

focus

on

Insolvency Law

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The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a dark blue square background.

FRASER MILNER CASGRAIN LLP

COMMERCIALLY REASONABLE REALIZATIONS

In *Royal Bank v. 2021847 Ontario Ltd. et al.* (2007), Carswell Ont. 8283, the plaintiff Royal Bank sought summary judgment against the guarantors of a credit facility it granted to 2021847 Ontario Ltd. ("2021847"). The amount the plaintiff sought against the guarantors was the deficiency remaining after the plaintiff had appointed a receiver over the assets of the debtor company. The proceeds from the realization of the receivership were insufficient to payout 2021847's credit facility.

The collateral secured was unique, consisting of two hydrofoil passenger boats. The boats had been built in 1989 and operated for limited runs in the mid-1990s. The appraised evaluation obtained by the receiver estimated the value of the collateral to be approximately \$900,000. Ultimately, the receiver realized \$96,000 for both boats.

When the plaintiff sought enforcement of the underlying guarantees, the guarantors defended on the basis that the receiver did not obtain the best possible price for the hydrofoil collateral. Although it is not clear in the decision, it can be inferred that the receiver was privately appointed and did not seek any court approval for the procedure it utilized to liquidate the collateral, or for the ultimate sale.

The defendant guarantors complained that the receiver did not take appropriate or commercially reasonable steps to market and sell the collateral and included five specific complaints about the receiver, namely that it failed:

(a) in view of the specialized nature of the security, to investigate the market adequately or at all in order to determine the most appropriate method of marketing the vessels in question;

(b) to then market the vessels in a commercially reasonable fashion by exposing them for sale widely or to an appropriate market;

(c) to take steps to actively market the vessels;

(d) to act in good faith to conduct a proper sale of the vessels; and

(e) to obtain adequate appraisals of the vessels.

The Court reviewed the various steps performed by the receiver, many of which were outlined in reporting letters from the receiver to the plaintiff bank. The evidence demonstrated that for over 20 months the receiver made thorough efforts to find a buyer for the collateral. Ultimately, the Court concluded that:

(i) the receiver was not required to undertake an expensive and uncertain liquidation process in Europe in view of the other steps the receiver had taken and in view of the costs involved for a European sales process; and

ii) the steps of the lender, and its agent/receiver, were commercially reasonable in the circumstances.

The allegations of the defendant guarantors were not substantiated on the evidence.

As a result, the Superior Court granted judgment in favour of the plaintiff lender against the defendant guarantors for the full amount of the deficiency remaining on 2021847's primary credit facility.

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.