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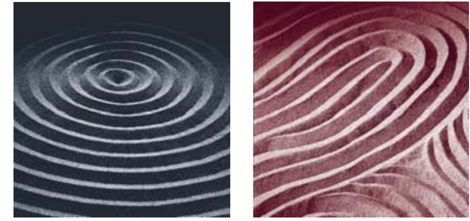

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Case Comment: *GMAC Commercial Credit Corp. Canada* v. *TCT Logistics Inc*.

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Case Comment: GMAC Ccommercial Credit Corp. Canada v. TCT Logistics Inc.

Jeffrey Carhart*

In *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.*,[1] Mr. Justice Ground of the Ontario Superior Court of Justice dealt with a number of issues relating to the relatively complex interim receivership of the TCT trucking and logistics group of companies. Those issues include matters of major importance to equipment lessors and financiers doing business in Canada.

The Facts

KPMG Inc. ("KPMG") was appointed as the interim receiver of TCT Logistics Inc. and a number of affiliated companies (the "TCT Companies") under s. 47 of the *Bankruptcy and Insolvency Act*[2] (the "BIA") on January 24, 2002. The order conferred a wide range of powers on KPMG and imposed a broad-based stay of proceedings on a host of third parties with involvement with the TCT Companies.

KPMG's appointment was sought by GMAC Commercial Credit ("GMAC"), which was the main operating lender to the TCT Companies. GMAC held "general" security over the assets of a number of the TCT companies. The TCT Companies had done business with several major equipment leasing and finance companies in the trucking industry. None of those leasing and financing companies received notice of the application to appoint KPMG.

Relatively soon after its appointment, KPMG discovered that the records of the TCT Companies relating to its owned or leased rolling stock were incomplete and extremely inaccurate. KPMG also made the decision to continue the business operations of the TCT Companies because, they felt, that approach would ensure maximum recovery under the receivership. As the fleet was constantly on the move, KPMG had to spend a great deal of time compiling a master list of rolling stock. In the end, the interim receiver gathered information on over 3,300 tractors and trailers. Among other things, that investigation disclosed that a sig-

*Miller Thomson LLP (Toronto) — I would like to thank my associate Craig Mills for his assistance in the writing of this paper

[1] *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.*, 2002 CarswellOnt 2682, 36 C.B.R. (4th) 37, 4 P.P.S.A.C. (3d) 107, [2002] O.J. 3149 (Ont. S.C.J.)

[2] R.S.C. 1985, c. B-3, as amended

nificant number of trucking units that were shown in the TCT records were, in fact, missing.

From very soon after its appointment, KPMG was faced with repeated demands from many of the equipment lessors and financiers (who had, by then, been made aware of the interim receivership order) for the return of their leased trucks and tractors and payment for those same vehicles. Understandably, KPMG asked those equipment lessors and financiers to provide copies of their documentation, a request which gave rise to a "lease review process" on the part of KPMG, certain costs of which it later suggested to the court should be borne by those leasing and financing companies. KPMG also wrote to the leasing and financing companies, assuring them of certain "payment for use" arrangements and other payment arrangements. In the case of one lessor (Volvo) KPMG entered into a written agreement stipulating that KPMG would make payments with respect to certain enumerated trucking units. That agreement later proved controversial.

Meanwhile, during a time when the equipment lessors and financiers were not receiving payments for usage, KPMG arranged for the sale of certain business units of TCT, which sales included assets subject to equipment lease and/or financing arrangements. For example, as noted in the decision of Mr. Justice Ground referred to, KPMG sold certain of the assets of TCT's refrigerated trucking business to Atlas Supply Chain Services Limited. While continuing to press for usage payments, the equipment lessors and financiers negotiated a number of terms to that sale — through the mechanism of the Court approval process — which were essential to deal with the interests of the equipment lessors and financiers. For example, the Atlas sale approval order was expanded to deal with such matters as the insuring of leased and financed assets and the possibility of the "return" of those assets after an initial post-closing "look-see" period of operation of the business by Atlas (which was an essential part of the agreement negotiated between KPMG and Atlas) and, again, payment for use.

The Issues Considered by Mr. Justice Ground

Eventually, Stoughton Trailers Inc. brought a motion seeking the lifting of the stay imposed by the original Order appointing the Interim Receiver, thereby allowing for return of its trailers and containers still in KPMG's possession, and requiring payments by KPMG for usage. A number of other equipment lessors and financiers, including CIT, Alter Moneta, Citicapital and ABN Amro brought similar motions. Volvo also brought a similar motion and, understandably, raised the issue of its written "usage agreement." (Xtra Canada also brought a motion relating to the issue of the validity of its PPSA registrations, which issue is not considered in this article.)

In turn, the interim receiver brought a motion seeking the advice and directions of the Court with respect to several issues, including:

1. What payments should be made by the interim receiver to the owner/lessors for the use of the rolling stock?

and

2. Whether certain significant costs incurred by the interim receiver relating to locating, identifying and determining leasehold and security interests in the rolling stock should be allocated to the equipment lessors and financiers? In this regard, KPMG suggested the allocation of just under $1 million to the equipment lessors/financiers (which was an equivalent of just under $300 "per unit").

KPMG conceded to Mr. Justice Ground that the equipment lessors and financiers should be compensated for the use of the units that were actually used by the interim receiver while it was carrying on the business operations of the TCT Companies. However, KPMG pointed out that a number of units were simply missing — including, as it had turned out, a number of units for which KPMG had agreed to pay in the agreement with Volvo, which was hammered out in the early days of the receivership, before KPMG had an opportunity to identify which units were missing or, indeed, for that matter, before KPMG had identified that there was a major problem with "missing units."

KPMG also took the position that the costs incurred by the interim receiver in locating, identifying and determining the leasehold and security interests in the units were for the benefit of all stakeholders. By undertaking these investigations, KPMG argued that the interim receiver was able to continue the operations of the TCT Companies, use the units as part of the operations and negotiate a sale of the units to third parties. As a result of these efforts, KPMG argued that the equipment lessors were able to receive *per diem* rates for the leased units rather than having the units returned to them and being required to re-lease them in the market.

Not surprisingly, the equipment lessors took a different view of the interim receiver's attempt to burden them with these costs. They argued that the leases were "true leases" and that, as such, the title to the assets themselves remained in the equipment lessors and financiers. Accordingly, among other things, the equipment lessors and financiers argued that a section of the initial order appointing the interim receiver that allowed for the possibility of assessing some of the costs of the receivership against "property" of the TCT Companies was inapplicable.

The equipment lessors and financiers also argued that the work done by the interim receiver in locating, identifying and determining security and leasehold interests in the units was essentially done for the benefit of GMAC in its capac-

ity as a general secured creditor. To the extent that any equipment lessors had "defective" arrangements (i.e., arrangements which did not constitute either "enforceable true leases" or valid "first ranking" purchase money security interests in accordance with the relevant Personal Property Security legislation) the benefit (i.e., of the work done to make that determination) would flow to GMAC.

The equipment lessors and financiers also argued that continuation of the TCT businesses and the negotiation of the sales of units by the interim receiver was essentially for the benefit of GMAC. The equipment lessors and financiers argued that they could have located and re-leased their units to third parties at their own expense — just as they had had to pay for the work associated with, for example, their efforts to expand the terms of the Atlas transaction to address their position.

Mr. Justice Ground's Decision

Mr. Justice Ground acknowledged that the interim receiver was faced with a monumental task in determining the identity and location of various units. Having said this, he felt that the equipment lessors were entitled to the return of their units since the date of the initial order. On this basis, he ordered that the interim receiver pay the equipment lessors for any units that remained in its possession, whether used or not, on a *per diem* rate calculated from the date of the initial order. However, with respect to the units that could not be located, Mr. Justice Ground felt that it would be inequitable to require the interim receiver to pay *per diem* amounts for these units. In that regard, Mr. Justice Ground ruled that the Volvo agreement "should be interpreted to provide that the *per diem* rate will be paid only for units that were actually in the possession of the Interim Receiver during the relevant period."

With respect to the issue of cost allocation, Mr. Justice Ground agreed with the equipment lessors and financiers that the costs incurred by the interim receiver with respect to the rolling stock were "principally for the benefit of GMAC as the principal secured creditor of the [TCT] Companies."[3] In that regard, Mr. Justice Ground noted that the information compiled by KPMG was "necessary in order to continue the operations of the [TCT] Companies and to negotiate the sales to [for example] Atlas ... which maximized the value of the companies for the benefit of GMAC."[4]

Mr. Justice Ground also held that it was in the interest of GMAC for the interim receiver to review the leases between the equipment lessors and financiers and the TCT Companies in order to determine whether they were true leases or fi-

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[3]Paragraph 18

[4]Paragraph 18

nancing leases and whether the equipment lessors and financiers had "priority over the [residual, general] interest of GMAC in the assets of the [TCT] Companies."[5]

Mr. Justice Ground also accepted that the equipment lessors and financiers would have been able to locate and identify their units themselves and to release those units into the market.

Therefore, in the end, Mr. Justice Ground concluded that it was not appropriate to allocate any part of the costs incurred by the interim receiver with respect to the rolling stock to the equipment lessors and financiers. Costs of the motions heard by Mr. Justice Ground were awarded in favour of the equipment lessors and financiers.

Conclusion

Mr. Justice Ground's decision may be seen in the context of the current debate surrounding the scope of (*ex parte*) interim receivership orders, which debate has essentially arisen as a result of the 2002 decision of Mr. Justice Slatter of the Alberta Court of Queen's Bench in the case of *Re Big Sky Living Inc.*[6] Personally I have always felt that appointment orders conferring relatively broad powers on interim receivers, which orders necessarily affect the rights of third parties (who are usually unrepresented in Court when the order is made) can legitimately be made within the scope of s. 47 of the BIA when the order is sought by a secured creditor.[7] Among other things, subss. 47(2) and (3) of the BIA unmistakably allow the Court much discretion to direct such an interim receiver to " ... take possession of all ... of the debtor's property ... [and] exercise such control over that property, and over the debtor's business ... [and] to take such other action as the court considers advisable" if the court is satisfied that that is necessary to protect either the debtor's estate or the interests of the secured creditor seeking the appointment.

However, it would be hard to disagree with the observations of David Baird in his annotation on the *Big Sky* case[8] to the effect that it is a commendable thing to make a careful analysis of, in effect, just how far such orders really need to go in a given situation and to recognize their impact on "third parties." In that respect, certainly the decision of Mr. Justice Ground in the TCT case stands as a re-

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[5]Paragraph 18

[6]*Big Sky Living Inc., Re*, 2002 CarswellAlta 875, 37 C.B.R. (4th) 42, 2002 ABQB 659, (sub nom. *Big Sky Living Inc. (Bankrupt), Re)* 318 A.R. 165 (Alta. Q.B.)

[7]See the article: "Interim Receivers Under the *Bankruptcy and Insolvency Act*" by Allan Rutman, John Varley and Jeff Carhart, (1999) 9 C.B.R. (4th) 89

[8]*Supra*, note 6

minder to secured creditors that while interim receivership orders are powerful tools, there are limits to that power. In particular, as a general proposition, first-ranking general secured creditors cannot expect that the cost of having the interim receiver (whom they had appointed) analyze the leases and/or security of equipment lessors and financiers who have been stayed by the interim receivership order, can be passed on to those same equipment lessors and financiers. Nor, as a general proposition, can such secured creditors expect to have such an interim receiver maintain possession and/or use of certain leased or financed assets (which were in the possession of the debtor at the time of the appointment order only as a result of the lease or financing arrangements extended by such equipment lessors and financiers) without paying for such possession and/or use.