**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2007-485-1563**

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| IN THE MATTER OF | the Receiverships Act 1993 |
| AND | |
| IN THE MATTER OF | SERVICE FOODS MANAWATU LIMITED (IN RECEIVERSHIP AND LIQUIDATION) |
| BETWEEN | NEW ZEALAND ASSOCIATED REFRIGERATED FOOD DISTRIBUTORS LIMITED<br>Applicant |
| AND | RICHARD GRANT SIMPSON AND RONALD WALTON<br>Respondents |

**CIV-2005-485-1820**

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| IN THE MATTER OF | the Receiverships Act 1993 |
| AND | |
| IN THE MATTER OF | SERVICE FOODS MANAWATU LIMITED (IN RECEIVERSHIP AND LIQUIDATION) |
| IN THE MATTER OF | an application for directions |
| BETWEEN | RICHARD GRANT SIMPSON AND RONALD WALTON AS RECEIVERS OF SERVICE FOODS MANAWATU LIMITED (IN RECEIVERSHIP AND LIQUIDATION)<br>Applicants |

Minute: 6 May 2008

**MINUTE OF DOBSON J ON APPLICATION FOR RECALL OF JUDGMENT**

[1] I have received Memoranda for New Zealand Associated Refrigerated Food Distributors Limited ("NZARFD") dated 29 April 2008, and for the receivers dated 30 April 2008.

[2] NZARFD invites me to recall the judgment I delivered on 28 April 2008 which has not been sealed. The receivers oppose any recall, submitting that a formal application is required, and that the matters sought to be addressed have already been dealt with.

[3] I am not inclined to ignore the concerns raised for NZARFD because of any procedural inadequacy. The matters raised deserve substantive consideration as promptly as possible.

[4] The jurisdiction to recall is narrowly confined, first to specific cases where there has been an amendment to relevant statutory provisions or a new judicial decision that is relevant and of high authority, or where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance. Further, recall may be appropriate where "for some other very special reason justice requires that the judgment be recalled" – per Wild CJ in *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633.

[5] An example of this last category is where a relevant matter such as interest was intended to be addressed, but has not been, such as was recognised as justifying recall in *Brake v Boote* (1991) 4 PRNZ 86.

[6] Here, I did intend to address two matters now raised on behalf of NZARFD, but did not deal with them in my judgment, namely:

a) Interest on the amount ordered to be paid to NZARFD.

b) Whether marshalling could apply.

[7] A third issue on which recall is invited is reliance in my judgment on the provisions of s 293 of the Companies Act 1993. My judgment records that argument was not addressed on some of the propositions I have had regard to. The consequence, claims NZARFD, is that the judgment ignores the interests of unsecured creditors whose rights are affected, if this dispute between two secured creditors relies on a statutory provision that avails liquidators on behalf of unsecured creditors.

[8] I am satisfied that justice requires these issues to be addressed. The first two may be dealt with now, with the intention that they be added to the reasoning in the judgment of 28 April 2008 so as to complete all matters other than the third issue, which is addressed separately below.

**Interest**

[9] As to interest, I had intended to accede to NZARFD's application for interest at Judicature Act rates, payable since 30 January 2006. I note that such additional relief, certainly to the extent of the value of the PMSI determined in the 28 April judgment, is not opposed by the receivers.

**Marshalling**

[10] As to marshalling, having recognised the separate argument for NZARFD on this point in paragraph 12 of the 28 April judgment, I had also intended to explain the reasons why my view on it did not alter the conclusion reached, and that omission was an oversight. The analysis I would include on the marshalling point is as follows.

[11] NZARFD asserted an obligation on the receivers to apply the doctrine of marshalling, to apportion the proceeds of recoveries from all the debtor's assets in a manner that recognised NZARFD's security over just some of them, rather than

electing a mode of satisfying Westpac's indebtedness from the assets that were charged to NZARFD when that would leave a surplus from other Service Foods' assets over which Westpac had security, but NZARFD did not.

[12] The receivers raised two grounds against marshalling applying in the present circumstances. First, that the different assets being realised by the controlling creditor had to belong to only one debtor, so that the doctrine could not apply where Westpac was, for example, resorting to securities granted by Service Foods on the one hand, and guarantors of its obligations to Westpac on the other.

[13] Secondly, that the doctrine does not extend to directing the controlling creditor as to which assets should be realised. Rather, where marshalling applies, equity intervenes after realisation by the senior creditor to ensure that the junior creditor is left in no worse a position than if a different sequence of realisations, respecting its interest, had occurred. In this sense, marshalling can operate as a form of subrogation: see *National Bank of New Zealand v Caldesia Promotions Ltd* [1996] 3 NZLR 467 at 474.

[14] The first point could involve factual enquiries going beyond the evidence, as to the status of guarantors of Service Foods' indebtedness to Westpac, but on the view I have come to, that is unnecessary in any event.

[15] The second point, which I take as a correct characterisation of the doctrine, leads to the point that the doctrine does not affect the quantification of what is covered by a security. Rather, once quantified, it preserves rights to recovery of such amounts where there is a shortfall relative to the claims of both secured creditors. That cannot avail NZARFD to increase the amount it claims in this case. The Court of Appeal has clearly confined the value of its security to the value of goods supplied after the PMSI was perfected and which have not been paid for. The receivers stand committed to paying the full extent of that security once it is quantified, so that the cause of NZARFD's concerns is not that there is inadequate to pay them the extent of their security, but in the rules that are to apply to its quantification.

[16] It could not avail NZARFD to argue that if the receivers elected to satisfy the indebtedness of Westpac by realisation of assets other than those covered by NZARFD's PMSI, then NZARFD would have avoided a contest with the receivers. In enforcing their security, NZARFD have to be prepared to make out its value, and cannot complain of the need to establish that on a contested basis. The absence of a challenge from the receivers could not make the PMSI any more valuable.

[17] It was argued for NZARFD that quantification for marshalling purposes was not confined to the extent of super security applying since the PMSI was perfected, so that it should also be protected for its "ordinary security interest" in respect of previous supplies. Consideration of the claims NZARFD might make in reliance on any such lesser security was not within the issues before the Court. All the evidence and argument focused on quantification of the security from 23 December 2004, consistently with the Court of Appeal's definition of its scope. There is some evidence that Service Foods made application for a trading account on 19 November 2004, and that was accepted on 15 December 2004, but there was no evidence of the value of goods supplied in any defined period prior to 23 December 2004. Accordingly, marshalling could not apply to advance the relevantly secured interest of NZARFD.

**Section 293 Companies Act 1993**

[18] The third issue is more complex. By applying an analogy invited on behalf of the receivers, I have arguably treated the issue as if it arose in a contest between secured and unsecured creditors, when it actually arises in the different context of a contest between two secured creditors. The risk of that compromising the position of unsecured creditors, which was not before me, does constitute a very special reason for justice requiring the matter to be reconsidered.

[19] Justice cannot be achieved on the point without re-argument, but that is to be narrowly confined. The issue relates to the appropriate means of quantifying the value of NZARFD's PMSI consistently with my findings to the effect that:

a) NZARFD's obligation to identify the goods supplied, but not paid for post 23 December 2004, does not extend to a requirement to identify individual items of stock, in the particular circumstances that pertained.

b) The rule in *Clayton's case* (*Devaynes v Noble, Clayton's case* (1861) MER 529) is appropriately applied to the sequence of payments, subject to any particular exceptions established on the evidence.

[20] Stripped of all its alternative arguments, NZARFD should have the opportunity to re-argue the value of its security without having to attribute the value on an individual stock unit basis. Assuming application of the rule in *Clayton's case*, is the value determined simply on the prices at which the stock was sold to Service Foods, or does some other value apply?

[21] In light of the two findings in paragraph [19], the receivers ought to have the opportunity to expand on their argument for a "ruling off", so that debt outstanding when the PMSI was perfected would have to be excluded. This may be by reference to s 293 of the Companies Act, or otherwise in the context of the remaining findings in the 28 April judgment.

[22] In addressing the various amounts referred to in submissions, I note that neither the original, nor a copy of the Bradley affidavit sworn on 29 February 2008 on the Court file has exhibited to it the "final statement" issued on 17 June 2005, which is referred to in paragraph 6 of that affidavit. The last invoice exhibited to the affidavits is dated 3 June 2005, for $20,947.24. Copies of any later invoices intended to be annexed should be supplied. I invite NZARFD, by way of submission rather than further evidence, to explain the manner and detail of verifying the amount outstanding on those invoices, as quantified for the receivers at $157,791.61.

[23] I also invite reconsideration of the extent of exceptions to the rule in *Clayton's case*, as acknowledged in paragraph 93 of the written submissions for NZARFD. In particular, whether there ought to be one or two amounts of $19,178.10 credited in April 2005.

[24] I direct that the defined issue in paragraphs 20 and 21 above be set down for argument for a half day during my next week for reserved judgments, being 26 to 30 May 2008 (except for Friday morning of that week). Counsel are to indicate their availability promptly to the Registrar, and the date will then be advised.

[25] I direct that outlines of argument on the defined issue are to be filed and served, for NZARFD by 5pm on Tuesday, 20 May, and for the receivers by 5pm on Friday, 23 May 2008.

**Dobson J**

Solicitors:
Buddle Findlay, Wellington for the receivers of Service Foods Manawatu Limited (in receivership and liquidation)
Kensington Swan, Auckland for NZ Associated Refrigerated Food Distributors Limited