BENNETT
on
RECEIVERSHIPS

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by

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Pending the determination of the security and its priority, the court may nevertheless order the receiver to devise a process, market, and sell the assets in such a manner that would protect security holders.[5] The receiver should have some marketing plan prepared for court approval. In a court appointment, the receiver may first seek court approval of the method and manner of sale. Often, the receiver prepares a marketing scheme and sets it out with some particularity in seeking approval. This gives the debtor and other interested persons an opportunity to become involved in the sale of the business.[6]

To obtain court approval, the court-appointed receiver prepares a report setting out the mechanics of sale and recommends that the court approve the sale. The court has the discretion to approve the sale and obviously wants to be satisfied that the best price possible has been obtained in the circumstances. In the proper case, the court may even approve a lower offer if the receiver is subsequently unable to close the transaction.[7] The court may also inquire into the effect of the sale with respect to the debtor and other subordinate secured creditors. In general, the receiver has the duty to obtain the highest possible price for all of the assets under receivership by selling them *en bloc* or on an individual basis. The receiver must have an unfettered right to attempt to realize the maximum value through the tender process.[8]

The receiver's sale of capital assets represents the ultimate step in terminating the debtor's business. Whether pursuant to a court order or under a security instrument, the receiver converts the assets into proceeds for distribution. Once the sale is completed, the debtor is no longer in business. At that time, subsequent secured creditors and other subordinate liens and encumbrances are usually foreclosed either by operation of law or judicially.

Prior to the sale, the receiver must decide whether to spend additional moneys to complete work in progress, repair, or restore the assets so that they are in a saleable condition. While there is no duty on the receiver to advance additional moneys, the receiver may borrow moneys to enhance the value of the assets. In so doing, the receiver must not borrow significant moneys that would impair the debtor's right to redeem.

To facilitate the sale of the debtor's business as a going concern, the receiver may consider selling the assets to a newly incorporated company without the claims of employees, trade creditors, and governments.[9] Then the receiver will have a company without debt and obligations. This gives the receiver a saleable package with which to market. The employees remain in the company's employment and they are

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5 *Royal Bank v. Ramco Sales Inc.* (2010), 16 P.P.S.A.C. (3d) 81, 64 C.B.R. (5th) 48, 2010 ABQB 1 (CanLII) (Alta. Q.B.).

6 See, for example, *Re SLMSoft Inc.* (2003), 47 C.B.R. (4th) 311, 2003 CarswellOnt 4730 (Ont. S.C.J.); *Re Produits forestiers Bellerive Ka'N'Enda inc.* (2007), 45 C.B.R. (5th) 128, 2007 CarswellQue 2731, 2007 QCCS 1530 (CanLII) (Que. S.C.).

For a suggested list of factors in selling property, see "A Creditor's Duty of Care on Realization", Frank Bennett, 1988 Law Society of Upper Canada Special Lectures, page 247, De Boo.

7 See *Alma College v. United Church of Canada* (1996), 43 C.B.R. (3d) 8, 1996 CarswellOnt 4235 (Ont. Gen. Div.), appeal dismissed (1996), 43 C.B.R. (3d) 19, 1996 CarswellOnt 4537 (Ont. C.A.).

8 *Genelcan Realty Ltd. v. Wiseman* (1986), 59 C.B.R. (N.S.) 197, 1986 CarswellOnt 187 (Ont. H.C.), leave to appeal refused (1986), 59 C.B.R. (N.S.) 284, 1986 CarswellOnt 193 (Ont. H.C.).

9 In the United Kingdom, this is called a hiving down agreement.