IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-007120

UNDER	s 34 of the Receiverships Act 1993
IN THE MATTER OF	of Plateau Farms Ltd, Ferry View Farms Ltd, Hillside Ltd and Taharua Ltd (all in Receivership)
BETWEEN	B J GIBSON AND M P STIASSNY Applicants
AND	STOCKCO LTD First Respondent
AND	NUGEN FARMS LTD Second Respondent
AND	A J CRAFAR Third Respondent
AND	R S CRAFAR Fourth Respondent
AND	G W CRAFAR Fifth Respondent

Hearing: 18 June 2010

Appearances: R B Stewart QC, S Gollin and A Simkiss for Applicants
F M R Cooke QC, B Gustafson and M Morrison for First Respondent
No appearances for Second, Third, Fourth and Fifth Respondents

Judgment: 5 July 2010

JUDGMENT OF WHITE J
[APPLICATION FOR PRE-TRIAL SALE ORDER]

This judgment was delivered by me on 5 July 2010 at 3:00 pm pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

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Background

[1] In this originating application under s 34 of the Receiverships Act 1993 dated 30 October 2009 the Receivers of four companies, part of the Crafar Farms, seek orders relating to the priority of the security interest of Westpac NZ Limited in certain cows. The application is opposed by StockCo Ltd essentially on the ground that the cows were sold to it by one of the Crafar Farm companies or acquired by it from third parties. The principal issue for determination on the originating application, which has been given a one week fixture commencing on 11 October 2010, is whether the sale of the cows by the Crafar Farm company was "in the ordinary course" of the company's business. The parties accept that this issue will require resolution of factual and legal matters at the substantive hearing.

[2] In order to preserve the position pending the determination of their application, the Receivers also obtained from the Court without notice to StockCo an interim injunction dated 30 October 2009 preventing StockCo from removing any of the cows from the Crafar Farms. Apparently before the injunction was served on StockCo, a number of the cows were removed from the Crafar Farms and relocated on other farms in both the North and South Islands. This action and the subsequent action of the Receivers in repossessing a number of the cows led to a series of telephone conferences with counsel for the parties and by consent on 9 November 2009 replacement interim orders whereby the Receivers returned the cows taken by them, StockCo returned cows located in the Taupo region taken by them, cows in the South Island taken by StockCo remained there and both parties held the respective cows in a state capable of identification pending determination of the Receivers' application. These interim orders have remained in place since then.

[3] Also during these telephone conferences a series of timetable orders were made in respect of the Receivers' originating application and StockCo's cross-application for orders requiring the Receivers to deliver up the cows. A two day fixture for the hearing of the Receivers' originating application for 9–10 December 2009 was replaced first with a fixture for the week of 19 July 2010 and then, by consent, with a fixture for the week of 11 October 2010. Timetable directions leading to this latter fixture were made on 4 May 2010. As recorded in my minute of that date—

> [2] These directions were made on the basis that the applicants are currently endeavouring to sell the farms fully stocked as a going concern for the best price and that in order to resolve the current dispute they have put forward a bond proposal to the first respondent as substitute security. If the proposal is accepted, a fixture in October 2010 for the current issues will be appropriate. If, however, the bond proposal is not accepted, then the applicants are likely to apply to the Court for an urgent fixture for a hearing before a Judge other than me.

[4] As the bond proposal was not accepted, the Receivers applied on 14 May 2009 for orders authorising sale of the cows or for a priority five day fixture as soon as possible after 1 June 2010. The application was opposed by StockCo which cross-applied for a judicial settlement conference. Further timetable directions were made for the purpose of an urgent one day fixture. It was noted in [2] of my minute of 21 May 2010 that the parties had agreed to follow up a private mediation prior to the urgent fixture.

[5] As it happened, the urgent fixture proceeded at the request of the parties on 18 June 2010 prior to the mediation on 21 June 2010. Judgment was reserved pending the outcome of the mediation and the filing of further submissions and evidence. Advice has now been received that the mediation was unsuccessful and that judgment is required. Further submissions and evidence have also been received from the Receivers and a memorandum in response from counsel for StockCo.

The current application

[6] The Receivers' application is for orders authorising the sale of the disputed stock, namely 3,762 cows conservatively valued at $4,138,200, and the holding of the proceeds in trust pending determination of the substantive proceeding. Alternatively, they seek a priority five day fixture.

[7] The Receivers' application is made under ss 17 and 34 of the Receiverships Act 1993, the Court's inherent jurisdiction and rules 7.9, 7.13 and 7.56 of the High Court Rules.

[8] The Receivers' application has been made following a conditional agreement for sale and purchase of the Crafar Farms by the Receivers to UBNZ Funds Management Ltd (UBNZ) dated 21 May 2010 for a price which should be sufficient

to repay the Westpac debt of $216 million. The agreement is conditional on the approval of the Overseas Investment Commission (OIC) under the Overseas Investment Act 2005 (OIA). This Court has confirmed that the consent of the OIC is required for this transaction: *UBNZ Assets Holdings Ltd v Plateau Farms Ltd and Ors.*[1]

[9] The Receivers understand that the OIA consent process is likely to take some 50 days, but that UBNZ will not submit its application until tenders for the sale of the Crafar Farms close, currently scheduled for 7 July 2010. If consent is obtained, the sale to UBNZ would therefore be likely to settle around September 2010. If settlement occurs then, it will not be necessary for the Receivers to seek an interim order for the sale of the cows because UBNZ has agreed to a lease and put option in relation to the disputed cows by which UBNZ will lease the cows pending the outcome of the substantive proceeding and will then either purchase the cows from the Receivers if they are successful or seek to purchase the cows from StockCo if StockCo is successful. These terms were concluded with StockCo's consent.

[10] The Receivers consider that the lease and put option with UBNZ is unique and attributable to a close relationship between UBNZ and StockCo, one of whose directors has apparently been advising UBNZ on the purchase and had a role in arranging UBNZ's funding.

[11] In order to obtain OIC consent for the UBNZ sale, the Crafar Farms must first be offered for sale on the open market in New Zealand to persons who are not overseas persons: OIA, s 16 (1)(f), and Overseas Investment Regulations 2005, Regs 4–11. Under the UBNZ agreement the Receivers are entitled to accept a better offer after giving UBNZ the opportunity to match it.

[12] In April 2010, prior to the agreement with UBNZ, the Receivers had instructed Bayleys Real Estate to begin a marketing campaign for the Crafar Farms. The purpose of the campaign was twofold: first to satisfy the OIA requirements and second to flush out interest in the farms in order to obtain the best price possible for all of the assets of the companies.

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[1] *UBNZ Assets Holdings Ltd v Plateau Farms Ltd and Ors* HC Auckland CIV-2010-404-3263, 11 June 2010.

[13] One of the Receivers, Mr Gibson, in an affidavit sworn on 22 June 2010, has described in detail the extensive marketing conducted by Bayleys. He has pointed out that no details are given about the number of cows to be sold with each farm. He then states—

> 24. From our discussions with Bayleys and the farming experts we have engaged, I understand that the expectation of a purchaser of a farm is that where possible the production system of the farm will be detailed in the document. This will allow them to make a judgement about value which is likely to be based on the "average efficient production". This is a term related to the carrying capacity and production of any given farm, and is what financiers and land purchasers have tended to use to help determine the value of a property. In terms of stocking levels, the term "average efficient production" means the number of milking cows that can be pastured and milked on the relevant land without the need for excessive outside inputs such as feed during the milking season.
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> ...
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> 26. Specific details about the farms including the terms of the sale will be included in the tender documents the release of which has been delayed to await the decision of the Court. The tender documents will also give details of the stock to be sold with each farm.

[14] As already noted, tenders are currently scheduled to close on 7 July 2010. Although it appears that that date might be extended to mid July 2010, it apparently cannot be extended further because under the terms of the UBNZ agreement better offers must be accepted by 30 July 2010.

[15] Mr Gibson has also deposed that by 9 June 2010 the Receivers had received a total of 408 inquiries, including domestic and international purchasers. Some of the interested parties had signalled that they were interested in purchasing the entire portfolio of farms. Tenders might also be submitted on a farm-by-farm basis.

[16] Significantly, for present purposes, Mr Gibson then states—

> 29. We have not had any inquiries about whether the cows will be sold with the farms. For example, whether they are owned by the companies or by sharemilkers. As noted above, the expectation is that the farms will be stocked appropriately throughout the milking season, and that details of each farm's arrangements will be in the tender documents. At present, potential purchasers are not aware of the issue with StockCo which is the subject of this litigation and so have not given us any feedback on it.

30. In paragraph 24 of my affidavit of 15 June, I described the way the draft tender documents currently deal with this point. A purchaser will contract to purchase all of the cows that the receivers are able to sell on settlement date.

31. Our advisers, Bayleys and the farming experts we have engaged, are of the view that a "put option", which is how the tender documents are drafted at present, is likely to detrimentally impact the value of tenders submitted. This affects the price that can be expected for the land as well as the stock.

32. The value of the stock that is sold will be calculated on the date of settlement by reference to market value. It is a simple matter of settling on a figure, usually done by an independent valuer, and multiplying it by the number of stock. Obviously therefore if the disputed stock cannot be sold, the overall price achieved will be correspondingly lower.

33. However, what we are selling is a going concern rather than solely assets. The assets that earn the income of the business are both the cows and the land. If there is a factor that is likely to adversely affect the income earning capacity of the land, then that affects its value. The possible removal of stock mid-season is one such factor and in my view, and the view of Bayleys and our farming consultants, is that it will affect the value we can achieve for the business.

34. A purchaser will expect certainty of income through the milking season. If this cannot be provided it affects the value of the productive asset they are buying – the land. There needs to be stock available, or there will be a material negative impact on the farm owner and on any sharemilker.

35. We believe this uncertainty will remove some buyers from the process because they will not know what they are buying.

36. This is not a problem if stock can be easily replaced. But as I explained in my affidavit of 21 May 2010 at paragraph 11, there is a real risk that replacement cows in sufficient numbers and of sufficient quality will not be able to be sourced easily or promptly when settlement of the farm sales is due.

37. The reason for this risk is the timing of the sale. By the time any sale is likely to settle, the milking season will have started and so it will be a seller's market...

38. If the timing of the sale was different, and a sale settled outside the milking season, between April and June, then the potential that a large number of cows will be removed from the farms would not be a risk of any importance, because replacements could be sourced easily and quickly. However, for the reasons I have addressed at paragraphs 15–18 above, given the timeline of our process, which is partly dictated by the OIO, we need to provide for the likelihood that a sale or sales will be exposed to this risk because they will settle during the milking season.

[17] For these reasons the Receivers wish to sell the cows with the farms. There are currently 12,190 cows on the farms, including the 3,762 disputed cows.

[18] It is against this background that the Receivers seek the order authorising the sale of the disputed cows now. In essence they believe that they need to be able to offer the cows for sale with the farms as a going concern in order to obtain the best possible price from other potential purchasers. They do not believe that other purchasers would be prepared to enter into the lease and put option arrangement they have with UBNZ.

[19] The Receivers are also concerned that, if they are unable to find a buyer and remain in possession of the farms and if StockCo is ultimately successful at the October 2010 trial, StockCo will remove the cows from the farms in the middle of the milking season leaving the Receivers with the problem of replacing the cows at high cost. Removal of the cows in the milking season would also be likely to have an adverse impact on the sharemilkers who are milking the disputed cows under agreements with the Receivers.

Submissions for Receivers

[20] For the Receivers, Mr Stewart QC submitted in summary—

a) The Receivers need the order for sale now in order to be able to achieve the best price in terms of their sale programme. It is in everyone's interests for the sale of the farms to be sooner rather than later as significant interest of $22 million per annum is running on Westpac's debt of $216 million.

b) StockCo is only at risk if the UBNZ sale does not proceed and the Receivers get back-up offers that are for materially less than the UBNZ contract.

c) If it is held at the substantive hearing that the Receivers do not have a superior interest over the cows, damages would be an adequate remedy for StockCo.

d) If the cows were returned to StockCo now, the Receivers are not satisfied that StockCo would be good for damages so damages would not be an adequate remedy for the Receivers.

e) If, notwithstanding Bayleys' market efforts, there is no sale of the assets before trial, the parties would still have the opportunity to explore a way through.

f) Sale of the cows now would not prejudice StockCo because—

   i) if StockCo is ultimately successful at the substantive hearing, it would be entitled to receive the funds held in trust from the sale of the cows (estimated to be worth conservatively $4,138,200) in respect of its security of $3.6 million; and

   ii) in respect of any further losses, it would have a claim against the Receivers whose costs would be a first charge on the realisation proceeds ranking ahead of the secured creditors' entitlement.

g) The Receivers were under an obligation to make the present application because of their obligation to obtain the best possible price for the assets. This does not mean, however, that the Court is necessarily under an obligation to grant the application.

h) The Receivers are required to obtain or seek back-up offers because of the OIA requirements and the possibility that the agreement with UBNZ is not confirmed or does not settle.

i) There is no accepted or recognised principle that the Courts will not order the sale of an owner's property where the owner opposed a sale. The Courts routinely order the sale of real property in the context of determining the balance of convenience and despite the owner's/mortgagor's opposition to the sale. If there is a serious question to be tried, the focus then turns to the balance of convenience and an assessment of where the overall justice lies: *Klissers*

Farmhouse Bakeries Ltd v Harvest Bakeries Ltd,[2] and *Pasquarella v National Australia Finance Ltd.*[3] Where the mortgagor's ownership interest is a purely financial one, ownership of the property will have less weight in considering where the balance of convenience lies and damages are likely to be considered an adequate remedy: *Taylor v Westpac Banking Corporation*[4] and *British Mercantile and Loan Trust Company Ltd v Trustees Executors Ltd.*[5] Here where the ownership interest StockCo claims in the cows is financial, damages should be an adequate remedy.

Submissions for StockCo

[21] For StockCo, Mr Cooke QC submitted in summary—

a) As the UBNZ agreement shows, it is not necessary for the Receivers to sell the disputed cows in order to sell the farms. The proceeds from the sale to UBNZ will be sufficient to meet all creditors and make sale of the cows unnecessary.

b) A possibility that the sale to UBNZ might not proceed does not justify the sale of the cows now when there is no evidence that other potential purchasers have concerns about their ownership or that they would not enter into an agreement on terms similar to those the Receivers have with UBNZ. The orders sought are therefore entirely contingent at present. If the situation were to change in the future, the Receivers could apply again.

c) The cows are owned by StockCo which is entitled to have the substantive dispute as to priority of security determined before they are sold. StockCo should not be deprived of its property rights before the substantive dispute is determined at the October 2010 hearing.

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[2] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).
[3] *Pasquarella v National Australia Finance Ltd* (1987) 1 PRNZ 130 (CA).
[4] *Taylor v Westpac Banking Corporation* (1996) 7 TCLR 177.
[5] *British Mercantile and Loan Trust Company Ltd v Trustees Executors Ltd* (2006) 7 NZCPR 738.

d) StockCo would be prejudiced by the sale of the cows because it would be left with all the uncertainties and contingencies involved in a claim for damages against the Receivers for lost income in the event that the Receivers are unsuccessful in the substantive proceeding.

e) As StockCo is the legal owner of the disputed cows and is not a "mortgagee" as defined in s 2 of the Receiverships Act 1993, the Court has no jurisdiction to make the orders sought by the Receivers under s 17 of that Act.

f) The Court should not make the orders sought under rule 7.56 of the High Court Rules because that would deprive StockCo of its rights as legal owner of the cows and its entitlement to enjoy the rights of ownership: *Dangar, Grant and Co v Gospel Oak Iron Co*[6] and *Te Ringa Mangu Ltd v Toyota Finance NZ Ltd.*[7] StockCo's ownership rights should not be replaced with a claim for damages.

g) StockCo is entitled to have the cows kept pending resolution of the substantive proceeding. The status quo should be preserved.

h) As far as the sharemilkers are concerned, if the Receivers have entered into contracts with them in relation to the disputed cows with knowledge of the dispute then the Receivers, not StockCo, need to accept the consequences.

i) The authorities relied upon by the Receivers relating to injunctions sought by owners of real property to prevent mortgagee sales have no application here because StockCo is not applying for an interim injunction to prevent the sale of real property. The Receivers are applying effectively to vary the terms of the existing interim orders by obtaining authority from the Court to sell the animals which they possess but which they do not own. Whether Westpac has any right in the livestock will be determined in the substantive proceeding. Until then the Receivers are permitted by the current interim order to

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[6] *Dangar, Grant and Co v Gospel Oak Iron Co* (1890) 6 TLR 260.
[7] *Te Ringa Mangu Ltd v Toyota Finance NZ Ltd* (1992) 6 PRNZ 51 (HC).

hold the animals and to earn income from them. They have no right to sell them.

Issues

[22] There is no dispute that there is a serious question to be argued on the Receivers' originating application at the hearing scheduled for October 2010. Disputed questions of fact and law between the parties will need to be resolved then. In the meantime the parties agree that the Court is not in a position to weigh the strengths and weaknesses of the competing arguments.

[23] There is also no dispute now that the present application needs to be considered in the context of rule 7.56 of the High Court Rules rather than under s 17 of the Receiverships Act 1993. The decision of the House of Lords in *On Demand Information plc v Michael Gerson (Finance) plc,*[8] relating to an application under the English equivalent of rule 7.56, shows that the rule provides the Court with jurisdiction to consider an application by receivers for a pre-trial order for the sale of property the subject of dispute in a receivership. In that case receivers sought an order for sale to enable them to accept the sole offer for the remainder of a business which was conditional on the purchaser being able to take over certain leased video and editing equipment.

[24] While some of the factors relevant to applications for interim injunctions may also be of assistance in the context of an application under rule 7.56, the Receivers' application for the sale of the disputed property is not in the same category as an application by a mortgagor for an order preventing a mortgagee sale.

Rule 7.56

[25] Rule 7.56 of the High Court Rules provides—

[8] *On Demand Information plc v Michael Gerson (Finance) plc* [2003] 1 AC 368.

Sale of perishable property before hearing

(1) A Judge may, on application, make an order authorising a person to sell property (other than land) in a manner and subject to any conditions stated in the order if-

(a) the proceeding concerns the property or raises, or may raise, questions about the property; and

(b) the property—

(i) is perishable or likely to deteriorate; or

(ii) should for any other reason be sold before the hearing.

(2) The Judge may treat an application under this rule as an application for directions under rule 7.9 and give directions accordingly.

[26] This rule confers a wide, but not unfettered, discretionary power on a Judge to order the sale of property, other than land, before a hearing. The power may be exercised only if the conditions in paragraphs (a) and (b) are met.

[27] The condition in paragraph (a) requires the proceeding to concern the property or raise questions about the property. There is no dispute that this condition is met in the present case as the substantive proceeding concerns the competing interests of Westpac and StockCo in the cows.

[28] The condition in paragraph (b) contains two alternative limbs. The property either—

(i) must be perishable or likely to deteriorate; or

(ii) should for any other reason be sold before the hearing.

[29] As to the first limb, the fact that a particular item of property "is perishable or likely to deteriorate" will not of itself necessarily be sufficient to warrant an order for sale of the item. The purpose of the rule is to enable an order to be made for the sale of perishable property to prevent further diminution in the value of the property the subject of the proceeding or further expense being incurred in respect of the property and to replace the property with a sum of money. Such an order will frequently be in the interests of both parties.

[30] The few reported cases on the rule and its English equivalent illustrate this approach. In *The Hercules*[9] a vessel which had been damaged in a collision was ordered to be sold to avoid further deterioration and expense. In *Bartholomew v Freeman*[10] a horse was ordered to be sold to save expense. The order would not have been made, however, if the horse had been a valuable one for which either party particularly cared. In *Te Ringa Mangu Ltd v Toyota Finance New Zealand Ltd,*[11] which involved an application for an order for the sale of a Toyota van under a predecessor to the rule, Master Williams QC said at 55—

> In this Court's view the evidence as to deterioration in the condition of the Toyota van clearly shows that although some deterioration is taking place and will continue if the van is not sold, that deterioration is not so marked as on its own to warrant an order for sale. Clearly the van is not of a perishable nature as that phrase is used in r 332(a).

[31] In *On Demand Information plc v Michael Gerson plc*[12] Lord Millett said at [33]—

> ...The paradigm case is where the ownership of goods is in dispute, so that they cannot be sold except by agreement between the parties or order of the court. The purpose of the court in exercising the power to order a sale is to avoid the injustice that would otherwise result by the property becoming worthless or significantly reduced in value during the interval between the application for sale and the determination of the proceedings or question.

[32] In the present case the cows, like the horse in *Bartholomew v Freeman*, are no doubt "perishable property", but the Receivers are not seeking an order for their sale on that ground. On the contrary, the Receivers are seeking an order for the sale of the cows so that they may be retained on the farms and included in any back-up sale or sales to a purchaser or purchasers other than UBNZ.

[33] This means that the focus here is on the second limb - "should for any other reason be sold before the hearing". While the expression "any other reason" is broad, it does not mean that an applicant for a pre-trial order is automatically entitled to the orders sought. There must be a "good" reason for the order sought. The equivalent English rule refers expressly to the need for a "good" reason. In New

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[9] *The Hercules* (1885) 11 PD 10.
[10] *Bartholomew v Freeman* (1878) 3 CPD 316.
[11] *Te Ringa Mangu Limited v Toyota Finance New Zealand* (1992) 6 PRNZ 51.
[12] *On Demand Information plc v Michael Gerson plc* [2003] 1 AC 368.

Zealand the need for a "good" reason should obviously be implied. This is reinforced by the requirement for the Judge to be satisfied before exercising the discretionary power under the rule that the order sought "should" be made, that is the order is necessary or justified in the circumstances of the particular case.

[34] Normally, property the subject of a proceeding will be preserved pending the hearing of the proceeding. Indeed the Court has a variety of powers to enable this to be achieved: e.g. rules 7.53 (interlocutory injunction), 7.55 (Preservation of property), 17.41 (Leave to issue charging order) and 32.2 (Freezing order). Similarly, the preservation of the status quo is one of the relevant factors when the Court considers whether an interim injunction should be granted. Courts are also reluctant to grant mandatory interim injunctions unless they are clearly justified: *Telecom NZ Ltd v Clear Communications Ltd.*[13]

[35] This approach was followed in *Te Ringa Mangu Ltd v Toyota Finance New Zealand Ltd* by Master Williams QC at 55—

> As to r 332(b), although Toyota Finance may complain at the cost of storage, the cost does not seem considerable when measured against the quantum of damages sought by the plaintiff and, to an extent at least, Toyota Finance must be regarded as having brought that cost on itself by undertaking the repossession to which reference was earlier made.
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> Of pivotal importance, however, in the determination of this matter, is that this case is, in part at least, now to be regarded as a claim by the plaintiff to regain possession of the Toyota van. Toyota Finance is the legal owner of the vehicle but the plaintiff has a legal interest in it as well. Clearly in those circumstances it could not be concluded that it was desirable that the property which is part of the subject of the action should be sold to a third party prior to the action being heard. It follows that, in this Court's view, there is no reason made out for the making of an order under r 332 and the application for such an order will accordingly be dismissed.

[36] On the other hand, in *On Demand Information plc v Michael Gerson plc* a pre-trial sale order was made for "good reason" because the receivers would otherwise have lost the sale offer for the remainder of the business. As Lord Millett said at [34]—

> In the present case the leased equipment was not perishable or likely to deteriorate, but there was good reason why it should be sold forthwith before

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[13] *Telecom NZ Ltd v Clear Communications Ltd* (1997) 6 NZBLC 102,325 (HC).

> the lessee's claim for relief from forfeiture could be determined. The parties had been unable to agree upon a sale, and neither party could sell without the consent of the other or an order of the court. The lessee could not sell unless and until it obtained relief from forfeiture and brought the leases to an end by the appropriate notices; and the lessor could not sell while the lessee's claim for relief from forfeiture remained outstanding. There was an impasse, which was resolved by the order for sale...

[37] In the event that the Court accepts that the conditions in paragraphs (a) and (b)(i) or (ii) of rule 7.56 are met, the Court will then need to consider whether the discretion under the rule should be exercised. The fact that the conditions are met provides the basis for the exercise of the discretion. It does not automatically require the discretion to be exercised. The Court may need to consider other relevant factors in deciding whether to exercise the discretion in the circumstances of the particular case.

[38] The need to consider the exercise of the discretion in this way was referred to in *Bank of Scotland v Neath Port Talbot County Borough Council*[14] where, after referring to the decision of the House of Lords in *On Demand Information plc v Michael Gerson plc*, David Richards J said at [27]—

> 27. Satisfying the court that there is good reason for an order for sale under the provision is, however, no more than the threshold issue. It is only then that the question arises as to whether the discretion to order the sale should be exercised. Of course, the existence of good reasons for an early sale is, itself, a strong factor in favour of making such an order, but there may be other factors which may need to be put in the balance on both sides. Additionally, even if, in principle, the court was minded to make the order, the mechanics of sale might themselves raise prejudice to the other party's position such as to make it inappropriate to make the order. In the end, the court must look at all the factors in the round and make its decision.

[39] In that case the Judge decided that the factors in favour of early sale outweighed the objections. If the applicant Council succeeded at trial without an order for early sale it would suffer loss for which the Bank would have no obligation to compensate it and some of the loss, unjustly suffered by the Council and the wider public, would, in any event, be incapable of adequate financial compensation.

[40] The need to consider other relevant factors when exercising the discretion under the rule was also recognised by Lord Millett in *On Demand Information plc v*

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[14] *Bank of Scotland v Neath Port Talbot County Borough Council* [2008] BCC 376.

Michael Gerson plc when he referred to the relevance of the potentially significant consequences of making a pre-trial sale order at [37]—

> But while the proceeds of sale are merely a substitute for the property in question, the sale inevitably affects the nature of the remedy which the court can grant. The subject matter of the proceedings, and therefore of the order which the court will ultimately make at trial, is no longer property but money. In the paradigm case, where the ownership of the property is in dispute, the court can no longer make a declaration of title, or order the party in possession to give possession to the other, or give specific relief in relation to the property. After the property has been sold no such relief is possible. Instead, orders which the court would otherwise have made are replaced by orders for payment out of the money (if in court) or declarations of entitlement to give a good receipt for the money (if in an escrow account).

[41] When the approach to the interpretation and application of rule 7.56 adopted in these authorities is taken into account, it is apparent that the Receivers, as applicants for a pre-trial sale order, need to persuade the Court not only that there is good reason why such an order is necessary or justified in the particular circumstances of this case but also that the Court should exercise its discretion in their favour in this case.

Decision

[42] I accept Mr Stewart QC's submission that the Receivers considered that they were obliged to make the present application on the basis that they had advice from Bayleys and farming experts that the sale of the Crafar Farm assets would be likely to be enhanced if the disputed cows were included. But I also accept that the Court is not under an obligation to make the order unless in terms of rule 7.56 it is first satisfied that there is good reason why it is necessary in all the circumstances of the case to make a pre-trial order which would have the affect of replacing the disputed property, that is the cows, with a sum of money. For the following reasons I am not satisfied that there is good reason why it is necessary to do so at the present time.

[43] First, if the OIC approves the agreement between the Receivers and UBNZ for the sale and purchase of the Crafar Farms and the agreement is settled, there will be no need for the pre-trial sale order. The Court would not normally make an order of this nature on a contingency or hypothetical basis.

[44] Secondly, the Receivers have not received an offer for the purchase of the Crafar Farm assets conditional on inclusion of the disputed cows. On the contrary, they have accepted an offer from UBNZ which contains lease and put option provisions preserving the position in respect of the disputed cows.

[45] Thirdly, there is no evidence yet that any of the other prospective purchasers will in fact only make offers if the disputed cows are included. While the Receivers, on advice, may consider that they would prefer to sell the disputed cows with the farms, there is currently no hard evidence that it is necessary to do so in order to obtain the best price. There is certainly no evidence that the Receivers have received only one offer conditional on inclusion of the cows: cf *On Demand Information plc v Michael Gerson plc.*

[46] Fourthly, the Receivers have not yet endeavoured to sell the assets on terms including a lease and put option in respect of the disputed cows. Unless and until that is done and there is a reaction from the market, it is not possible to be satisfied that the inclusion of such terms would necessarily adversely affect the price for the assets.

[47] Fifthly, the OIA and regulations relate only to the sale of the land. There is no OIC requirement for the disputed cows to be included in the tenders.

[48] In the absence of evidence establishing that the Receivers have to sell the disputed cows with the land, there also is no reason why StockCo's ownership rights to the cows should be prejudiced by the forced sale of the cows before the trial scheduled for October 2010. StockCo seeks retention of the cows in order to have the benefit of an economic return from them in the event that it is successful at trial. Conversely, if the cows are retained and the Receivers succeed at the trial, they will not suffer any non-compensatable loss: cf *Bank of Scotland v Neath Port Talbot County Borough Council.*

[49] I agree with Mr Cooke QC that, if the position were to change, because the UBNZ sale did not proceed and the Receivers were able to adduce evidence that established that it was necessary for the disputed cows to be sold with the Crafar Farm assets, a further application for a pre-trial sale order could be made. The Court

would be able to consider the position in the light of the further evidence. If the Court were then satisfied that there was good reason why the order was necessary and justified, it would also be able to consider whether to exercise its discretion to make the order.

[50] At present I do not see that the fact that with the sale of the disputed cows the substantive proceeding would involve a dispute over money rather than cows would necessarily preclude the Court from exercising its discretion to make the order. Whether or not the cows are sold now, StockCo, if successful in the substantive proceeding, will have a claim for damages against the Receivers with the uncertainties and contingencies involved in such a claim.

[51] I should also record that the question whether, if StockCo is successful in the substantive proceeding, it should be entitled to remove the cows from the farms in the middle of the milking season is a matter which may be addressed at the October 2010 trial in the context of considering the timing of the granting of any orders to be made then. In the meantime the possibility of the cows being removed by StockCo after the October hearing is not a reason for making a pre-trial order for the sale of the cows. The position of the sharemilkers will also be able to be addressed at the trial.

[52] The Receivers' alternative application for a priority fixture is also declined because the current fixture for the week of 11 October 2010 is effectively now a priority fixture. The Civil List Judge advises that there is currently no earlier 5 day fixture available in this Court

Result

[53] The current applications by the Receivers for a pre-trial order for the sale of the disputed cows or for a priority fixture are therefore dismissed.

[54] Leave is reserved to the Receivers to apply again if circumstances change.

[55] In the meantime I see no reason why StockCo should not be entitled to its costs on this application on a 2B basis with disbursements to be fixed by the Registrar. If the Receivers do not agree, they may file and serve a memorandum within 14 days and StockCo may reply within a further 14 days.

D J White J.

D J White J