Agnew v Pardington

Court of Appeal Wellington CA 109/05
19 September; 22 December 2005
Anderson P, Glazebrook and Chambers JJ

Company law – Receivership – Property disposed of by receiver – Whether subsequent secured creditors then became unsecured creditors – Receiverships Act 1993, s 30A(1) – Personal Property Securities Act 1999, ss 115 and 117.

Statutes – Interpretation – Legislative history – Use of subsequent legislation – Purpose and context – "Reading down".

The respondents, Pardington and Jarrold, were the receivers of The Building Depot Ltd, which was in receivership and liquidation. They were appointed by the first-ranking general security holder, ANZ Banking Group (New Zealand) Ltd. The first appellants were appointed as receivers of the same company, on a later date, by a second-ranking general security holder, Fletcher Distribution Ltd (the second appellant). The respondents realised the assets of The Building Depot, leaving a surplus of $2.8m (the surplus funds) after payment to ANZ and other preferential creditors. Fletcher was owed $1.82m. The respondents applied to the Court for directions as to where to pay the surplus funds. The High Court held that s 30A of the Receiverships Act 1993 had the effect of extinguishing the security interests of Fletcher and all other subsequent secured creditors and that the respondents were obliged to pay the surplus funds to Fletcher's receivers or to the Official Assignee. Fletcher appealed.

Held: The purpose of s 30A of the Receiverships Act was limited to passing clear title to a purchaser of assets from a receiver. It had not been Parliament's purpose to extinguish the interests of subsequent security holders with regard to the surplus. The context to s 30A was consistent with this interpretation. It was legitimate to read down s 30A so that its effect was limited to an effect on a purchaser, to ensure that the Court's interpretation aligned with the purpose of the provision (see paras [33], [34], [35], [36], [37], [43], [44]).

Result: Appeal allowed.

Observation: It is rarely permissible to rely on subsequent legislation as an interpretative aid. The subsequent provisions are of no assistance in this case, particularly given the existence of transitional provisions (see para [28]).

Other cases mentioned in judgment

Inland Revenue, Commissioner of v Databank Systems Ltd (1990) 12 NZTC 7,227.

Matai Industries Ltd v Jensen [1989] 1 NZLR 525.

New Zealand Bloodstock Ltd v Waller and Agnew (2005) 9 NZCLC 263,944 (CA).

Winchester International (NZ) Ltd v Cropmark Seeds Ltd (Court of Appeal, CA 226/04, 5 December 2005).

Appeal

This was an appeal by Richard Dale Agnew and John Anthony Waller as receivers of The Building Depot Ltd appointed by Fletcher Distribution Ltd, the second appellant, from the judgments of Williams J (reported at (2005) 9 NZCLC 263,830) extinguishing Fletcher's security over assets of The Building Depot, opposed by Rodney Gane Pardington and Grant Stephen Jarrold as receivers of The Building Depot appointed by ANZ Banking Group (New Zealand) Ltd, the first respondents, and by the Official Assignee, the second respondent.

M M B van Ryn and *J P Ion* for Fletcher and Messrs Agnew and Waller.
S E Cameron for Messrs Pardington and Jarrold.
G S Caro for the Official Assignee.

Cur adv vult

The judgment of the Court was delivered by
GLAZEBROOK J.

Table of contents

Introduction

[1] The issue for this appeal is whether s 30A [now 30A(1)] of the Receiverships Act 1993 turned subsequent secured creditors into unsecured creditors where property is disposed of by a receiver. In an interim judgment of 19 May 2005 (confirmed by a judgment dated 2 June 2005), which are now both reported at (2005) 9 NZCLC 263,830, Williams J held that it did.

The legislation

[2] Section 30A of the Receiverships Act read:

> **30A. Extinguishment of subordinate security interests –** If property has been disposed of by a receiver, all security interests in the property and its proceeds that are subordinate to the security interest of the person in whose interests the receiver was appointed are extinguished on the disposition of the property.

[3] The other legislative provisions referred to in this judgment are set out in the appendix.

Background

[4] Mr Pardington and Mr Jarrold are the receivers of The Building Depot Ltd, which is in receivership and liquidation. They were appointed by the first-ranking general security holder, ANZ Banking Group (New Zealand) Ltd, on 8 September 2004.

[5] Fletcher Distribution Ltd holds a second-ranking general security. Pursuant to the terms of a deed of subordination and priority, Fletcher's security interest in The Building Depot's present and after acquired property, with the possible exception of various vehicles, is subordinated to ANZ's security interest.

[6] Mr Agnew and Mr Waller were appointed by Fletcher as receivers of The Building Depot on 24 September 2004. On 14 February 2005, The Building Depot was placed in liquidation, with the Official Assignee as liquidator.

[7] Mr Pardington and Mr Jarrold have realised all of the assets of The Building Depot with the exception of one vehicle. Following payment of preferential creditors, security holders with security interests ranking ahead of ANZ, and ANZ, there is an estimated surplus of approximately $2.8m.

[8] Fletcher is owed in the vicinity of $1.82m. There are other secured creditors ranking below Fletcher whose debts would, we understand, exceed the remaining surplus.

The application to the High Court

[9] Because of uncertainty as to the interpretation of s 30A of the Receiverships Act, Mr Pardington and Mr Jarrold filed an application for directions as to where to pay the surplus funds referred to at para [7] above. This led to the judgment of Williams J, which is under appeal.

[10] The application identified four options for paying out the surplus:

(a) To Fletcher or to Mr Agnew and Mr Waller, as receivers appointed by Fletcher, to the extent that The Building Depot is indebted to Fletcher and then to any other secured creditors in accordance with their securities and priorities on the basis that the Fletcher general security agreement makes Fletcher the next ranking secured creditor;

(b) To the Official Assignee as liquidator of the Building Depot, on the basis that the deed of priority gives ANZ's security over certain identified vehicles priority over Fletcher's security over those vehicles and that s 30A of the Receiverships Act extinguished all security interests that are subordinate to ANZ's security interest;

(c) Any proceeds from the sales of the identified vehicles to Fletcher or to Mr Agnew and Mr Waller, on the basis that Fletcher's security interest has priority over ANZ's security interest in the vehicles and

that the deed of priority does not affect this, with the remaining surplus funds to the Official Assignee;

(d) In some other way as the Court directs.

Williams J's judgment

[11] In his interim judgment of 19 May 2005, Williams J held that s 30A in its present form was clear on its face. He concluded that the effects and the purpose of s 30A had been placed squarely before Parliament and that Parliament had deliberately intended to depart from the long-standing distribution regime which would have seen Fletcher paid from the surplus as the next-ranking secured creditor after ANZ. Therefore, Fletcher and all other subordinate secured creditors lost priority to the surplus proceeds of sale, as their security interests were extinguished once Mr Pardington and Mr Jarrold had sold the secured property.

[12] Accordingly, Williams J held that (subject to receiving argument in relation to a point raised by the Court) Mr Pardington and Mr Jarrold were required to pay the surplus, after paying prior ranking creditors, ANZ and their costs, either to Fletcher's receivers or to the Official Assignee. This was on the basis that all security interests in those proceeds, other than that of ANZ but including that of Fletcher, were extinguished on the sale of The Building Depot's property by the ANZ receivers.

[13] This order was confirmed in Williams J's final judgment of 2 June 2005, the parties having indicated that they would not be presenting argument on the point raised by Williams J in his May interim judgment because Fletcher intended to lodge an appeal against that judgment.

Parties' submissions

[14] The issue between the parties to this appeal is simple. Ms van Ryn, for the appellants, submitted that s 30A of the Receiverships Act was never intended to do anything other than provide clear title to any purchaser. It was not intended to eliminate the priority of subsequent security holders in any surplus. In her submission, the provision should be interpreted accordingly. Ms van Ryn also submitted that the fact that Parliament had moved to correct the position in a Bill introduced into Parliament before the election (see paras [25] – [26]) was relevant in interpreting s 30A.

[15] Mr Caro, for the Official Assignee, accepted that s 30A was not intended to eliminate the priority of subsequent security holders. He submitted, however, that the wording of s 30A admits of no other interpretation. In Mr Caro's submission, it is up to Parliament and not the Courts to correct this error. The fact that Parliament has moved to do so is irrelevant to the interpretation exercise the Court is currently facing.

[16] Although Mr Pardington and Mr Jarrold were represented in this Court, this was a "watching brief". They abide the decision of this Court.

Legislative structure and history

[17] Section 30A was introduced into the Receiverships Act at the same time as amendments were being made to the Personal Property Securities Act 1999 (the PPSA) before it came into full force on 1 May 2002. The amendments originated from the same Bill (the Business Law Reform Bill), before it was divided into separate Bills. As s 30A cannot be understood except in the context of the PPSA, we now outline the major provisions of the PPSA.

[18] The PPSA was designed to provide New Zealand with an integrated regime for security interests in personal property. It was based on Canadian models, which have in turn borrowed heavily from art 9 of the Uniform Commercial Code (USA). It repealed the Chattels Transfer Act 1924, the Companies (Registration of Charges) Act 1993 and the Motor Vehicle Securities Act 1989, and replaced the various registers of security interests created by those Acts with a single, nationwide register. Creditors register brief particulars of their security in a financing statement. With certain exceptions, the PPSA awards priority to the first creditor to register a financing statement. Securities are still enforceable without registration, however. In addition, whether something is a security interest is determined in accordance with its substance and not its form (see Gedye and others, *Personal Property Securities in New Zealand* (2002), para 4.1, for a brief overview of the Act).

[19] The PPSA is divided into 12 parts. Parts I and II contain an outline of the PPSA and various preliminary provisions. Parts III and IV deal with the concepts of attachment and perfection. Attachment relates to the creation of the security, and perfection most commonly occurs by the registration of a financing statement. There are circumstances in which buyers or lessees of goods take the goods free of any security interests. The provisions relating to these situations are contained in Parts V and VI. Parts VII and VIII are concerned with priorities and Part IX with the enforcement of security interests. Part X governs the personal property securities register. Parts XI and XII contain miscellaneous and transitional provisions respectively.

[20] Part IX is of particular significance in this case. The draft PPSA prepared by the Law Commission in 1989 did not include enforcement provisions, as the experts advising the Law Commission could not agree whether such provisions were necessary and left the matter for further consideration. All versions of the North American legislation on which the New Zealand PPSA was based do, however, contain an enforcement regime, and it was decided in the end to introduce one for New Zealand.

[21] The enforcement regime in Part IX is not, however, a code. Parties can contract out of many of the Part IX provisions. In addition, enforcement of security interests on consumer goods continues to be regulated by the Credit (Repossession) Act 1997, and the enforcement of security interests by the appointment of receivers remains subject to the Receiverships Act.

[22] It was generally perceived that the Receiverships Act was working well and that, therefore, receivers should not be subject to the enforcement provisions of the PPSA. Section 106 of the PPSA originally provided that Part IX did not limit the rights, powers and obligations of a receiver, and that, in the event of a conflict between Part IX and the Receiverships Act, the Receiverships Act was to prevail. There remained concern, however, that receivers would not be free to realise assets in a manner that would enable purchasers to take those assets free of subsequent security interests that had been perfected under the PPSA.

[23] It is against this background that s 30A of the Receiverships Act was passed. Section 30A essentially mirrored the equivalent provision in Part IX of the PPSA, namely s 115 (set out at para [57] below). Section 106 of the PPSA was amended at the same time as the introduction of s 30A. That section now simply provides that Part IX does not apply to a receiver within the meaning of s 2(1) of the Receiverships Act (essentially those appointed as

agents of the debtor) (see para [56] below). An equivalent of s 117 of the PPSA (set out at para [57] below), which deals with the distribution of surpluses after the sale of any collateral, was not replicated in the Receiverships Act.

[24] Section 30A was originally introduced into Parliament at the second reading stage of the Business Law Reform Bill on 5 October 1999. The Commerce Select Committee gave the following reasons for its introduction (Business Law Reform Bill (No 319-2), Commentary, pp 12 – 13):

> "**New Part 6 – Receiverships Act 1993**
>
> Leave was also given under Standing Order 302(1) to add new Part 6B. This part relates to the proposed amendments to the Receiverships Act 1993 and are [sic] complementary to the recommended amendments to the Personal Property Securities Act . . .
>
> Part 9 of the Personal Property Securities Act deals with the enforcement of security interests. Section 106 provides that Part 9 does not limit the rights, powers and obligations of a receiver, and that in the event of a conflict between Part 9 and the Receiverships Act the latter shall prevail. This was intended to ensure that a receiver appointed under the Receiverships Act would be able to sell and deal with assets despite any subsequent security interests, notwithstanding the enactment of the Personal Property Securities Act.
>
> There is concern that this result may not have been achieved and would significantly limit the powers of receivers if they were not able to sell or deal with property that is subject to a subsequent security interest. We recommend that section 106 of the Personal Property Securities Act be amended to provide that Part 9 does not apply to a receiver under the Receiverships Act. As a consequence, we also recommend that the Receiverships Act be amended to provide that a sale by a receiver will extinguish all subordinate security interests."

The 2005 amendments

[25] Proposed amendments to the Receiverships Act were introduced into the House of Representatives on 18 February 2005, before the general election. Clauses 81 – 83 of the Statutes Amendment Bill (No 5) 2005 imported the equivalent of s 117 of the PPSA into the Receiverships Act. The explanatory note to the Bill as introduced states at Part 19:

> "**Receiverships Act 1993**
>
> Clauses 82 and 83 respectively amend section 30A of the principal Act and insert new sections 30B and 30C. The effect of the changes is to preserve priority rights of subordinate security holders in any surplus left from the disposal of property by the receiver. If there is any doubt as to the entitlement to the surplus by subordinate security holders, the receiver may pay the surplus into court."

[26] The Bill had its first reading on 5 April 2005. After its first reading, it was referred to the Government Administration Select Committee, as a result of which further amendments were made to cls 82 and 83. A transitional provision (cl 83A) was then included in the redrafted amendments, which, as enacted, provides:

> **5. Transitional provision for sections 30A(2) and 30B to 30D of principal Act –** Sections 30A(2) and 30B to 30D of the principal Act (as added and inserted by ss 3 and 4 of the Receiverships Amendment Act 2005) apply to any surplus referred to in those provisions that has not been distributed on the date when those provisions come into force.

[27] The Bill was reinstated by the new Parliament and had its third reading on 8 December 2005. It was assented to on 14 December 2005 as the Receiverships Amendment Act 2005.

Discussion

[28] We deal first with Ms van Ryn's argument that the amendments (discussed above at paras [25] – [26]) are relevant to the interpretation of the current s 30A of the Receiverships Act. It is rarely permissible to rely on subsequent legislation even as an interpretative aid (see the comments by Professor Burrows in *Statute Law in New Zealand* (3rd ed, 2003), pp 441 – 444 and those of the Privy Council in *Commissioner of Inland Revenue v Databank Systems Ltd* (1990) 12 NZTC 7,227 at p 7,236, and also *Winchester International (NZ) Ltd v Cropmark Seeds Ltd* (Court of Appeal, CA 226/04, 5 December 2005) at para [41]). We do not consider the subsequent provisions of any assistance in this case, particularly given the existence of the transitional provisions.

[29] We move therefore to an analysis of s 30A as it applies in this case. We start this analysis with the words of s 30A. We accept that it is possible to interpret those words as meaning that, upon the sale or other disposal of property by a receiver, all subsequent security interests in the proceeds of sale held by the receiver are extinguished, as well as those in the property and in any future proceeds from the property (interpretation A). It is also possible, however, to interpret the words of s 30A as meaning that, upon the sale or other disposal of property by a receiver, it is only the subsequent security interests in the property and any future proceeds from the property that are extinguished (interpretation B).

[30] In our view, it is essential for a provision of this nature to deal with future proceeds as s 45(1) of the PPSA provides that a security interest in collateral (being "personal property that is subject to a security interest") that is dealt with or otherwise gives rise to proceeds continues in the collateral and extends to the proceeds. "Proceeds" is defined as including identifiable or traceable personal property that is derived directly or indirectly from a dealing with collateral or the proceeds of collateral. It thus may, it seems, extend not only to proceeds of sale but also to income arising from the collateral (see *New Zealand Bloodstock Ltd v Waller and Agnew* (2005) 9 NZCLC 263,944 at para [78]).

[31] Even if s 30A is viewed in isolation, we favour interpretation B. Under interpretation A, the term "proceeds" must have a dual meaning. It must include not only the future proceeds in the hands of the purchaser but also the proceeds of the sale and disposition in the hands of the receiver. We consider it more likely that the term "proceeds" was meant to have a single meaning. Section 30A related to dispositions. Once property is disposed of it is no longer held by the receiver. It is logical, therefore, to conclude that s 30A was designed to deal with the situation of the person to whom the property passes and that person's position with regard to future proceeds from the property, rather than dealing with the position of the receiver and the proceeds of the sale or other disposition, as well as that of the future proceeds in the purchaser's hands.

[32] The words of the section are not, however, to be viewed in isolation. Section 5(1) of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. While the reference to context in the original Law Commission draft Interpretation Act was not enacted, there is no doubt that the text of a provision must be interpreted having regard to the Act as a whole and the legal system generally. The process of interpretation is an evaluative one. As Burrows says at p 114:

> "Although the meaning of the provision seems clear enough as it stands, a strong argument can sometimes be mounted against that meaning on evaluative grounds. For example, it may be argued that that meaning leads to:
>
> - an absurd or unreasonable consequence;
> - inconsistency with long-established principles in that branch of the law;
> - inconsistency with important and fundamental values of our legal system;
> - inconsistency with New Zealand's international obligations (by treaty or otherwise);
> - a result that is not readily workable in an advancing, technological, modern society.
>
> Doubts raised by such considerations as these can properly be described as interpretative problems, for they are problems about the meaning that should properly be attributed to the words of the provision and their application to the facts in hand. Cases of statutory interpretation not infrequently involve the resolution of the relative strengths of linguistic arguments on the one hand and these value-type arguments on the other."

[33] We thus now turn to a consideration of the purpose of s 30A. Williams J, in his judgment of 19 May 2005, said that Parliament had deliberately decided to remove the priority of subsequent security holders in the proceeds when a sale of property takes place by a receiver (see para [11] above). With respect, we do not consider that to be so. In our view, Parliament's purpose was to ensure a purchaser could take clear title to the property. It was not part of Parliament's purpose to extinguish the interests of subsequent security holders with regard to the surplus.

[34] In our view, this is quite clear from the comments of the select committee reproduced at para [24] above. The only matter mentioned there is the removal of possible constraints on receivers selling property, which s 106 of the PPSA in its unamended form arguably did not achieve. If the purpose of s 30A had also been to extinguish subsequent security interests for all purposes, it is reasonable to expect that there would have been some discussion in the select committee's report on that aspect, given the major nature of the change and the ramifications to both borrowers and lenders.

[35] We also accept Ms van Ryn's submission that there was no obvious policy reason for Parliament to depart from an historical and fundamental feature of providing credit, namely to do so in consideration for a priority obtained by the granting of a security interest. It would have been particularly odd for Parliament to have chosen to do so in the course of rationalising the

security regime for personal property through the PPSA (see also the comments of Michael Gedye in this regard in his article, "What's Yours is Mine: Attachment of Security Interests to Third Party Assets" (2004) 10 NZBLQ 203, p 219).

[36] It is also significant that, if the purpose of s 30A had been to destroy subsequent priorities, then it could have been easily defeated. As Ms van Ryn pointed out, if, in this case, the Fletcher receivers (rather than the ANZ receivers) had disposed of the secured property, then Fletcher would have retained its priority. The same would apply if The Building Depot itself had sold the secured property by agreement with the registered security holders or if ANZ had elected not to appoint receivers but had exercised its own powers under the PPSA.

[37] For all of the above reasons, it is clear that the purpose of s 30A was limited to passing clear title to a purchaser. This favours interpretation B.

[38] The context must also be taken into account. In this regard, it is significant that s 30A of the Receiverships Act was in very similar terms to s 115 of the PPSA (set out at para [57] below). Mr Caro made much of the fact that the Receiverships Act has no equivalent to s 117 of the PPSA (also set out at para [57] below). His argument was that, in the absence of a provision similar to s 117 of the PPSA, which provides for the order in which creditors are to be paid, subsequent security holders must become unsecured creditors where a sale of property is undertaken by a receiver. In our view, this is not the position. Section 117 of the PPSA is merely a mechanical provision dealing with the distribution of a surplus or the application of purchase moneys. It does not alter the priorities which are created by Parts VII and VIII of the PPSA. That is made clear by s 117(2) (see also the comments in Gedye and others, *Personal Property Securities in New Zealand*, p 413).

[39] In the case of receiverships, there is no need for a mechanical payment provision such as s 117. The traditional and long-standing position in a receivership is that, once the receivership has progressed to the point where the receiver has paid all debts for which he or she has a personal responsibility and has paid out the debenture holder, any surplus assets held by the receiver are held on trust for subsequent encumbrancers and the company (see *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 at p 538. See also Gedye in *Laws NZ*, Receivers para 18 and Blanchard and Gedye, *The Law of Company Receiverships in New Zealand and Australia* (2nd ed, 1994), para 3.09). Section 30A of the Receiverships Act did nothing to change this position.

[40] In addition, the interpretation of s 30A espoused by Mr Caro does not fit easily with other provisions of the Receiverships Act. Section 40D(3) contains a payment regime with regard to local authorities (similar to s 117 of the PPSA). The alleged extinguishment of subsequent security interests in s 30A would thus presumably not apply to local authorities. There seems no obvious reason why there should be a distinction between receiverships involving local authorities and other receiverships. Sections 18(3) and 19 of the Receiverships Act (set out at para [51] below) provide that receivers have certain duties to subordinate security holders. We accept Ms van Ryn's submission that it is difficult to reconcile these duties with the alleged effect of s 30A; that is, that the sale of an asset destroys the priority of subsequent security holders.

[41] Any interpretation of a provision in a statute must also be consistent with the statute book as a whole (see Burrows, pp 168 – 169). If s 30A was interpreted as applying to extinguish security interests for all purposes where a receiver sells property, then it would be inconsistent with the position where any other sale takes place (see ss 115 and 117 of the PPSA and s 104 of the Land Transfer Act 1952, set out at paras [57] and [53] respectively). It would also be inconsistent with s 305(3)(b) of the Companies Act 1993 (see para [58] below).

[42] Interpretation B, therefore, is consistent with the words of s 30A, it is in accordance with its purpose and it fits in with the context. It is also consistent with long-established principles in this branch of the law and it avoids absurd and unreasonable consequences (see Professor Burrows' comments at para [32] above).

[43] Finally, it is in any event legitimate to "read down" s 30A so that its effect is limited to an effect on the purchaser. Professor Evans, in "Reading Down Statutes", in Bigwood (ed) *The Statute: Making and Meaning* (2004), sets out the circumstances in which he considers the reading down of a statute to be allowable. He says at p 123:

> "Judges and lawyers often speak nowadays of 'reading down' statutes. When is it legitimate to 'read down' a statute? I contend that it is legitimate in only three circumstances, the third deriving from the first two. The first is when a non-literal meaning for a rule that is narrower than some apparent literal meaning was the meaning intended by its authors. The second is when making some modification of the intended meaning of a rule, whether that intended meaning is literal or not, is consistent with respecting the practical judgment (or will) that its authors intended the rule to implement. Because there can be uncertainty on these two matters, reading down can sometimes be justified by doctrines that allow us to limit such uncertainty, or deal reasonably with it. This is the third circumstance. Outside of these three types of circumstance, reading down seems to me illegitimate."

[44] This case clearly falls within Professor Evans' first category. The "reading down" is necessary to ensure that the interpretation aligns with the purpose of the provision which, as we discuss above, was limited to ensuring clear title passed to a purchaser.

Result

[45] For the above reasons the appeal is allowed. The order made by the High Court (referred to at para [13] above) is set aside.

[46] The question of whether ANZ has priority over the funds realised from the sale of certain of the vehicles (see para [10](c) above) was not addressed in Williams J's judgment and we are uncertain if it is still a live issue. If it is, then the matter must be remitted to the High Court to deal with. If it is not, then it would seem to be appropriate for this Court to make orders relating to the payment of the surplus funds.

[47] If these matters need further input from this Court the parties have leave to file a (preferably joint) memorandum dealing with these points (including the form of any order sought) on or before 5 pm on 3 February 2006.

Costs

[48] No costs were sought by the appellants and none are awarded in their favour in this Court or in the High Court.

[49] We note, however, that, if the Official Assignee had not argued this case, it would have been necessary for the Court to have appointed counsel to represent the unsecured creditors. The parties would likely have been ordered to reimburse the Crown for counsel's costs (see s 99A of the Judicature Act 1908).

[50] We understand that there will, as a result of this judgment, be no funds available for the unsecured creditors (see para [8] above). While the matter was handled in-house by the Official Assignee, expenses such as airfares and other disbursements were incurred. It is inappropriate that the Official Assignee should be out of pocket. In the circumstances, we consider that the appellants should pay these disbursements.

APPENDIX

Other legislative provisions

Receiverships Act

[51] Sections 18(3) and 19 of the Receiverships Act provide as follows:

> **18. General duties of receivers –**
>
> . . .
>
> (3) To the extent consistent with subsections (1) and (2) of this section, a receiver must exercise his or her powers with reasonable regard to the interests of –
>
> (a) The grantor; and
>
> (b) Persons claiming, through the grantor, interests in the property in receivership; and
>
> (c) Unsecured creditors of the grantor; and
>
> (d) Sureties who may be called upon to fulfil obligations of the grantor.
>
> **19. Duty of receiver selling property –** A receiver who exercises a power of sale of property in receivership owes a duty to –
>
> (a) The grantor; and
>
> (b) Persons claiming, through the grantor, interests in the property in receivership; and
>
> (c) Unsecured creditors of the grantor; and
>
> (d) Sureties who may be called upon to fulfil obligations of the grantor –
>
> to obtain the best price reasonably obtainable as at the time of sale.

[52] Section 40D(3) provides the following order of priority with regard to local authorities:

> **40D. Constraints on receiver –**
>
> . . .
>
> (3) A receiver must distribute the proceeds of collection of the money and assets the receiver is entitled to collect in the following order of priority:
>
> (a) first, the receiver's remuneration, and costs incurred by the receiver and reimbursement of the costs of obtaining appointment of the receiver to any person who has incurred them:

(b) second, any amounts payable in respect of claims by law to be preferred to claims under any charge over those assets:
(c) third, any amounts required to be paid out of the proceeds of collection of the money and assets to enable the receiver to provide the services specified in subsection (1):
(d) fourth, the amounts secured by any charges over those assets in the order of priority accorded those charges, so as to preserve the respective entitlements of the holders of those charges:
(e) fifth, if the receiver was appointed on the application of an unsecured creditor or unsecured creditors, to those creditors or, as the Court may direct, any amounts payable to them, –

and any residue must be paid to, or applied for the benefit of, the local authority, as it may direct.

Land Transfer Act

[53] Sections 104 and 105 of the Land Transfer Act provide as follows:

104. Application of purchase money – (1) The purchase money to arise from the sale by the mortgagee of any mortgaged land, estate, or interest shall be applied –
(a) Firstly, in payment of the expenses occasioned by the sale:
(b) Secondly, in payment of the money then due or owing to the mortgagee:
(c) Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in the order of their priority:
(d) Fourthly, the surplus (if any) shall be paid to the mortgagor.

(2) Where the surplus cannot be paid to the mortgagor by reason of his not being found after reasonable inquiry by the mortgagee as to his whereabouts, the surplus may be paid to the Secretary to the Treasury in accordance with section 102A of the Property Law Act 1952, and the provisions of that section shall apply accordingly.

105. Transfer by mortgagee – Upon the registration of any transfer executed by a mortgagee for the purpose of any such sale as aforesaid, the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage or which by reason of the consent of the mortgagee is binding on him.

Personal Property Securities Act

[54] Section 45(1) of the PPSA provides:

45. Continuation of security interests in proceeds – (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds –
(a) Continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and
(b) Extends to the proceeds.

Example
Person A has a security interest in person B's car.
Person B sells the car without person A's consent.
Person A has a security interest in the car and in the money received by person B from the sale of the car.

[55] Section 16(1) defines proceeds in the following manner:

> **proceeds –**
> (a) Means identifiable or traceable personal property –
> (i) That is derived directly or indirectly from a dealing with collateral or the proceeds of collateral; and
> (ii) In which the debtor acquires an interest; and
> (b) Includes –
> (i) A right to an insurance payment or other payment as indemnity or compensation for loss of or damage to the collateral or proceeds; and
> (ii) A payment made in total or partial discharge or redemption of chattel paper, an intangible or investment security, or a negotiable instrument; but
> (c) Does not include animals merely because they are the offspring of the animals that are collateral . . .

[56] Section 106 of the PPSA provides:

> **106. Part not to apply to receivers –** This Part does not apply to a receiver within the meaning of section 2(1) of the Receiverships Act 1993.

[57] Sections 115 and 117 of the PPSA provide:

> **115. Extinguishment of subordinate security interests on sale –** If collateral has been sold under section 109, all security interests in the collateral and its proceeds that are subordinate to the security interest of the secured party who sold the collateral are extinguished on the sale of the collateral.
>
> **117. Distribution of surplus –** (1) If a secured party has applied collateral under section 108 or sold collateral under section 109, as the case may be, the secured party must pay the following persons the amount of any surplus by satisfying the claims of those persons in the following order:
> (a) Any person who has registered a financing statement in the name of the debtor over the collateral that is sold where –
> (i) The registration was effective immediately before the collateral was applied or sold; and
> (ii) The security interest relating to that registration was subordinate to the security interest of the secured party who applied or sold the collateral:
> (b) Any other person who has given the secured party notice that that person claims an interest in the collateral that is sold and in respect of which the secured party is satisfied that that person has a legally enforceable interest in the collateral:
> (c) The debtor.
> (2) The security interests to which subsection (1)(a) applies must be paid in the order of their priority as determined by Part 7 or by Part 8.
> (3) Subsection (1) applies despite the extinguishment of a security interest under section 115.

Companies Act

[58] Section 305 of the Companies Act provides in relevant part as follows:

> **305. Rights and duties of secured creditors –** (1) A secured creditor may –
> (a) Realise property subject to a charge, if entitled to do so; or

(b) Value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance due, if any; or

(c) Surrender the charge to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.

(2) A secured creditor may exercise the power referred to in paragraph (a) of subsection (1) of this section whether or not the secured creditor has exercised the power referred to in paragraph (b) of that subsection.

(3) A secured creditor who realises property subject to a charge –

(a) May, unless the liquidator has accepted a valuation and claim by the secured creditor under subsection (6) of this section, claim as an unsecured creditor for any balance due after deducting the net amount realised:

(b) Must account to the liquidator for any surplus remaining from the net amount realised after satisfaction of the debt, including interest payable in respect of that debt up to the time of its satisfaction, and after making any proper payments to the holder of any other charge over the property subject to the charge.

Appeal allowed.

Solicitors for Fletcher and Messrs Agnew and Waller: *Simpson Grierson* (Auckland).

Solicitors for Messrs Pardington and Jarrold: *Lowndes Associates* (Auckland).

Solicitors for the Official Assignee: *Ministry of Economic Development* (Auckland).

Reported by: Mary-Anne Borrowdale, *Barrister*