CHAMBERS PRACTICE IN BANKRUPTCY AND RECEIVERSHIP

Robert MacKeigan

I. BANKRUPTCY

Nova Scotia Supreme Court has special jurisdiction in proceedings commenced under the Bankruptcy Act by virtue of Section 153. Under the first Bankruptcy Act, the provincial courts were constituted "Courts of Bankruptcy" but this reference was subsequently deleted. While it is frequently considered to be a separate court when sitting in bankruptcy, it does not appear to be legally so. However, when the court is dealing with bankruptcy matters, there are a number of distinct differences from the position when it is exercising its regular civil jurisdiction.

Nova Scotia's Chief Justice has not exercised the power to assign a particular judge to hear bankruptcy matters. Applications come before the regular chambers judge in much the same manner as other chambers motions. During the course of the day, the chambers judge may shift back and forth from acting in bankruptcy to its regular jurisdiction. When hearing a proceeding as a judge in bankruptcy, there appears to be some question whether he can act also at the same time as a judge of the civil side of the Supreme Court.

In the present practice in Nova Scotia very little distinction is made between the jurisdictions. However, it is to be kept in mind that when dealing with proceedings before a judge sitting in bankruptcy, the judge's authority may sometimes be limited and there are separate rules of court which are applicable. The forms of notices and other documents provided for as schedules to the rules are also somewhat different from those specified in the Civil Procedure Rules.

The rules governing the procedure before a judge in bankruptcy are passed by federal Orders in Council, unlike the Civil Procedure Rules. Due to the jurisdiction of the federal government over "bankruptcy and insolvency" these rules take precedence over the rules passed by the judges. The Governor in Council could delegate to the judges under Section 180 of the Act, the power to make, alter or revoke these rules but it has merely provided, in subsection 4 of the General Rules as follows:

> " The practice of the court in civil actions or matters, including the practice in chambers, shall in cases not provided for by the Act or these rules, and so far as the same are applicable and not inconsistent with the Act or these rules, apply to all proceedings under the Act or these rules."

Chambers practice in bankruptcy matters, because of the different procedures and rules, frequently involves

the final determination of the matter in dispute. Therefore, a chambers judge is frequently asked to have extensive hearings which may involve several days of examination and cross-examination of witnesses. Some common examples include:

(a) contested petition for a receiving order;

(b) applications by trustee to set aside conveyances, preferences or settlements etc.;

(c) applications by trustee to determine priority of creditors;

(d) appeal from determination by trustee of amount a creditor may claim in bankruptcy.

All of these matters involve the final determination of rights and may require extensive examinations prior to hearing. The actual hearing is not necessarily solely on affidavits but may involve several days of oral evidence. Despite this, the General Rules passed under the Bankruptcy Act encourage these proceedings to be determined in chambers. More so than in other litigation, there seems to be a recognition in this field that there is a need for the issues to be decided as soon as possible and at the least cost. To try to accomplish this, the Bankruptcy General Rules, subsection 12 provides that "every application to the court shall be made by motion unless the court otherwise orders."

In Relcor Ltd. v. Neiff Joseph Land Surveyors Ltd. (1977), 18 N.S.R. (2d) 370, Mr. Justice MacDonald in the decision on behalf of the Appeal Division expressed the view that the trustee could have commenced the application to set aside a conveyance by Originating Notice (Action) or an Originating Notice (application inter partes). In some jurisdictions, proceedings commenced by ordinary action are dismissed or at least transferred into the bankruptcy court to be determined in a summary manner. Despite Mr. Justice MacDonald's comments, the summary notice of motion appears to be the usual manner even where the facts are hotly disputed. As indicated above, this is the manner which is contemplated by the General Rules under the Bankruptcy Act and most of the decided cases.

The comments of Chief Justice Harris in The Eastern Trust Co. v. The Lloyd Manufacturing Co. (1923), 56 N.S.R. 246 (in banco) at page 251 still seemed to be appropriate:

> " An examination of the Bankruptcy Rules shews that they are a full and complete code and framed for the obvious purpose of providing summary and expeditions methods for determining questions arising in Bankruptcy matters with the minimum of cost. It is of the utmost importance that bankrupt estates should be wound up as cheaply and expeditiously as possible, and Parliament

> had the right in dealing with the question of bankruptcy and insolvency do to what I think it has done in this case - prescribe a special procedure for determining questions raised in realizing the assets of the estate."

In that case the court transferred a regular action by the trustee to the judge in chambers to be dealt with in a summary manner due to the predecessor of subsection 12 (1) of the Rules.

Once a motion is made under subsection 12, many of the more complicated matters involving the setting aside of conveyances or payments etc. frequently becomes an application for directions under subsection 86. Often the supporting affidavit becomes in essence the statement of claim to which the other party files a defence or affidavit in response. The parties and the court then set out in the order for directions any other matters, including whether any further discovery examination will be held and try to find an appropriate time for the chambers judge to hear the matter. This may well mean a time commitment of several days and in such cases under the current system, time must be found outside the period during which the judge is hearing regular chambers matters.

In many cases, there is little in the way of disputed facts or may be largely just an argument on the law and the court may be able to deal with it immediately in the regular chambers or at a time certain set for 11:00 a.m. or at 2:00 p.m.

Pre-Hearing Procedures

Some have asked how one can proceed to a final trial in chambers without the benefit of discovery examinations and other pre-trial procedures. Where this is considered necessary, the trustee will, prior to making the motion itself already have examined the bankrupt and others under oath. This may be done without an Order before the Registrar (or person appointed by the Registrar) upon resolution of the creditors or the inspectors (Section 133 of the Act). The trustee also has powers to require production of documents. Where further discovery is necessary, this can be provided for in the order giving directions on the return of the initial motion pursuant to subsection 86 of the Rules.

Chambers Jurisdiction of the Registrar

The Registrar (in this district Daniel Morrison) has extensive powers under the Act (see Section 162). He does hear petitions in bankruptcy if unopposed. Thus, such matters are normally returnable 9:30 on a regular chambers day and the petition in bankruptcy specifies that it will be heard by the judge in chambers if opposed. Thus, one does not normally set such a matter down initially for a time certain, but naturally the hearing may have to be adjourned to another day if there is opposition involving oral evidence.

The Registrar has the power (which is exercised in many provinces) to hear many unopposed applications, appeals from disallowance of claims and any matter whatsoever with the consent of the parties. In this province, this is limited to routine administrative ex parte or unopposed applications. He does, however, tax accounts, whether opposed or not and deals with certain unopposed applications for the discharge of a bankrupt. Other than the very routine unopposed applications for discharge, these are however, normally referred to the chambers judge. As indicated in Section 162 of the Act, the Registrar may refer any matter within his jurisdiction to a judge in chambers.

Other Differences Under the Bankruptcy Rules

Anyone involved in a bankruptcy proceeding should be totally familiar with the Bankruptcy Rules as these take precedence over the Civil Procedure Rules. In addition, it is to be noted that the Rules and the forms published pursuant to the Rules are slightly different. The Civil Procedure Rules are important in this area but they only apply when the situation is not covered by the General Rules. Some commonly overlooked requirements of the Bankruptcy Rules include:

(a) notice to the Office of the Superintendent of Bankruptcy of all proceedings (7 (5));

(b) notice of proceedings must generally be given at least four clear days (5 (1));

(c) requirement of leave for interrogatories or discovery of documents (29 (1)), except for trustee's powers under the Act;

(c) special provisions re time for service (36);

(e) awards of costs are taxed by the Registrar - not the Taxing Master.

Until recently, the Bankruptcy General Rules prohibited affidavits sworn before a client's solicitor or partner or agent of such solicitor - similar to what existed in regular civil matters prior to March, 1972. This prohibition was finally revoked for bankruptcy matters in 1981

II RECEIVERSHIPS

Many people incorrectly assume that the Bankruptcy Act and it general rules of court have some application in cases of Receivers or Receiver-Managers appointed in proceedings to enforce a debenture or in other proceedings in the regular civil court. This may partly be due to the fact that under the Bankruptcy Act one sometimes has an "interim receiver" who has very limited power at the initial stages of a bankruptcy proceeding (after filing the petition or proposal). In addition, bankruptcy frequently occurs when there is also a receivership. However, this is usually for some purpose such as to assist the Receiver in the realization of assets or have some person act for other creditors to review the Receiver's actions or to bring into effect the priorities of various claims set out in the Bankruptcy Act. In addition,if there are assets available after payment of the secured creditor obtaining the receivership, a bankruptcy frequently occurs to distribute the surplus. Otherwise, it presumably revests in the name of the debtor.

Most people think of a Receiver (which term I will use to describe both a Receiver and a Receiver-Manager) as a person who is assisting the holder of a debenture to realize on the assets charged under the

debenture. Frequently, other security instruments such as mortgages also contain receivership provisions. An appointment by the court is also obtained in other circumstances from time to time - eg. to assist in the recovery of a judgment or other claim or to hold and/or sell assets pending the outcome of the dispute such as one among shareholders of a company or on the validity of certain obligations.

The Judicature Act, Section 39 (9), provides that a Receiver may be appointed "by an interlocutory order of the court, in all cases where it appears to the court to be just or convenient that such order should be made ...". Much the same provision is found in Civil Procedure Rule 46.01 and the powers which are to be given are specified in Rule 54. I have been asked to concentrate, however, on the theory relating to Receivers appointed to enforce a debenture or mortgage.

A. Court Appointed Receiver in Action to Enforce a Debenture or Mortgage

In most provinces there is a statutory power of sale under which a debenture holder or its Receiver may effectively sell real property free and clear of the interest of the mortgagor (or maker of the debenture) and all subsequent encumbrancers. Any power of sale which

exits in Nova Scotia appears to be purely contractual and has fallen into disuse. This, it seems, is due to the failure of Nova Scotia to introduce improvements to the common law power of sale which England did by the Conveyancing Act, 1881. Nova Scotia adopted the powers of the Court with respect to sales in foreclosure proceedings and other proceedings set out in that English statute by virtue of the Judicature Act and under Section 14 of the Real Property Act.

We are quite familiar with the "normal" procedure for foreclosing a mortgage using the standard documents approved by the judges. The main reason for court-appointed Receivers in this Province is to make use of the same laws and rules as are used in the "normal" procedure. If you take a look at the receivership precedents in the material, you will see that the statement of claim is very similar to the usual form of foreclosure statement of claim. We simply claim a few more remedies.

You should consider the receivership order as the parallel to the normal foreclosure order. In addition to the foreclosure provisions, it also allows the Receiver to have certain powers pending the sale or sales of assets. The foreclosure provisions of the order (Section 4 (c) and Section 5) follow very closely the wording in the "normal" order which was approved for foreclosures in Mortgage

Corporation of Nova Scotia v. Allen (1929), 60 N.S.R. 535, as amended by the Supreme Court of Canada in [1930] S.C.R. 16. This seems to be the basis for the existing forms approved by the judges.

Some have questioned the power of the Court in Nova Scotia to foreclose other than by auction. However, it is clear that the court has a wide discretion as to the manner of sale (see Rule 47.16). Even though this Rule is not under the heading "Foreclosure and Sale", it still applies (Pew v. Zinck et al [1953] 1 S.C.R. 285, at pp. 303.

In the "normal" foreclosure sale subsequent encumbrancers are not made parties to the action. They are, nevertheless, bound by the order due to the provisions of Rule 5.13 (4) which provides for 30 days notice of the sale and an opportunity to apply to revoke or vary the order (see also Real Property Act, Section 24 (1)). This is not feasible when another method of sale in employed. Therefore, the common practice is to add the subsequent encumbrancers as parties, either initially or at least before an unconditional agreement for sale of the land in entered into. It appears clear that some procedure must be used in order to make the subsequent encumbrancers bound by the foreclosure order (see Mortgage Corporation of Nova Scotia v. Allen, supra) and this is

usually done in receivership matter by formally making them parties defendant. Nevertheless, the court may in proceedings to enforce a debenture order a sale "before or after judgment and whether or not all interested persons are ascertained or served" (Rule 47.15).

Under Rule 47.12 a second or subsequent mortgage cannot be foreclosed without the consent of the prior mortgagee leave. Therefore, partly for this reason, a debenture which is subsequent to an undisputed prior charge should have such a consent or, alternatively, a provision in the order to the effect that it is "without prejudice to the rights of prior encumbrancers who may think fit to take posssession by virtue of their respective securities". In absence of this, a prior mortgagee would be prevented from going into possession or taking proceedings. The court-appointed Receiver is an officer of the court and one cannot disturb his possession without leave.

There may, of course, be reasons to join the holder of the prior charge as a defendant - eg. to prevent him from taking assets and disposing of them in a manner detrimental to other creditors or to obtain priority over the prior mortgagee for all expenses.

Since he becomes an officer of the court, the Receiver no longer has duties or powers under the debenture.

The debenture holder cannot control the Receiver and the Receiver must look only to the order to find the extent of his power. As an officer of the court, he will have a duty to all creditors, both secured and unsecured, and to the debtor company. The power of sale and other powers set out in the debenture, dispite views to the contrary, become irrelevant upon the court appointment. Such an appointment is possible whenever there is a charge under a security instrument, regardless of whether or not that security instrument itself contains receivership clauses.

As indicated, the court has a very wide discretion as to the method of sale under Rule 47.16. Receivers generally are authorized to accept the highest tender or enter into private agreements for the sale after advertisement.

It is also possible for the court to appoint a person other than the sheriff to conduct a foreclosure sale - for example, to complete the terms of a beneficial private agreement without having a full receivership with all of the management powers frequently set out in the receivership order.

After a normal foreclosure sale, the sheriff prepares a report and application is made to approve the sale (see Rule 47.17). Similarly, in receivership matters

the Receiver reports on his actions and gets an order confirming the proceedings and obtains a discharge (see precedents).

The foregoing attempts to set out in some detail why in Nova Scotia we have a tendancy to have more court-appointed Receivers than in some other jurisdictions. When there is only personal property involved, the aid of the court in Nova Scotia is not necessary.

There are, of course, other reasons for a court-appointed in actions to enforce debentures - including the assistance of the court in taking possession of assets and providing a form for the determination of questions involving how a Receiver should operate or realize. However, the need for the aid of the court in some manner in order to sell real property remains the most common reason.

Between the time of the appointment by the Receiver and his discharge, there are often a number of other applications coming before the Chambers Judge - such as application to approve a particular sale and challenges by other interested parties to the actions of the Receiver. It is my view that any creditor should have the power to intervene and request directions to be given to the Receiver and this is expressly provided

for in the standard precedent.

If the debtor company is a federal company, Section 95 of the *Canada Business Corporations Act* sets out a method for interested persons applying, without formally intervening:

> "95. Directions given by court. - Upon an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or upon an application by any interested person, a court may make any order it thinks fit including, without limiting the generality of the foregoing,
>
> > (a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
> >
> > (b) an order determining the notice to be given to any person or dispensing with notice to any person;
> >
> > (c) an order fixing the remuneration of the receiver or receiver-manager;
> >
> > (d) an order requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation, or to relieve any such person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager;
> >
> > (e) an order giving directions on any matter relating to the duties of the receiver or receiver-manager."

B. Private Appointments under Debentures

In most cases, there is a private appointment under a debenture which is followed, if necessary, by a court appointment in order to aid in foreclosure or for other reasons. Under the Canada Business Corporations Act, the court is given certain powers over all receivers whether court appointed or not and applications can be made even if there are no proceedings commenced (Section 95, supra).

No such express rules apply to Nova Scotia companies. It may well be, however, that if an interested creditor commenced a "proceeding" under the Civil Procedure Rules requesting a court appointment, our courts would require the privately appointed receiver to come under its jurisdiction and if the private receiver was reluctant to do so, the court might well appoint another receiver to act in his place on the grounds that it is "just and convenient" (Rule 46.01).

C. General

Despite suggestions from time to time to the contrary, the area of receivership does not generally involve any unique rules or procedures. As I hope you can see from the above, it is simply an application of the Civil Procedure Rules and the normal practice

relating to Chambers motions applies. However, there is a similarity to bankruptcy in that there is often a need for a summary determination of issues in dispute. Thus, you frequently find a final determination of the rights of creditors or the determination of priorities among creditors being dealt with on a motion for directions - which can involve extensive oral evidence.

October, 1982.