SUPREME COURT OF NOVA SCOTIA

Citation: *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82

Date: 2018-04-11
Docket: Tru. No. 470166
Registry: Truro

Between:

Bank of Montreal

Applicant

v.

Linden Leas Limited

Respondent

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 20, 2018, in Truro, Nova Scotia
Counsel:	Bruce Clarke, Q.C., and Leon Tovey for the Applicant Jillian Foster representing the Respondent

By the Court:

Introduction

[1] Linden Leas Ltd. (LL) is a corporation. However, its embodiment is the Foster family.

[2] Frank and Edna Foster and their children started, and continue to grow, a distinctive herd of cattle, which are highly sought after by buyers. They have collectively worked and managed the farm that sustains the cattle herd that is its core enterprise. Their daughter, Jillian, is a veterinarian and intimately involved with the farm. Even in the documents filed herein, the respondent Corporation is referred to by the Fosters as the "Farmer". [1]

[3] The Bank of Montréal (BMO) are presently the *only* secured creditor having as security the farm's cattle herd. Its financial dealings with LL stretch back to at least May 2001. [2] It seeks a receivership order in relation to the cattle herd.

[4] LL contests the application. It does not deny that it owes approximately $200,000 in principal payments, while recognizing BMO is claiming a further $220,000 for legal *and* receiver fees to date, some of which began accruing between 2012 and 2017, and $165,000 in accrued interest on those outstanding amounts.

[5] BMO made a demand for the immediate full payment of those outstanding amounts on September 20, 2017. [3]

[6] LL has made no payments towards the claimed indebtedness since October 2016. [4]

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[1] Some of the background is contained in Justice Moir's decision- *Bank of Montréal v. Linden Leas Ltd.*, 2017 NSSC 223; the herd had grown between 2012 and 2016 from 650 to 850 head – para. 52 Rachel Chemtob affidavit sworn January 25, 2018

[2] See comprehensive affidavit of Rachel Chemtob, sworn January 25, 2018

[3] Exhibit "R", Chemtob affidavit

[4] The only payments made in 2015, were pursuant to the Fifth Forbearance Agreement, and limited to: $2000 in January; $900 in June; $1000 in August; and $1000 in December; the only payments made in 2016 were: $1000 in March, $1000 in August, and lastly $10,000 in September and October – see Exhibit "Q" and paras. 41-46, Chemtob affidavit

[7] LL says, based on various arguments, including that they were unnecessary and unreasonable, that it should not be responsible to pay a substantial portion of the legal and receiver fees to date and accrued interest thereon.

[8] BMO says that throughout, it is has made sustained diligent and good faith efforts to provide financing to LL, and particularly so over the course of the years 2011 to present, but that LL has not paid its indebtedness as agreed. BMO therefore no longer has confidence in the financial management of the farm by the Fosters. BMO is no longer prepared to place itself at such a level of ongoing risk. Its primary security is the herd, and it proposes to have the receiver sell off not more than $40,000 worth of cattle per month (without an express "total amount owing" limit in the draft order), which it suggests will still allow the herd to retain a critical mass for viability. BMO also wants the receiver to have the power to insure the herd.

[9] LL says that the farm is a "going concern", and still has a bright future, without the appointment of a receiver as suggested by BMO. It strenuously argues that insuring the herd is prohibitively expensive. From the evidence and representations presented I infer that no insurance is presently in place, nor has there been in the past [5]

[10] As Justice Moir summarized it in his recent decision, when the bank made its application for an interlocutory receivership:

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

[5] See also para. 26 *Linden Leas*, 2012 NSSC 223.

The evidence presented at the hearing

[11] BMO presented only the affidavit of Rachel Chemtob, sworn January 25, 2018. No notice of intent to cross-examine was filed – Civil Procedure Rule (CPR) 5.05(5), nor was there a request to do so at the hearing. [6]

[12] LL presented no evidence. I note that Jillian Foster, who was authorized to speak on behalf of the Corporation, indicated in her written materials that she wished to rely upon previous decisions of, and evidence from, proceedings in this court contained in files Tru. No. 408708 and Amh. No. 348700, including affidavits filed therein.

[13] I advised Ms. Foster that I would not be reviewing the contents of those files[7] or the affidavits therein, because BMO had provided evidence that was up-to-date and superseded any evidence presented therein; and our Civil Procedure Rules require that the affidavits be related to the same "proceeding". In my view that is not the case here. I have as the "proceeding", an originating application in chambers before me. [8]

[14] CPR 39.06 reads:

> (1) An affidavit may be filed for use on a motion or application.
>
> (2) An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding, if the party who wishes to use the affidavit filed a notice to that effect before the deadline for that party to file an affidavit on the motion.
>
> (3) The affidavit may be used for other purposes in the proceeding, if a judge permits.

[15] Thereafter, Ms. Foster spontaneously suggested that she wished to call as witnesses to give *viva voce* evidence to the court on the application, her brother Robert Foster, and David Boyd (the proposed receiver), both of whom were present.

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[6] Rachel Chemtob was present at the hearing

[7] Keeping in mind the principles in *British Columbia (Atty. Gen.) v. Malik*, 2011 SCC 18

[8] Under the old Rule 38.14, see Justice Fichaud's comments at paras. 15-18, *Amica Mature Lifestyles Inc. v. Brett*, 2004 NSCA 100. Moreover, although the Truro file might have been readily available as we were sitting in Truro, the Amherst file was not.

[16] I ruled against her request. Nevertheless, I do believe that some of her representations of fact/opinion made by way of inclusion of her unsigned September 14, 2012 affidavit from the proceeding in Amh. No. 390679, found at Tab 8 of LL's "brief", are not disputed by the bank and remain relevant at present. Those representations include:

> I am a veterinarian with 25 years of professional experience in livestock medicine and health. I have witnesses [sic] firsthand on clients' farms in the Maritimes, and Ontario and through observation in Alberta, the effects of moving cattle from their "homes". Movement of cattle where unnecessary, results in direct costs and losses to health, life and consequently value and food safety.
>
> …
>
> a) the gestational period, the time from breeding or conception to calving or giving birth, for the common North American cattle breeds is between 275 and 292 days, with 285 being used as average.
>
> b) The ideal is for breeding females to calve or give birth to one calf every year (12 months)
>
> c) the weaning age in days used as an industry standard for calculations to compare animals is 205 days. Weaning is the graduation of calves from being dependent on their mother's milk for nutrition to not. Premature weaning causes stress to both calf and cow and consequentially results in a loss in value and becomes a welfare issue.
>
> d) Cows or breeding females ideally are already 3 to 5 months pregnant when their calves are weaned.
>
> e) Premature weaning of calves results in excess stress and consequently even if safeguarded for, can result in substantial losses and welfare concerns (see [reference to "shipping fever"]).
>
> f) Bred females are most safely moved between four and six months of gestation, after the risk of early embryonic death caused by change of home and stress, when their calf is naturally weaned and before they become heavy in calf. The calf they are pregnant with gets big.
>
> g) Pregnancy tested cattle, *certified safe in calf* at least four months, have a market value above that of *exposed to the bull* and not confirmed pregnant and substantially more than *open not bred* cattle.
>
> h) The Linden Leas herd is synchronized to optimize the benefits of the seasons and grass growth.
>
> i) Calving. Cows calve or give birth on grass with most births occurring in the summer months.

j) Breeding. Insemination. Eligible females are bred by bulls at pasture starting at the beginning of August.

k) Natural weaning of calves occurs between December and February as calves reach adolescence. At this age they are ruminating and able to forage on their own.

…

'Shipping fever' is the common term used to describe the diseases of cattle that occur when they are moved from their home. Orderly weaning, proper "preconditioning" at least five weeks ahead of shipping and an adequate period of bunk adjustment are preventative measures that can make a substantial difference to losses. Given the time that is needed to travel to the next "home" destination for calves weaned early the price paid by buyers is reflective of the expected morbidity and mortality rates that occur from purchasing "high risk" calves. The associated price drop per pound can be 50% of optimal for calves of the same weight as the losses can be substantial to the buyer not to mention the unnecessary suffering and deaths that occur.

The position of BMO

[17] The bank has established that no payments have been made since October 2016, and that at least $200,000 in principal payments presently remain outstanding. *Prima facie*, approximately $220,000 in legal counsel and receiver fees and $165,000 in interest are also presently outstanding. The bank has permitted LL to have the benefit of five Forbearance Agreements (October 4, 2012; February 7, 2013; June 24, 2013; September 4, 2014; and April 30, 2015). Mr. Clarke represented to the court that most of the legal counsel expenses arose not as a result of litigation, but rather solicitor work, in preparing and dealing with the forbearance agreements etc. Notably, within each Forbearance Agreement, LL acknowledged the debt outstanding, and that it was in default. There was no rectification to those defaults, and on September 20, 2017, the debt was again demanded to be immediately paid. On the limited evidence presented, I infer that it is more likely than not, that LL is insolvent.

[18] There is a provision in the contractual documentation for the bank to have a receiver appointed in circumstances such as in evidence before the court. BMO emphasizes that it is seeking the receivership as a "final remedy", and not as a

typical interim receivership. It points out that the Model Order from this court does *not* require a judgment amount to be determined before such appointment. [9]

[19] BMO relies on several legal bases to support its application in chambers, filed October 30, 2017, for the court-ordered appointment of a receiver:

> 1-Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (BIA)- "… on application by a secured creditor, a court may appoint a receiver to do any or all of the following *if it considers it to be just or convenient to do so*:
>
> a-take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> b-exercise any control of the court considers advisable over that property and over the insolvent persons or bankrupt's business; or
>
> c-take any other action that the Court considers advisable."
>
> 2-Section 77 of the *Companies Act*, RSNS 1989, C. 81-"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;
>
> …
>
> c-An order fixing the remuneration of the receiver or receiver manager;
>
> …"
>
> 3-Civil Procedure Rule 73 and specifically 73.02(2)(b) and 73.04 –
>
> 73.01 (1) This Rule provides for receivership as a final remedy, such as an order appointing a receiver to liquidate mortgaged property or to sell a business as a going concern.
>
> (2) An interlocutory or interim receivership may be obtained under Rule 41…
>
> (3) A receivership may be ordered and conducted in accordance with this Rule.

[9] However, in these specific circumstances, the bank requests the Receiver be appointed soley to sell cattle and effect a pay down of the debt. In my view, the better practice is to determine a fixed amount that this Receiver will be authorized to reduce over time by sales of cattle (as well as payment of its own reasonable fees and disbursements, and any statutory claims having priority to the bank's security).

> 73.02 (1) A party who obtains a judgment for an amount of money may make a motion for the appointment of a receiver to enforce the judgment.
>
> (2) A party who claims for the appointment of a receiver may make a motion for an order appointing a receiver in either of the following circumstances:
>
> (a) the party is entitled to the order under Rule 8 – default judgment, or Rule 13 – summary judgment;
>
> (b) *a judge determines, after* the trial of the action or *hearing* of the application in which the claim is made, *that the appointment should be made*.
>
> 4-Section 43(9) of the Nova Scotia *Judicature Act*, RSNS 1989 c. 240 - "A… receiver [may be] appointed by an interlocutory order of the Supreme Court, in all cases in which *it appears to the Supreme Court to be just or convenient* that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just…" based on principles established pursuant to the equitable common-law jurisdiction of this Superior Court.

[20] The bank relies particularly on the following two cases: *Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; and the decision of Justice Morawetz, in *Bank of Montréal v. Sherco Properties Inc*., 2013 ONSC 7023, which is cited with approval in the *Crown Jewel* decision, at paras. 27-28.

[21] Significantly, Justice Edwards in *Crown Jewel*, also cited with approval:

> 26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (a) Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
>
> (b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> (c) The nature of the property;
>
> (d) The apprehended or actual waste of the debtor's assets;
>
> (e) The preservation and protection of the property pending judicial resolution;
>
> (f) The balance of convenience to the parties;

> (g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
>
> (h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
>
> (i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
>
> (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
>
> (k) The effect of the order on the parties;
>
> (l) The conduct of the parties;
>
> (m) The length of time that a receiver may be in place;
>
> (n) The cost to the parties;
>
> (o) The likelihood of maximizing return to the parties; and
>
> (p) The goal of facilitating the duties of the receiver.

27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc*., 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:

> [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See Textron Financial Canada Limited v. Chetwynd Motels Limited, 2010 BCSC 477; Freure Village, supra; Canadian Tire Corp. v.Healy,2011 ONSC 4616 and Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd., 2011 ONSC 1007.

28 The court in *Bank of Montreal v. Sherco Properties Inc*. offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:
>
> > (a) The terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

> (b) The terms of the mortgages permit the appointment of a receiver upon default;
>
> (c) The value of the security continues to erode as interest and tax arrears continue to accrue;
>
> (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

[22] *Crown Jewel* involved a request for the appointment of a receiver to effect a final remedy. As was the case there, here, a security instrument contains an express clause permitting the creditor to appoint a receiver. Justice Edwards reiterated the importance of appreciating the distinction between a court-appointed and private receiver:

> 40 The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. *A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court.* Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.
>
> 41 *The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However,* in Houlden, Morawetz and Sarra at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or

> convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].
>
> 42 Finally, the authors note at p. 1024 of The 2013-2014 Annotated Bankruptcy and Insolvency Act that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In Romspen Investment Corp. v. 1514904 Ontario Ltd. et al. (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:
>
> > [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.
>
> [My italicization]

[23] Notably, although Justice Moir was dealing with a request for an interlocutory appointment of a receiver in *Linden Leas*, 2017 NSSC 223, he did state in relation to the appointment of receivers to effect a final remedy:

> 19 While I accept the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, and engages the need to protect the credibility of security, it is prominent in trials or hearings for a final order….
>
> 20 The approach our Rules adopted leaves the final receivership order to default, summary judgement, trial of an action, or hearing of an application. This embraces the policy against pre-judgement that underlines the *Metropolitan Stores*, *RJR-MacDonald Inc.*, and *Google Inc.* line of cases.

[24] **An examination of some factors relevant to whether it is just and equitable to appoint a receiver** [10]

a) Whether irreparable harm might be caused if no order were made (although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed) [11]

[25] Although BMO's security contains a provision permitting it to have a private receiver appointed, insofar as a court-appointed receiver is concerned, it still bears the onus. Its evidence as contained in the Chemtob affidavit suggests that:

i) On January 25, 2018 the outstanding amounts were: $203, $314.36 in principal; $220,419.12 in legal and receiver fees; and $164,915.63 in interest, for a total of $588,649.11.

ii) That indebtedness is also secured by the May 18, 2001 personal guarantees of Frank Foster and Edna Foster (limited to $200,000); the July 26 2004 personal guarantees of Frank Foster, Edna Foster, Jillian Foster and Robert Foster, (limited to $100,000) the July 26, 2004 guarantee of Robert Foster (limited to $100,000); and the July 26, 2004 guarantee of Jillian Foster (limited to $100,000).

iii) LL and the Nova Scotia Farm Loan Board are the registered owner of 24 real properties in Nova Scotia. The cattle herd has grown from 650 in 2012 to approximately 850 head in 2016. The 2017 financial statements of LL indicate the value of its cattle to be more than $1 million.

iv) "BMO is concerned about Linden Leas' ability and willingness to take necessary steps to reduce the Indebtedness… [and] is therefore of the view that a receiver needs to be appointed by the court with the authority to begin selling some of the company's cattle in order to reduce the amount of the Indebtedness.

[10] While these factors arise in the general context of interlocutory receivership applications, they do provide a ready starting point for determining whether, as a final remedy for a secured creditor, it is "just or convenient" to appoint a receiver.

[11] In the circumstances of this case, there is a serious concern that *any* culling of the herd could precipitously undermine the viability, and value of the cattle operation.

[26] In its brief, BMO argued that there exists a risk of such harm to its security. Because the herd is the company's most valuable asset,and is BMO's only direct security, BMO may be at greater risk. To the extent that there are valid concerns about the company's financial ability to care for the herd, and no insurance on the herd, its security is presently particularly vulnerable.

[27] On the facts and representations herein, I cannot conclude that BMO has established irreparable prejudice might occur, if no receiver is appointed by the court. I accept that, at law, it is not essential that BMO demonstrates irreparable harm.

b) The risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets, while litigation takes place

[28] As set out above, the cattle herd, which is the primary security that BMO can claim, has an estimated $1 million value. [12] The debtor's equity in the assets appears to be significant.

c) The nature of the property

[29] The cattle herd is an ever-changing group of living assets. By its nature, it requires intensive monitoring, handling and care, by trained or experienced personnel in order to ensure its maximum value. Realistically, this monitoring must be done by the Fosters, although it could be under the auspices of a court-appointed receiver.

d) The apprehended or actual waste of the debtor's assets

[30] This is not a significant concern here.

(e) The preservation and protection of the property pending judicial resolution (i.e. material reduction or elimination of the Indebtedness)

[31] While this is a significant concern given that the cattle herd is BMO's primary security (beyond any risk reduction attributable to the personal

[12] The bank's security includes the cattle specifically, pursuant to s. 427 *Bank* Act security documentation registered April 19, 2010 – see Exhibit "C" Chemtob affidavit referred to at paras. 4-6.Linden Leas also owns real property.

guarantees), LL, and the Fosters collectively, are similarly motivated to preserve and protect the cattle herd.

f) The balance of convenience as between the parties.

[32] LL argues that the receiver should not be appointed, but more importantly even if appointed, should not be permitted to sell off *any* of the cattle herd without its consent; and in particular not to do so to pay down the indebtedness attributable to past receiver and legal fees or any interest accruing on those amounts. The amount of that indebtedness is in dispute. In contrast, the approximately $200,000 in principal owing is not seriously in dispute. LL suggested at the hearing, it will be in a position within several weeks to pay close to $200,000 to BMO. [13]

[33] However, LL has presented no particularized plan to pay off, or pay down, the Indebtedness. BMO has received no payments since October 2016 – this is suggestive of a failing business. BMO could fairly comment that there is no evidence, but only a somewhat vague representation by Ms. Foster at the hearing, that there has been an accumulation by LL of such vast stores of surplus monies, now available to it to pay BMO $200,000.

[34] I observe that, if issued including terms to an order appointing a receiver is limit the sale of cattle to the amount of the principal owing such monies are paid, then LL would be able to avert the sale of any of the herd *at this time*.

g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan

[35] This factor generally strongly supports BMO's position that the Court should appoint a receiver.

h) The enforcement of rights under security instrument where the security holder encounters, or expects to encounter, difficulty with the debtor and others

[36] BMO and LL have fundamentally different perspectives on how to resolve the financial dispute between them. I repeat Justice Moir's recent comments:

[13] At the hearing, Jillian Foster alluded to monies LL had received from timbering operations, and suggested $200,000 would shortly be available to pay BMO.

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

[37] If the court appoints a receiver with conditions that ensure that the Foster family have meaningful input [14] into the decisions of the receiver which affect the viability of the herd, it would expect a genuine good faith collaborative effort by the parties will emerge.

i) The principle of the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly

[38] While this is generally true, here the contractual provisions between the parties permit a private receiver to be engaged, and LL does not seriously dispute that it owes at least $200,000 to BMO under the security, and has not made a payment since October 2016, thereon.

j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently

[39] I am satisfied that this is the case. The receiver is responsible to the court. This heightened fiduciary responsibility is to the benefit of both parties.

k) The effect of the order on the parties

[40] The Foster family is understandably very protective of its hands-on management of the cattle herd, and the farm generally. They have invested their lives, as much as their money and talent, in creating and growing this distinctive and valuable herd. However, while they appear to have had the determination, knowledge, and resources to be outstanding farmers, they have not managed their

[14] A right to be meaningful consulted in a timely manner regarding, but not a right to veto, decisions of the receiver in determining, which cattle, and how many should be sold, and when.

financial affairs to that same standard. The bank is entitled to be paid according to law. They have sought the Court's intervention to effect payment by LL of the Indebtedness. The appointment by the court of a receiver, who is an officer of the court, and must take instructions from the court, and not favour the interests of the debtor or creditor, can be an effective means of resolving disputes such as the one before the court. It is intended to let the Fosters be farmers, and the receiver be a conduit through which BMO can receive sufficient payments towards its indebtedness to alleviate its concerns.

l) The conduct of the parties

[41] There is no evidence of past misconduct, nor any anticipated.

m) The length of time that a receiver may be in place.

[42] If the receiver is entitled to sell some of the herd over time in order to satisfy at least the $200,000 principal indebtedness, and if the 850 head of cattle have a value of $1 million, then, in static terms, roughly speaking 20% of them (170 head) would need to be sold in order to generate $200,000. If BMO's proposal to sell *no more* than $40,000 worth per month is accepted by the court, that would see no more than 34 cattle sold monthly (presuming their price is approximately $1200 per head), for five months to reach 170 head in total.

[43] I am reluctant to arbitrarily set out a fixed monthly maximum allowable sale of the cattle by the receiver. No particulars were offered in evidence regarding such a timetable. Even presuming 20 head are sold per month continuously, that could entail roughly 8 consecutive months of sales. Given LL's legitimate concerns about sustaining a critical mass and mix required for herd viability, and the requirement to sell approximately 170 head in total to pay back $200,000, the receiver may need to be in place for an indefinite period of time. This cannot be calculated with precision. The court must accord the Receiver the necessary discretion to effect an orderly and thoughtful reduction of the debt.

Conclusion

[44] Upon consideration of all the circumstances, viewing those through the factors noted above, and collectively pursuant to the statutory and equitable

jurisdiction of the court, [15] I am satisfied that it is convenient or just to appoint a receiver.

The order to issue

[45] Specifically, I appoint Price Waterhouse Coopers Inc., without security. [16]

[46] Although, it is not necessary to articulate a precise amount of indebtedness in the order, I am satisfied it is more likely than not that LL is indebted to BMO for an amount of at least $200,000 as at March 23, 2018.

[47] The Receiver will effect a reasonably timely reduction of LL's indebtedness to BMO, only toward payment for any true principal and interest thereon outstanding as of March 23, 2018, and to a maximum of $200,000. [17] The Receiver will reduce that indebtedness, by making payments to BMO arising from the revenue generated by sales of portions LL's cattle herd. The timing, content, and amounts thereof to be in the Receiver's sole discretion, *but* only after having had genuine and timely collaborative consultations with LL regarding the ongoing objective of keeping the cattle herd at a critical mass and mix for viability. LL will fulsomely facilitate the Receiver's patent and patently implied responsibilities to effect the debt reduction.

[48] I decline to order LL to be responsible for the cost of any herd insurance.

[49] I believe it appropriate for the court to order the parties to attend at a mutually convenient time for a status update in approximately six months. [18]

Costs

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[15] As reflected in s. 43(9) of the *Judicature Act*, and s. 243(1) of the *Bankruptcy and Insolvency Act*, s. 77 of the *Companies Act (Nova Scotia)* and our *Civil Procedure Rule* 73

[16] I am satisfied that this is appropriate – see Rule 73.07(a).

[17] The Receiver shall also pay from the proceeds before paying BMO's indebtedness: its costs incurred in acting as Receiver, including its own fees, charges and expenses; any statutory claims due and owing, which have prioirity over the secured claim of BMO.

[18] The mutually convenient date will be ascertained in advance and inserted into the body of the court's order. BMO also sought payment of the legal and Receiver fees and disbursements with interest to date, but were agreeable to defer the court's assessment of their reasonableness to a future date. I will leave it to the parties to arrange any further hearings required, on notice to all parties including the guarantors, regarding the remaining claimed indebtedness beyond $200,000, and costs of this Application. I direct the Applicant to draft the form of order.

[50] Typically, an application in chambers set for one half day, would justify an order of approximately $1,000 in costs as against the Respondent. I note that in the *Crown Jewel*, Justice Edwards ordered $1,500 costs. BMO has suggested deferring the determination of the costs of this proceeding to the date when the legal, professional fees and outstanding interest amounts are assessed. I believe this can best be addressed at a future date.

Rosinski, J.