

Real Estate
Real Estate Case Law Update
Rosling King LLP



Background

Devon Commercial Property Limited (the “Claimant”) purchased a cider brewery in Devon (the “Property”). The Claimant granted a five-year lease for 70% of the brewery to a connected company, Devon Cider Company Limited (“DCC”). The Claimant later granted a mortgage over the Property to State Securities plc in respect of a £3.47 million loan.

Four years after granting the lease to DCC, DCC went into administration. The administrators sold the business and assets to a competitor, Aston Manor Brewery Co Ltd (“Aston Manor”) and provided them with a licence to use the land under the Claimant’s lease.

On the same day that the business and assets were sold to Aston Manor, State Securities assigned the Claimant’s mortgage to Aston Manor. When the Claimant later defaulted on their mortgage payments, Aston Manor appointed LPA Receivers (the “Defendants”) over the Property.

The Property was put on the market. There was a limited prospect for the Property to obtain residential planning permission and, whilst offers were made for £4.25 million and £4.3 million, they required vacant possession. A valuation was undertaken that stated that the Property, fully equipped with bottling plant and fixtures and fittings, was valued at £2.5 million. The Defendants granted a new 3-year lease with a 6 month break clause whilst the Property was being marketed. Aston Manor had at one point made an offer of £2.3 million but, after marketing, eventually Aston Manor made an offer of £2.75 million together with payment of certain costs which was accepted. The sale of the Property was completed to Aston Manor Freeholds Limited (a newly formed subsidiary of Aston Manor) After completion of this sale and payment of the outstanding debts secured by the mortgage, there was no surplus to return to the Claimant.

The Claimant alleged that the Defendants failed to act in good faith in failing to take the best price offered. The Claimant also maintained that the Defendants proceeded despite having a conflict of interest and should have treated Aston Manor as a special purchaser connected to the appointment of the receivers.

Decision

The High Court dismissed the claim.

The Court revisited the scope of a receiver’s duties to a mortgagor and mortgagee including the duty to act in good faith. The Judge confirmed that a receiver of the mortgaged property appointed by a mortgagee owes the same duty to the mortgagor as the mortgagee in relation of the property. Whilst a receiver has to be acting in the protection and preservation of the charged property, the receiver does not have to await or effect any increase in value of the property before selling it. In terms of a receiver breaching his or her duty to act in good faith, the Judge explained that this requires that the act was intentional, more than mere negligence with an improper motive or element of bad faith.

On the facts of the case, the Judge found that there was no breach of the duty to act in good faith in particular because:

- The reasoning behind the lease to Aston Manor to generate income was valid and it was also noted that Aston Manor wanted a lease for longer than three years, but did not obtain it;
- One of the receivers included the option of remarketing the Property which (as he said) Aston Manor would not like, and yet that was in fact what happened;
- The fact that the Defendants followed separate internal advice to remarket the Property on the open market following the reduced offer of £2.3 million by Aston Manor, rather than sell it to Aston Manor at that price;
- The non-disclosure of a valuation from Edward Symmons' report to Aston Manor, on the basis that that might lead Aston Manor to reduce its offer (the valuation indicated a value range of £2 million to £2.5 million).
- The higher offers received were validly considered by the Defendants as not serious and the receivers were within their rights to treat them as such.

With respect to the issue as to whether there was a conflict, the Court held that, whilst a conflict could arise for a mortgagee seeks to buy the property itself because of its interest to buy the property at the lowest possible price, a receiver's interest lies instead in performing the role properly for fees. Those fees are earned whether the price is high or low, so long as reasonable care is taken that it is a proper one. The receiver may be tempted to go with the mortgagee's cheaper pricing for other, improper reasons, for example to continue to earn fees from the current appointment or to secure further appointments in the future, but that is a different issue. So, in principle there is no conflict of duty where the receiver is selling to an associate of the appointor as here.

Commentary

The facts of the case are unusual involving as they do the sale by receivers to a purchaser connected to the appointor but it does happen.

In any event, the decision is to be welcomed as providing clarity on the scope of Receiver duties in acting in good faith and dealing with conflicts. It helped that the defendant receivers had a fair bit of experience with this kind of scenario and this may be why they rightly were alive to the issues of acting in good faith and dealing with conflicts. It is also evident that the careful records that the receivers kept in this regard helped defend their position.

For further information, please contact [Alexander Pelopidas](#) or the Partner with whom you usually deal.