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Insolvency Law

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FRASER MILNER CASGRAIN LLP

A JUNIOR SECURED LENDER MAY BE ABLE TO RECOVER ITS COSTS FOR APPOINTING A RECEIVER AHEAD OF SENIOR SECURED LENDERS

In *Father & Son Investments Inc. v. Maverick Brewing Corp.* (2007), 2007 CarswellAlta 1452 (Alta. Q.B.), Maverick Brewing Corporation ("Maverick") operated a brewery in Edmonton in space leased from Five Oaks Inc. ("Five Oaks"). The two major creditors of Maverick were Father & Son Investments Inc. ("Father & Son") and Five Oaks. Pursuant to a postponement and subordination of security interest document, Five Oaks had priority over Father & Son to the assets of Maverick.

Maverick encountered financial difficulties and fell into arrears with its secured creditors. On July 4, 2007, an Interim Receiver was appointed by way of court order on the application of Father & Son.

The sale proceeds generated in the receivership were inadequate to pay out secured creditors, including the claims of the Employment Standards Branch, Canada Revenue Agency, and the first secured creditor, Five Oaks. Father & Son, as second secured creditor, did not stand to see any recovery although it incurred legal costs in relation to the original application for the appointment of a Receiver and in relation to subsequent applications made during the course of the Receivership.

Father & Son applied for a declaration that it was entitled to its costs in priority to all other charges except the Receiver's own charge and that of the Canada Revenue Agency. Five Oaks opposed the application, which, if successful, would have reduced its recovery as first secured creditor.

The Court found that a creditor may logically receive super-priority for its costs when the costs:

- (a) are incurred while a creditor takes actions that increase the recovery from a debtor;
- (b) the increased recovery provides a benefit to higher ranked creditors; and
- (c) The actions of the creditor are not a consequence of a separate legal duty.

In this case, the appointment of the Receiver by Father & Son had increased the recovery of Maverick's creditors, including those with a higher priority. Father & Son was therefore entitled to priority in its award of costs over Five Oaks, but not over the Receiver, who was an officer of the court and serves to benefit all creditors.

However, while the Court did award Father & Son its costs respecting the application for the appointment of the Receiver, the Court did not award Father & Son its subsequently incurred costs as there was no evidence that any subsequent acts of Father & Son, and its counsel, benefited the estate generally or any creditors other than itself.

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