
RECEIVERS AND THE CREDIT CODE — ISSUES FOR SUCCESSFUL RECOVERY (A CASE STUDY)

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CASE STUDY

Oz Bank (Brisbane Branch) provides financial facilities to Ritz Car Dealers Pty Ltd and Mary Jones as joint borrowers, comprising a come and go facility, wholesale facility and an operating account facility. Mary Jones is a director and shareholder of Ritz Car Dealers Pty Ltd. The security for the facilities is:

- company charges over Ritz Car Dealers Pty Ltd and Ritz Car Finance Pty Ltd, a subsidiary of Ritz Car Dealers;
- mortgage over the car yard in Sydney owned by Mary Jones;
- guarantees from Jim and Jane Jones, New Zealand residents who are parents of Mary Jones. Jim is a director of Ritz Car Dealers and owns a 5% interest in the company. Jane is neither a director nor shareowner and has no knowledge of the business operations and financial affairs. The wording of the guarantees deems Jim and Jane to be principal debtors.

Oz Bank finances the used car part of the business except for some used cars on bailment from another financier.

The retail market for cars is depressed and in order to accelerate demand Ritz Car Dealers uses arrangements known in the industry as "tiny terms". An example of this arrangement was when Stewart Desperate went to Ritz Car Dealers to look at cars. He had recently written off his uninsured car in an accident and needed another car for work. Although Stewart Desperate was interested in a recent model utility he told the sales representative that he did not think he could get finance to buy the car because he had a low income and a record for defaulting on credit. The sales rep told him not to worry because he could get finance from Ritz Car Finance. Ritz Car Finance gave him the money and he bought the utility. Ritz Car Finance uses money from the wholesale facilities provided to Ritz Car Dealers by Oz Bank to fund customers to buy cars. The credit provided by Ritz Car Finance to customers are regulated credit transactions.

Stewart Desperate defaults under his finance arrangements and Ritz Car Finance repossesses the car and sells it. Stewart Desperate seeks advice from Legal Aid Consumer Service Group and is told that the finance documents do not comply with the Credit Code. Stewart Desperate takes his story to a current affairs program and as a result a number of other people who bought cars from Ritz Car Dealers with finance through Ritz Car Finance complain to Consumer Affairs.

A major investigation follows which finds that these transactions are common, ie customers pressured to buy vehicles, the finance company not having any compliance systems and documents and computer systems not complying with the Credit Code. As a result of the television publicity a number of customers bring applications under the Credit Code with respect to their car finance.

Ritz Car Dealers are concerned the bad publicity will affect the solvency of their business and appoint an administrator. Within the "decision period" Oz Bank appoints receivers and managers under the mortgage to the car yard and under the company charges to all the assets of Ritz Car Dealers (other than some of the used cars) and Ritz Car Finance comprising vehicle stock and loan book of Ritz Car Finance. The administrator challenges the receiver's appointment. The security documents of Oz Bank do not have the appointment of an administrator as an event of default. There has not been a monetary default. The securities provide, as an event of default, if in the reasonable opinion of Oz Bank there is any significant change in circumstances of the company likely to affect its value. The receivers and managers, as part of their administration, run the finance company book collecting debts from borrowers of Ritz Car Finance without being aware of the Credit Code obligations. The business trades at a loss during the period of administration and receivership, and there are now monetary defaults. After six months creditors of Ritz Car Dealers decide not to enter into a Deed of Company Arrangement and the company goes into liquidation.

Oz Bank brings proceedings against Jim and Jane Jones for failing to meet their obligations under the guarantees. In addition, Oz Bank seeks to sell residential property owned by Jim and Jane Jones in Auckland, New Zealand during the administration period. The home was purchased and financed by Oz Bank after the guarantees were given. Jim and Jane did not know the mortgage is "all accounts", also securing their obligations under the guarantee. It was not pointed out by the bank officer in Brisbane with whom they dealt or by the solicitor who acted for them in the purchase and loan. The solicitors also acted for Oz Bank. Jim and Jane defend the proceedings and seek an injunction restraining the mortgagee sale of the New Zealand property. An immediate sale of the property would be disastrous to Jim and Jane because there is an overwhelming likelihood of a zoning change in 18 months which will greatly enhance the value of the property by allowing piece-meal disposal.