unable or unwilling to rectify or answer any valid objection which the Purchaser will not waive, the Vendor shall be at liberty to rescind the Agreement notwithstanding any intermediate acts or negotiations with respect to such objection, or any attempt to remove or comply with same, by notice in writing served upon the Purchaser or its solicitor. In that case, the Purchaser shall be entitled only to the return of the deposit money without interest, costs, or compensation.
15. The Purchaser of Parcel ____ agrees to accept title subject to municipal requirements, including building and zoning by-laws, etc., easements for hydro, telephone and like services to the Parcel and to restrictions and covenants that run with the lands, providing such restrictions and covenants have been complied with.
16. If the Purchaser fails to comply with the terms and conditions of the Agreement, the deposit and all other payments thereon shall be forfeited as liquidated damages and the assets may be sold and the deficiency, if any, on such resale, together with all charges attending to the same or occasioned by such default shall be paid forthwith by the Purchaser.

17. The Vendor shall not be required to furnish or produce any abstract deeds, declarations or other documents or evidence of title, except those in its possession.
18. The Vendor shall remain in possession of the assets until the purchase is completed and title to the assets shall not pass to the Purchaser nor shall the Purchaser be entitled to possession of same until the purchase price has been paid in full and the Vendor has delivered the documents referred to in Paragraph 10 of these Conditions of Sale.
19. The obligation of the Vendor to sell and of the Purchaser to purchase the assets under the Agreement shall at the option of the Vendor terminate in the event that prior to the closing date of the sale such assets are in the opinion of the Vendor substantially destroyed by fire, flood, the elements, Government action, or civil commotion or any other external cause beyond the control of the Vendor. Such option to terminate by the Vendor shall be exercised by giving notice in writing to the Purchaser that it intends to take the proceeds payable under existing insurance policies and terminate the Agreement. In such event, the Agreement shall automatically terminate and be deemed null and void and the deposit money shall be returned to the Purchaser without interest, cost, compensation or deduction and no party shall be liable to another for any costs or damages whatsoever. If the Vendor does not exercise such option, the Purchaser, at his option may perform the Agreement, such option to be exercised, in writing, within five days after notice to the Purchaser that the Vendor does not intend to exercise its option to terminate. In such event, the Purchase shall be entitled only to an assignment of any proceeds payable under the existing insurance policies and a transfer of any remaining assets in full settlement of the Vendor's obligations to repair or replace the damaged assets and in full satisfaction of this Agreement. If the Purchaser does not exercise this option, the Agreement shall be automatically terminated and deemed null and void and the deposit money shall be refunded to the Purchaser without interest, costs,

compensation or deduction and neither party shall be liable to the other for any costs or damages whatsoever.

20. The Purchaser agrees that the Purchaser will submit all proposed advertisements which the Purchaser intends to make with respect to the resale of the purchased assets to the Vendor and no advertisement shall be placed without the Vendor's prior written approval, which approval shall not unreasonably be withheld.
21. The Vendor represents and warrants to the Purchaser that the Vendor is not now and will not be at the closing date, a non-resident of Canada within the meaning of the Income Tax Act (Canada), which representation and warranty shall survive the closing of the transactions contemplated herein.
22. A list of the assets is attached to these Conditions of Sale. This list has been prepared solely for the convenience of prospective tenderers and is not warranted to be complete or accurate.
23. The Purchaser shall pay, in addition to the tender prices:
 - (a) all applicable Federal, Provincial and Municipal taxes including any retail sales taxes and excise taxes levied on or payable by either the Vendor or Purchaser as a result of the completion of any Agreement of Purchase and Sale;
 - (b) the cost of dismantling and removing the assets from their present location and of repairing any damage caused thereby.
24. The Purchaser shall assume complete responsibility for compliance with all laws, municipal, provincial or federal, insofar as the same apply to the assets and the use thereof by the Purchaser.
25. The Vendor, in its discretion, may vary, amend, supplement or waive any or all of the foregoing conditions.

26. The terms and conditions contained in Paragraphs 9, 10, 20, 23 and 24 shall not merge on the closing of the Agreement but shall remain in full force and effect.
27. The Vendor herein acts in its capacity as Receiver and Manager and shall have no personal or corporate liability under these Terms and Conditions of Sale.
28. The Vendor reserves a right to withdraw any parcel or any part thereof on or before the closing date if there is any actual, threatened or anticipated litigation with respect to any parcel or if any parcel has been redeemed or if the security under which the Vendor was appointed has been redeemed. If the Vendor exercises this right, the Agreement of Purchase and Sale shall be automatically terminated and deemed null and void and the deposit money shall be refunded to the Purchaser without interest, costs, compensation or deduction and neither party shall be liable to the other for any costs or damages whatsoever.
29. Any notice provided for herein shall be given in writing:
 - (a) to the Vendor, at the address set forth below; and
 - (b) to any tenderer or purchaser at the address set forth in its tender; and shall be delivered personally or sent by telex, telegram or facsimile or by certified or registered mail, postage prepaid. Any notice which is delivered shall be effective when delivered, any notice which is sent by telex, telegram, or facsimile shall be effective on the day of sending and notice which is mailed shall be effective on the second day following the day of mailing.
30. The Agreement shall be governed by the law of the Province of Nova Scotia and the Courts of the Province of Nova Scotia shall have exclusive jurisdiction with respect to any disputes arising out of the Agreement.

31. Appointment for inspection of assets may be arranged by contacting the undersigned.

**XYZ LIMITED
Receiver-Manager and
Agent for a Secured Creditor of**

Telephone:

Facsimile:

Telex:

SCHEDULE "A"
FORM OF TENDER
TENDER

TO : XYZ LIMITED, Receiver of WE CAN'T PAY LIMITED
ATTENTION : JOHN DOE

1. _____
(Name of Tenderer)

2. _____
(Address of Tenderer)

3. _____
(Telephone Number)

(Facsimile Number, if available)

(Telex Number, if available)

4. We/I hereby submit this irrevocable tender for the parcel or parcels indicated below (a blank indicates no bid). All amounts set out in this tender form are in Canadian Dollars.

Parcel A \$ _____

Parcel B \$ _____

5. Total amount of our/my tender is: \$ _____.

6. Enclosed is our/my certified cheque payable to _____ as a deposit in the amount of \$ _____, representing 15% of the total amount of our/my tender submitted herein.

7. We/I agree irrevocably to be bound by the Conditions of Sale herein.

DATED at _____ this _____ day of _____, 1992.

Witness

(Signature)
(If Tenderer is a Corporation, corporate seal must be affixed.)

APPENDIX II

APPLICATION TO APPOINT A RECEIVER

ORDER

1992

S.H. No. 0000

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

B E T W E E N:

ABC BANK,
a body corporate

PLAINTIFF

- and -

WE CAN'T PAY LIMITED,
a body corporate

DEFENDANT

ORDER

BEFORE THE HONOURABLE MR. JUSTICE IN CHAMBERS:

UPON READING the Originating Notice (Action) and Statement of Claim herein, the Affidavits of A. Smith and B. Smith and the Exhibits referred to therein and upon reading the other papers on file herein;

AND UPON IT APPEARING that the Originating Notice (Action) and Statement of Claim together with copies of the said Affidavits, and a copy of this Order as proposed, have been served on **We Can't Pay Limited** and accepted by, and consented to by A. Lawyer, solicitor for the Defendant herein.

AND UPON MOTION of A. Barrister on behalf of the Plaintiff.

IT IS ORDERED:

1. THAT XYZ Limited, a body corporate, be and it is hereby appointed Receiver and Manager (herinafter referred to as the "Receiver") of the undertaking, property and assets of the Defendant, comprised in a subject to two Debentures of the Defendant held by the Plaintiff dated July 4, 1989, as amended, together with the authority to manage the business and undertaking of the Defendant and to act at once, without prejudice to the rights of prior encumbrancers who may think fit to take possession and realize by virtue of their respective securities.
2. THAT the Defendant to forthwith deliver over to the Receiver all of the undertaking, property and assets of the Defendant, real and personal, and of every kind and description, including all books, documents, papers and records relating thereto, subject to the rights of all other persons (if any) having secured claims superior to that of the Plaintiff, upon any part of the property and assets of the Defendant.
3. THAT no person, firm or corporation (other than a secured creditor whose claim is prior to that of the Plaintiff) shall take or continue any action at law or other action or proceeding as against the Defendant or against the Receiver or otherwise interfere with the carrying on of the business of the Defendant by the Receiver, without leave of this Court having been first obtained.

4. **THAT** the Receiver be and it is hereby empowered, from time to time, to do all or any of the following acts or things, until further Order of this Court, or a Judge thereof:

- (a) To carry on and operate the business of the Defendant in all its phases whatsoever, for as long as the Receiver shall, in its opinion, deem necessary including the completion of any work in progress and any work under contract which may have been negotiated by the Defendant and to enter into new contracts if the Receiver feels it desirable to do so and the Receiver shall account to this Court for the operation of the Business as an active business;
- (b) To sell or in any other manner dispose of all the goods, chattels and equipment of every kind and description now owned by the Defendant and subject to the security or mortgages or charges created by the Defendant, such sale to be upon such terms as the Receiver may, in its discretion, deem advisable;
- (c) To enter into agreements for the sale, conveyance, transfer, assignment, leasing or other dispositions of the real property of the Defendant which are subject to the security, charges or mortgages created by the Defendant, in such manner and at such prices as the Receiver may, in its discretion, determine, subject to the approval of this Honourable Court;
- (d) In connection with any such sale, lease or other disposition of property, to execute any deeds or other documents conveying, and which shall be effective to convey all the estate, right, title, interest, claim, property and demand of the Defendant in any of its property at the time of the making of the Debenture to the Plaintiff, or at any time since, and of all persons claiming or

entitled by, from or under the Defendant, of, in and to the said property and subject to the security, mortgages or charges created by the Defendant, and subject always to the rights of other secured creditors having priority over the Plaintiff;

- (e) To institute and prosecute all suits, actions and proceedings at law, as may, in the opinion of the Receiver, be necessary or desirable for the proper protection of the property, assets and undertakings of the Defendant, and likewise to defend all suits, proceedings, and actions instituted against it as such Receiver, and to appear and conduct the prosecution and defence of such suits, actions or proceedings now pending in any court against the Defendant, the prosecution or defence of which will in the judgment of the Receiver be necessary for the proper protection of the property, assets and undertakings of the Defendant, and the authority hereby conveyed shall extend to such appeals as the Receiver shall deem proper and advisable in respect of any order or judgment pronounced in any such suit, action or proceeding;
- (f) To pay all debts of the Defendant which have priority over the claims of the Plaintiff, which the Receiver deems necessary or advisable, to properly operate, manage and realize on the assets subject to the Debenture to the Plaintiff, and all such payments shall be allowed to the Receiver in passing its accounts, and shall form a charge on the undertaking property and assets of the Defendant in priority to the Debenture of the Plaintiff.
- (g) For the purpose of carrying out the powers and duties hereunder, to employ and retain such agents, assistants, employees, solicitors and auditors as the Receiver may consider necessary for the purpose of preserving the property and assets of the Defendant, the carrying on of the business and undertaking of the Defendant,

and the disposition of such property and assets, and to enter into agreements with any person respecting the business or property of the Defendant and that any expenditure which shall be properly made or incurred by the Receiver in so doing shall be allowed it in passing its accounts and shall form a charge on the undertaking, property and assets of the Defendant in priority to the Debenture to the Plaintiff and the charges contained therein;

- (h) To receive and collect all monies now or hereafter owing to the Defendant;
- (i) To take such other steps as the Receiver may deem necessary or desirable to preserve and protect the real and personal property, in its custody, of the Defendant.

5. **THAT** for the purpose of exercising the powers and performing the duties hereunder, the said Receiver be and it is hereby empowered from time to time to borrow monies not exceeding Twenty Thousand Dollars (\$20,000.00) with interest thereon at a rate from time to time equal to the prime commercial lending rate of the Plaintiff at Halifax, plus one quarter of one percent (1/4 of 1%) in priority to all claims of the Plaintiff under the Plaintiff's Debenture. Such borrowings shall be evidenced by a Receiver's Certificate, substantially in the form attached as Schedule "A" hereto, which form, or documentation similar thereto, is hereby specifically approved.

6. **THAT** the Receiver shall be at liberty, and is hereby authorized to give or issue receipts or certificates for any sums so borrowed by it pursuant to this Order, which receipts or certificates shall be substantially in the form of Schedule "B" annexed hereto, which is hereby directed to be made a part of this Order.

7. **THAT** the Receiver shall be at liberty from time to time to apply to this Honourable Court for further borrowing;

8. **THAT** the said Receiver do from time to time pass its accounts for the period commencing the 1st day of January, 1992, as this Honourable Court, or a Judge, may direct, and that any fees or expenditures, both before and after the date of this Order, including necessary solicitors' fees on a solicitor and client basis, which shall be properly made or incurred by the Receiver shall be allowed it in passing its accounts and shall form a charge on all of the said property and assets in priority to the claims of the Plaintiff and that the Receiver be allowed all such payments in its accounts, and when the accounts are so passed, the balance be disbursed as this Honourable Court may direct.

9. **THAT** the Receiver do from time to time pass its accounts before this Honourable Court at Halifax and at any time of passing such accounts, the Court fix the remuneration and indemnification of the Receiver which shall be at liberty, before passing its accounts and applying to have its remuneration fixed, to pay to itself in respect to its services as Receiver a reasonable amount, either monthly or at such longer intervals as it deems appropriate, which amounts shall constitute an advance against its remuneration when fixed.

10. **THAT** the Receiver also be at liberty, from time to time, to make interim payments to the Plaintiff out of the amounts realized by the Receiver in liquidating the property charged by the Debenture to the Plaintiff.

11. **THAT** the Receiver may from time to time apply to this court, or to a Judge thereof, for direction and guidance in the discharge of its duties as Receiver.

12. **THAT** liberty be preserved to any and all parties interested to apply for any further or other Order as may be advised.

13. **THAT** the said Receiver need not file security with this Honourable Court for the due and proper performance of its duties as such Receiver, but the Receiver or the Plaintiff shall make good any default in connection with the Receiver's custody or management of the property and business of the Defendant, unless relieved from any default on such terms as this Honourable Court thinks fit.

14. **THAT** the Costs of the Plaintiff of and incidental to this action up to and inclusive of this Order be taxed as between solicitor and client and paid by the Receiver as a part of the expense of the management of the property and undertaking of the Defendant.

15. **THAT** the powers and duties hereunder of the receiver may be exercised by John Doe, Vice-President of **XYZ Limited** or any person acting under his supervision and the said John Doe and any such persons shall be considered to be officers of this Honourable Court when so acting.

16. **THAT** the Receiver shall report to this Honourable Court as to its Administration at least annually during the currency of the Receivership and shall provide this Honourable Court with all copies of reports provided to the Plaintiff.

Prothonotary

CONSENTED TO:

SCHEDULE "A"

FORM OF RECEIVER'S CERTIFICATE

No.

1. THIS IS TO CERTIFY that the undersigned,, the Receiver and Manager of the undertaking, property and assets of(Defendant)..... comprised in and subject to the security created by a Debenture given by(Defendant)..... to(Plaintiff)..... dated the day of, 1992, and by Order of the Supreme Court of Nova Scotia dated the day of, 1992, made in an action by as Plaintiff and as Defendant has received as such Receiver and Manager from the holders of this Certificate the sum of Dollars (\$.....) which the Receiver and Manager was authorized to borrow under and pursuant to the said Order.

2. The principal sum of Dollars (\$.....) represented by this Certificate is payable not later than the day of, 19.., with interest thereon at the prime lending rate of plus of one percent (..... of 1%) payable monthly, the first of such payments of interest being payable on the day of, 19..

3. The said principal sum, together with interest thereon, not exceeding the prime lending rate of plus of one percent (..... of 1%) per annum, is by the terms of the said Order, together with the principal amounts and interest thereon of all other Certificates issued by the said Receiver and Manager pursuant to the said Order, or to any further Order of the said Court, a charge upon the whole of the undertaking, property and assets of of every nature and kind comprised in or subject to the Debenture and all other assets and property which are now or may hereafter be in the custody or control of the Receiver and Manager as such, in priority to the Debenture.

4. All sums payable in respect of principal and interest under this Certificate are payable at the office of
5. In case default shall be made in payment of interest on this Certificate and such default shall continue for a period of thirty days, the principal of this Certificate shall be declared immediately due and payable by the holder thereof.
6. This Certificate is subject to be redeemed and all liability in respect of the sum for which it is issued and for further interest thereon terminated on tender to the holder thereof of the principal sum due in respect thereof with interest as aforesaid to the date of such tender.
7. The said charge shall operate so as to permit the Receiver and Manager to deal with the undertaking, property and assets of and to carry on the business and undertaking of as authorized by the said Order of the Supreme Court and as authorized by any further or other Order of the said Court.
8. The Receiver and Manager does not undertake and it is not under any personal liability to pay any sum in respect of which it may issue Certificates under the terms of the said Order dated the ... day of, 19., or any interest thereon.

DATED at, Nova Scotia, this day of, 19...

Receiver and Manager

APPENDIX III

THIS INDENTURE made in duplicate this day of, 1992

B E T W E E N:

XYZ LIMITED, a body corporate, Receiver and
Manager of **We Can't Pay Limited**

(hereinafter called the "Grantor"

OF THE FIRST PART

- and -

WE GOT A DEAL LIMITED,

(hereinafter called the "Grantee")

OF THE SECOND PART

WHEREAS in a certain suit, lately commenced and prosecuted in the Supreme Court of Nova Scotia by **ABC Bank.**, as Plaintiff and **We Can't Pay Limited**, as Defendant under 19.. S.H. No. 0000, the said Plaintiff has sought payment by the Defendant of the obligations of the Defendant to the Plaintiff as holder of two Debentures dated July 4, 1989 as amended by Amendments and Supplements dated December 24, 1990 and further sought the confirmation of the appointment of **XYZ Limited** as Receiver and Manager of all of the property of the said Defendant charged by the said Debentures, the Plaintiff having previously appointed the said **XYZ Limited**, as its Receiver and Manager effective June 15, 1992;

AND WHEREAS by an Order issued the 1st day of April, 1992, **XYZ Limited**, was so appointed as the Receiver and Manager of the Defendant and was empowered by the terms of the said Order to sell the real and personal property of the Defendant and in connection with any such sale: "to execute any deed, deeds or other documents conveying, and which shall be effective to convey all of the estate, right, title, interest, claim, property and demand of the Defendant in any of its property at the time of making of the security to the Plaintiff, or any time since, and of all persons claiming or entitled by, from or under the Defendant, of, in or to the said property";

AND WHEREAS by the terms of an Order dated April 12, 1992, XYZ Limited, was further specifically authorized to complete the sale contemplated herein;

NOW THEREFORE THIS INDENTURE WITNESSETH that pursuant to the said Order issued April 12, 1992, and in consideration of the premises and the sum of Two Hundred Thousand Dollars (\$200,000.00), the Grantor hereby conveys to the Grantee, its successors and assigns, all the estate, right, title, interest, claim, property and demand of the said Defendant We Can't Pay Limited, as at July 4, 1989, or at any time since and of all persons claiming or entitled by, from or under the said We Can't Pay Limited in and to the real property described in Schedule "A" attached hereto and the personal property described in Schedule "B" hereto.

The Grantor shall not, by this Indenture, or by any other act, deed, matter or thing, be taken to give or make any assurance, warranty or covenant, either for title or the condition of the estate, right, property and assets or any part thereof, or for or in respect of any matter or thing connected therewith, except that the Grantor covenants with the Grantee that the Grantor has done no act to encumber the said real or personal property.

IN WITNESS WHEREOF the Grantor has hereunto executed these presents by affixing its corporate seal under the hand of its duly authorized officer.

SIGNED, SEALED AND DELIVERED)	
in the presence of:)	XYZ LIMITED
)	
)	Per:
)	
.....)	Per:
)	
)	

APPENDIX IV

THIS INDENTURE made this day of April, A.D., 1992

B E T W E E N:

XYZ LIMITED, a body corporate, Trustee of the
Estate of **We Can't Pay Limited**, In Bankruptcy

(hereinafter called the "Grantor")

OF THE FIRST PART

- and -

WE GOT A DEAL LIMITED, a body corporate,

(hereinafter called the "Grantee")

OF THE SECOND PART

WHEREAS the Grantor was appointed Trustee of the Estate of **We Can't Pay Limited** (the "Company") in bankruptcy pursuant to a Receiving Order issued January 5, 1992;

AND WHEREAS at a duly called meeting of the creditors of the Company, the Grantor was affirmed as Trustee of the estate of the Company, in bankruptcy, and certain Inspectors (the "Inspectors") of the estate of the Company were appointed;

AND WHEREAS the Inspectors have approved an Agreement of Purchase and Sale between the Grantor and the Grantee dated March 31, 1992 (the "Agreement"), and have authorized the Grantor to consent to the completion of the sale in accordance with the terms of the Agreement pursuant to a Resolution duly passed by the Inspectors on April 5, 1992;

AND WHEREAS there have been no changes as at the date hereof either in the Trustee of the estate in bankruptcy of the Company or in the Inspectors;

