As appeared in Owner/Driver Magazine

Equipment Repossession

While a financier may take possession of borrowers equipment, the controller has certain duties regarding the disposal of the charged assets, writes David Lilac.

In these difficult times, it's not unusual for finance companies to take possession and sell equipment to reduce a borrower's facility with finance company.

The purpose of this article is to examine the duties of finance companies or controllers when exercising their power of sale.

Section 420A of The Corporations Act, 2001 (the Act) outlines the step a controller should take in exercising its power of sale.

The sale of the equipment must be for market value if the equipment has a marker value.

If it doesn't must be sold for the most reasonably obtainable price.

From the court cases about these types of sales, it has become clear that a controller exercising the power of sale should take the following steps:

- Investigate the market value, if any, of the equipment.
- Consider how the equipment should be sold.

To get the market value, the controller should:

- Advertise sufficiently to bring the equipment to the attention of any prospective purchasers.
- Obtain a valuation and/or expert advice in relation to the market value of the equipment.
- Consult with the company's directors in relation to the sale of the equipment, including discussing with them who possible purchasers might be.

Finally, the sale itself needs to be conducted in a way which helps to maximise value of the equipment.

If the controller or receiver breaches the duties imposed by section 420A of the Act, the owner has a right to claim against the controller. The value of the claim is the difference between the price obtained and the price that should have been conducted in accordance with section 420A of the Act. This usually means the difference between the amount realised and the market value of the equipment.

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