

focus

on

Insolvency Law

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FRASER MILNER CASGRAIN LLP

A TRUSTEE SHOULD BE WARY OF ACCEPTING A DUAL APPOINTMENT AS A PRIVATE RECEIVER UNTIL AFTER IT HAS OBTAINED A LEGAL OPINION AS REQUIRED BY SECTION 13.4 OF THE BANKRUPTCY AND INSOLVENCY ACT

In *First Vancouver Finance v E. Sands & Associates Inc.* [2005] B.C.J. No. 2146, E. Sands & Associates Inc. ("Sands") was appointed the Trustee in Bankruptcy of Emerald Intermodal Inc. ("Intermodal"). Subsequently, First Vancouver Finance ("FVF"), a secured creditor of the estate of Intermodal appointed Sands as its Receiver. A second secured creditor, Emerald Transport Inc. ("Transport") also appointed Sands as its Receiver. Prior to its appointment as Receiver, Sands approached legal counsel to provide it with an opinion as to FVF's security, as required by s.13.4 of the Bankruptcy and Insolvency Act (the "BIA"). Section 13.4 states:

s.13.4 No trustee shall, while acting as the trustee of an estate, act for or assist a secured creditor of the estate to assert any claim against the estate or to realize or otherwise deal with the security that the secured creditor holds, unless the trustee has obtained a written opinion of a legal counsel who does not act for the secured creditor that the security is valid and enforceable as against the estate.

While Sands requested the legal opinion prior to its appointment, it did not receive the legal opinion until seven weeks had elapsed since its appointment. Furthermore, some time after its appointment as Receiver by FVF, Transport attacked the amounts that Sands had calculated were due to FVF. Sands did not resign its position as Receiver at this time.

The B.C. Supreme Court found that, in accepting its appointment to act as Intermodal's Receiver prior to receiving the legal opinion required by s.13.4, Sands had breached its statutory duty. In addition, the Court found that Sands had a conflict of interest at least from the time Transport challenged FVF's claim, and should have resigned one of its positions, likely its position as FVF's Receiver.

For further information please contact David Mann at (403) 268-7097 or David LeGeyt at (403) 268-3075, or visit our website www.fmc-law.com/insolvency.