

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

A. FARBER & PARTNERS INC.

Applicant

- and -

UNIVERSAL MOULD & DIE CO. LTD.

Respondents

SECOND REPORT OF THE INTERIM RECEIVER

JANUARY 3, 2008

Court File No. 07-CL-7259

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

A. FARBER & PARTNERS INC.

Applicant

- and -

UNIVERSAL MOULD & DIE CO. LTD.

Respondents

SECOND REPORT OF THE INTERIM RECEIVER

INTRODUCTION

1. On October 25, 2007 Universal Mould & Die Co. Ltd. (“Universal” or the “Company”) filed a Notice of Intention to make a Proposal (“NOI”) under Section 50.4 of the Bankruptcy and Insolvency Act (the “BIA”). A. Farber & Partners Inc. (“Farber”) was appointed as Trustee in the Proposal (the “Trustee”) of the Company. By order of the Honourable Justice Campbell dated November 23, 2007, the time for the making of a proposal was extended to January 8, 2008.

2. By Order of the Honourable Mr. Justice Spence dated November 19, 2007 and restated by the Honourable Mr. Justice Lederman (the “Order”), Farber was also appointed interim receiver (the “Interim Receiver”) of all of the current and future assets,

undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “Property”) with authority limited to the provisions of the Order but, for greater certainty, not to manage or operate the business and undertaking of the Company without further order of the Court. A true copy of the Order is attached hereto as **Exhibit “A”**.

3. By Order of the Honourable Mr. Justice Lederman dated December 20, 2007, the Interim Receiver’s powers were expanded to permit it to take possession of and deal with all of the property of the Company. A true copy of this Order is attached hereto as **Exhibit “B”**.

4. This Report deals only with the activities of Farber in its capacity as Interim Receiver.

PURPOSE OF THIS REPORT

5. The purpose of this Report is as follows:

- (a) to provide to the Court information that it has obtained from the records of the Company regarding a piece of equipment described as a 2007 IMSA “MF1200BBL” 7-Axis Gun Drill w/ Selca “S4045PD” Controls, 20-Station Automatic Tool changer, 20% Up Down, Rotary Table (the “Gun Drill”) in connection with a motion brought by the vendor of the Gun Drill, Dynamic International Inc. (“Dynamic”), seeking, among other relief:

- i. a Declaration that the Gun Drill does not fall within the definition of “Property” of the Company as contained in the Order;
 - ii. an Order requiring the Receiver and Universal to forthwith release the Gun Drill to Dynamic;
 - iii. in the alternative, directions as to the party properly entitled to pay Dynamic for the Gun Drill; and
- (b) to provide the Interim Receiver’s position in respect of Dynamic’s motion.

STATUS OF COMPANY

6. The Company has ceased operations. Pursuant to the order of the Honourable Mr. Justice Lederman dated December 20, 2007, the machinery and equipment of the Company, with the exception of the Gun Drill, was sold to Infinity Asset Solutions Inc. (“Infinity”) on December 21, 2007. The sale process is described in the First Report of the Interim Receiver dated December 18, 2007. Infinity will be conducting an auction sale of this equipment from the Company’s premises expected to take place on or about February 13, 2008.

STATUS OF SECURED CREDITORS

7. The following is a list of secured creditors in order of registration under the Ontario PPSA and the amounts that each is owed before distribution of any sale proceeds:

Creditor	Security	Indebtedness
Bank of Montreal	General security agreement	\$2,118,245.26 ¹
Thomas Roselli	General security agreement	\$405,000.00
Chrysler Canada Financial (“Chrysler”)	equipment, other (pick-up truck)	\$18,000.00
CIT	equipment, other	\$263,235.00
Honda Canada Finance Inc. (“Honda”)	goods, equipment (car)	\$40,000.00
HSBC Bank Canada (“HSBC”)	All	\$844,355.30 ²
Lift Capital Corporation	equipment, other	\$53,000.00

8. Bank of Montreal holds security over all of the property and assets of the Company with the exception of secured interests described in paragraph 7 above.

9. Thomas Roselli (“Roselli”), the Company’s sole shareholder, has entered into an assignment and postponement agreement with HSBC wherein he has assigned his general security agreement to HSBC.

10. Subject to satisfactory review of the security documentation, it is expected that Chrysler, Honda and CIT will be paid in full or as otherwise agreed with the Interim Receiver through the sale to Infinity of the specific assets securing their respective indebtedness.

¹ Excluding legal fees

² Excluding legal fees

11. Subject to satisfactory review of the security documentation, it is further expected that HSBC will recover a portion of the amount due to it through the sale to Infinity.

12. Lift Capital Corporation's ("Lift") registration is in connection with specific tooling.

DISPUTE REGARDING GUN DRILL

13. Universal acquired the Gun Drill on July 12, 2007 for the sum of US\$580,000 with payment terms of 10% down with the balance 90 days after installation. Dynamic has brought a motion for a declaration that the Gun Drill does not fall within the definition of Property of the Company. In light of the possible dispute over the machine it was excluded from the sale of equipment and machinery to Infinity pending a determination of title by the Court.

14. In order to properly reply to the claims of Dynamic regarding the Gun Drill, the Interim Receiver requested of the Company and attended at its premises for the purpose of reviewing the Company's records and taking possession of those records dealing with the Gun Drill. All of the records obtained by the Interim Receiver are included either in this report or in the affidavit of Thomas Roselli sworn in response to Dynamic's motion herein. Those records not included in Mr. Roselli's affidavit are attached together hereto as Exhibit "C".

15. In addition, it was suggested by counsel for Dynamic that Lift may have an interest in the Gun Drill as a lessor. The Interim Receiver requested, via its counsel, that Lift provide to the Interim Receiver any documentation in Lift's possession, power or control relating to the issue. As of the date of this report, no such information has yet been provided.

16. In support of the motion, Dynamic has filed an affidavit of Richard Layo dated December 12, 2006 (the "Layo Affidavit"). Thomas Roselli, the President and Secretary and a director of Universal has sworn an affidavit dated January 3, 2008 (the "Roselli Affidavit") responding to Mr. Layo's affidavit.

17. The Interim Receiver has reviewed both affidavits and all of the available records concerning the Gun Drill as provided by the Company and by Dynamic. Based primarily on a review of the documentation and supplemented by the evidence of Mr. Layo and of Mr. Roselli, it is the position of the Interim Receiver that the transaction for the Gun Drill was in the nature of a purchase and sale without reservation of title and for which any condition applicable was fulfilled.

(a) Review of Relevant Documentation

18. There are two quotations from Dynamic for the Gun Drill included in the material, one dated May 25, 2007 (Exhibit "A" to the Layo Affidavit) and one dated June 1, 2007 (Exhibit "A" to the Roselli Affidavit). Mr. Roselli states that he did not receive

the former and acted on the latter, which by date would appear to supersede the May 25 quotation and in any event is consistent with later documentation.

19. The June 1, 2007 quotation sets out the price for the Gun Drill as \$580,000 and payment terms are stated as follows:

“\$55,000 Down, Balance 90 Days After Installation”

20. Both the Layo Affidavit and the Roselli Affidavit concur that a purchase order for the Gun Drill dated June 1, 2007 was issued by Universal to Dynamic (the “Purchase Order”) (Exhibit “B” to the Roselli Affidavit).

21. The Purchase Order indicates a FOB price for the Gun Drill of US\$580,000. Payment terms set out on the Purchase Order state as follows:

“\$55,000 US deposit to be sent Monday, June 4, 2007 via Fed Ex”

“Balance 90 days after installation and acceptance”

22. It is not disputed that the deposit was paid and duly received by Dynamic.

23. Dynamic and Universal also entered into a sales contract for the Gun Drill in the form provided by Dynamic (the “Sales Contract”) (Exhibit “C” to the Roselli Affidavit).

24. The Sales Contract sets out the purchase price of US\$580,000.

25. The Sales Contract sets out an estimated delivery date of June 20, 2007. Terms of delivery are set out as “FOB customer dock”. Terms of payment are stated as:

“10% down, net 90 days after installation”

26. The Sales Contract also includes the following terms:

1. **Acceptance.** PURCHASER may accept this quotation by either indicating its acceptance on the quotation or by issuing a purchase order to DYNAMIC expressly referring to this quotation. This quotation is made on the terms and conditions set forth on the face and back of this quotation and no others. PURCHASER’s acceptance shall be limited to the terms and conditions of this quotation. No alterations, additions, subtractions or supplemental terms are acceptable unless and until expressly and mutually agreed on in a writing signed by both parties and notice of objection is hereby given to any proposed changes whether major or minor in character.

2. **Sale.** Dynamic agrees to sell and PURCHASER agrees to buy the goods described in this quotation in the quantity, for the price and on the payment terms set forth in this quotation.

...

4. **Inspection and Rejection.** PURCHASER agrees to inspect the goods on arrival and, in the event of nonconformity of the goods, to exercise its rights of rejection not later than fifteen (15) days after receipt of the goods. In addition to such other duties as the law may impose, on rejection, PURCHASER agrees to comply with all reasonable instructions from DYNAMIC.

...

8. **Security Interest.** PURCHASER hereby grants to DYNAMIC and DYNAMIC hereby retains a purchase money security interest in all of the goods sold by DYNAMIC and held by the PURCHASER hereunder and all replacements therefore, additions thereto, and goods made therefrom (the “Collateral”) to the fullest extent provided under the Uniform Commercial Code. The PURCHASER specifically authorizes the filing by DYNAMIC of an initial financing statement; an amendment that adds Collateral or adds a debtor covering the Collateral.

PURCHASER shall keep the Collateral free from any adverse lien, security interest or encumbrance and will not waste or destroy the collateral or any part thereof or use or store the collateral in violation of any statute or ordinance.

9. **Installation and Training.** The goods will be installed by DYNAMIC without additional charge, at PURCHASER's facility identified on the front side of this contract or acknowledgement, provided that PURCHASER shall provide a suitable installation location and utilities and other services required to allow DYNAMIC to assemble and prepare the goods for PURCHASER's use. DYNAMIC shall provide PURCHASER with DYNAMIC's customary training of PURCHASER's personnel. Any other or additional training will be at an agreed upon rate.

...

11. **Entire Agreement.** When accepted, this quotation shall constitute the entire, full and complete agreement between the parties and supersedes all prior understandings, writings, quotations, purchase orders, representations or communications, oral or written, of either party. This agreement may only be amended by a writing executed by the authorized representatives of both parties.

27. In addition, Dynamic issued to Universal an invoice dated July 2, 2007 (the "Invoice") (Exhibit "D" to the Layo Affidavit). The Invoice includes the Gun Drill at the quoted price reduced by the \$55,000 deposit paid.

28. The Invoice also includes a payment due date of September 30, 2007.

29. Dynamic has advanced the position that the Gun Drill was purchased on a "90-day trial basis". There does not appear to be any evidence to support this position in any of the documentation, in particular that issued by Dynamic. The Dynamic documentation does not stipulate any other condition of sale.

30. While not a stipulated condition of sale, Mr. Roselli states in his affidavit that Dynamic did request a financing commitment. Universal forwarded a leasing commitment from Canadian Lease Corporation, a lease broker for Lift, the intended lessor (Exhibit "D" to the Roselli Affidavit). Dynamic thereafter shipped and installed the Gun Drill.

31. The Layo Affidavit includes the bill of lading for the Gun Drill (Exhibit "E") showing shipment of the machine on July 2, 2007. The Roselli Affidavit includes documentation and evidence regarding the installation of the Gun Drill (Exhibit "E").

32. Included with these documents are a Dynamic Customer Service Report (the "Service Report") and a Dynamic Installation Checklist (the "Checklist").

33. The Service Report and Checklist indicate that Dynamic engineers installed the Gun Drill from July 7 to July 12 and did so to the satisfaction of Universal as is indicated by the signatures of Mark Roselli on each of the Service Report and the Checklist. This does not appear to be disputed by Dynamic.

34. The Interim Receiver is not aware of any documentation or evidence indicating any operational problems with the Gun Drill. Mr. Roselli's evidence is that there were no such problems and the Gun Drill was used in Universal's operations.

(b) Issue of Canadian Safety Standards Configuration

35. Dynamic raises in paragraph 11 of the Layo Affidavit an issue regarding the Gun Drill not being configured to comply with Canadian Safety Standard (“CSS”) regulations.

36. None of the quotations or the Sales Contract (or any other documentation provided to the Interim Receiver) refers to any such regulations or a requirement for any safety configuration. In particular, there is no reference in the documentation to any CSS configuration being completed upon acceptance and payment for the Gun Drill. As well, the Interim Receiver has seen no documentation or other evidence indicating that there was any intention of Dynamic to return to do further work on the Gun Drill. Mr. Roselli states in his affidavit that there was no discussion with Dynamic staff about returning to configure the Gun Drill to comply with CSS regulations.

(c) Issue of Lift Financing and Acceptance

37. Presumably in support of its motion, Dynamic has provided series of emails and a copy of an invoice that it issued to Lift. The invoice was in furtherance of prospective lease financing by Lift for the Gun Drill.

38. The Interim Receiver is satisfied that an invoice was delivered to Lift (Exhibit “H” to the Layo Affidavit). It is not disputed that Lift did not ultimately provide financing for the transaction.

39. The Lift lease documentation was provided to and executed by Universal (Exhibit "F" to the Roselli Affidavit). The Interim Receiver has seen no documentation indicating acceptance of a lease agreement by Lift. The Interim Receiver understands from the affidavit of Mr. Roselli that ultimately he did not proceed with Lift financing because of the financial circumstances of Universal.

40. The Interim Receiver accepts that in a lease financing scenario, the lessor would require that it be invoiced as part of the transaction. However, if the transaction is not consummated, the Interim Receiver takes the position that the issuance of an invoice to a potential financier is of no effect.

41. The Lift lease documentation includes a Lease Commencement Authorization executed by Mr. Roselli on behalf of Universal stating, in part, as follows:

The equipment described in the Lease between the Lessor and the Lessee has been delivered, received, installed, is operating satisfactorily and is accepted by the lessee.

42. In the Interim Receiver's view, the Lease Commencement Authorization, also known in the leasing industry as a delivery acceptance certificate, would be consistent with the acceptance referred to in paragraphs 17 through 19 of the Layo Affidavit. It is Mr. Roselli's belief that this is the certificate to which Mr. Layo refers in those paragraphs.

POSITION OF THE INTERIM RECEIVER

43. Respectfully, it is the position of the Interim Receiver that the Gun Drill forms part of the Property of the Company and the Interim Receiver should be free to dispose of same upon approval by the Court. As there is no perfected security interest specific to the Gun Drill, the proceeds of any such sale would be paid out in accordance with accepted or proven priorities of creditors.

44. In this regard, the Interim Receiver notes as follows:

- (a) Both the June 21, 2007 quotation and the Sales Contract prepared by Dynamic show a balance due on the Gun Drill payable 90 days after installation, without reference to a requirement for acceptance by Universal. The Invoice, also prepared by Dynamic, sets out a specific payment date of September 30, 2007;
- (b) The Sales Contract states specifically that Dynamic agreed to sell and Universal agreed to buy the Gun Drill for the price and on the payment terms set forth in the Sales Contract;
- (c) By a document prepared by it (the Sales Contract), Dynamic specified that there were no other terms, conditions or representations other than as made in the Sales Contract;
- (d) Universal made a down payment on the Gun Drill of US\$55,000. There is no indication that these funds were refundable in any manner;
- (e) Notwithstanding that the Sale Contract states delivery as “FOB customer dock”, from the Customer Service Report and the

Installation Checklist, installation of the Gun Drill was completed and accepted on July 12, 2007. As installation was complete, payment under the Sales Contract was due not later than 90 days thereafter and Universal was bound to pay same;

- (f) None of the documentation in the Company's possession references in any manner that a sale of the Gun Drill was on a trial basis or that Universal would be entitled to return the Gun Drill. The only right of Universal was to reject the Gun Drill for "nonconformity of the goods" within 15 days of receipt. The Interim Receiver has seen no evidence of rejection of the Gun Drill by Universal at any time;
- (g) The Interim Receiver has seen no documentation, correspondence or email from Universal indicating before or after 90 days from the date of installation of the Gun Drill an intention to return the Gun Drill and Universal remained in possession after 90 days following installation;
- (h) The Interim Receiver has seen no documentation, correspondence or email from Dynamic requesting or demanding the return of the Gun Drill before or after 90 days from the date of installation;
- (i) Pursuant to the Sales Contract, Dynamic specifically reserved and Universal granted a PMSI interest in the Gun Drill. Dynamic did not reserve title in the Gun Drill pending payment;
- (j) None of the documentation in the Company's possession, and in particular neither the Service Report nor the Checklist, references any requirement for acceptance prior to any action being taken to configure the Gun Drill to CSS regulations;

- (k) The Gun Drill has been used for commercial purposes since the date of installation; and
 - (l) The Lift lease documentation includes a Lease Commencement Authorization executed by Universal stating that the Gun Drill had been accepted by Universal.
45. As a result, the Interim Receiver respectfully submits that the Gun Drill forms part of the Property of the Company.

All of which is respectfully submitted,

**A. FARBER & PARTNERS INC.
IN ITS CAPACITY AS INTERIM RECEIVER
OF UNIVERSAL MOULD & DIE CO. LTD.**
