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

**TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2017-404-000996**
**[2017] NZHC 2374**

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| UNDER | the Receiverships Act 1993 |
| IN THE MATTER | of an application for directions under section 334 of the Act and agency approval under section 31 of the Act |
| BETWEEN | KEITH VINCENT HARRIS AND IAIN ANDREW NELLIES RECEIVERS OF CIT HOLDINGS LTD (IN LIQUIDATION AND IN RECEIVERSHIP)<br>Applicants |
| AND | BANK OF NEW ZEALAND<br>First Respondent |
| | THE BANKHOUSE TRUST LTD<br>Second Respondent |
| | cont:.../2 |

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| Hearing: | 10, 11 August 2017 |
| Appearances: | D M Hughes for Plaintiffs<br>A Cunninghame for First Respondent<br>M J Tingey for Ninth Respondent<br>S Sparks Tenth Respondent in person |
| Judgment: | 29 September 2017 |

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**JUDGMENT OF JAGOSE J**

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*This judgment is delivered by me on 29 September 2017 at 12.30 pm pursuant to r 11.5 of the High Court Rules.*

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*Registrar / Deputy Registrar*

COMMISSIONER OF INLAND REVENUE
Third Respondent

GLOVER No. 2 LTD
Fourth Respondent

IGNITE ARCHITECTS LTD
Fifth Respondent

URBAN LIVING LTD
Sixth Respondent

MINTER ELLISON RUDD WATTS
Seventh Respondent

BBG HOLDINGS LTD
Eighth Respondent

VIVIAN FATUPAITO and ANDREW HAWKES, liquidators of CIT HOLDINGS LTD
Ninth Respondent

SARAH SPARKS
Tenth Respondent

**Summary**

[1] This proceeding concerns steps in the liquidation of CIT Holdings Limited (the "**Company**"). The ninth respondents are the Company's liquidators.

[2] The Company's principal asset is properties in Glover and Waimarie Streets in St Heliers, Auckland. The Company appears to hold the properties as bare trustee for trusts associated with the tenth respondent ("**Ms Sparks**") and her former husband, Gregory Martin Olliver ("**Mr Olliver**"). Mr Olliver is the Company's sole director.

[3] The Company's creditors claimed approximately $21.2m in the liquidation. Within that sum are secured creditors' claims of nearly $9m plus interest from the first respondent (the "**Bank**") and $2.5m plus interest from the second respondent ("**Bankhouse**"). (The third to eighth respondents are unsecured creditors.)

[4] Bankhouse and the Company are party to a general security deed dated 23 January 2014 (the "**general security deed**") by which the Company granted security for Bankhouse's financing to the Company. Mr Olliver is also Bankhouse's sole director.

[5] The liquidators have been seeking to sell the properties to meet valid claims. Various entities connected with Mr Olliver made offers to purchase the properties on diverse terms. Ultimately, terms were not agreed.

[6] Under the general security deed, Bankhouse appointed the applicants as receivers. The receivers entered into an agreement with GMO Trust Limited ("**GMO Trust**", of which Mr Olliver was sole director) for sale and purchase of the properties, on terms including this Court's approval of the receivers' role as agent for a company in liquidation. The receivers issued this proceeding accordingly, seeking directions and orders under the Receiverships Act 1993. The Bank supported the properties' sale.

[7] The liquidators considered the receivers were in breach of their duties under s 18 of the Receiverships Act 1993, including by being appointed, and entering into

the sale and purchase agreement, for the allegedly improper purpose of enabling Mr Olliver to retain control of the properties. The liquidators opposed the receivers' application, and made their own application for directions and orders under the Companies Act 1993 and the Receiverships Act 1993.

[8] In the course of hearing the applications, the parties agreed terms for the Court's approval of sale of the properties to GMO Trust. Consent orders were sought and made accordingly. The orders included provision for the receivers' discontinuance of their application and retirement from the receivership, if the terms were not met within a specified timeframe.

[9] The terms were not met within the specified timeframe, with the result the receivers' application is discontinued, and the receivers have retired from the receivership. This judgment therefore only addresses the liquidators' application. By consent, the liquidators' claim for damages from losses attributed to the receivers' alleged breach of duty under s 18 of the Receiverships Act 1993 is not for determination in this judgment.

[10] In the balance of this judgment:

(a) under s 299 of the Companies Act 1993, I set aside the whole of the general security deed as against the liquidators; and

(b) under s 35 of the Receiverships Act 1993, I prohibit the appointment of any other receiver in respect of the property in receivership under the general security deed; but

(c) I decline to make other orders or directions sought by the liquidators, including that Bankhouse's claimed debt be rejected in whole or in part as unsubstantiated, the receivers are invalidly appointed and not entitled to any remuneration, and the receivers be prohibited from acting as receivers in any current or other receivership for a period of up to five years.

## Facts

[11] On 4 March 2016, the Company was placed into liquidation on application of the third respondent ("**CIR**"), in reliance on the Company's outstanding tax debts.[1] The CIR's application was dated 29 April 2015. Creditors' claims amounted to $21.2m at June 2017.

*—the Company's assets*

[12] The Company appears to hold property as bare trustee through two joint venture agreements, entered into respectively in March and April 2009 with the Waimarie Trust Limited as trustee for the Waimarie Trust, and with The Glover Trust Corporation Limited as trustee for the Glover Trust. The Waimarie Trust is associated with Ms Sparks' interests; the Glover Trust with Mr Olliver's.

[13] Through the joint venture agreements, the Company acquired nine unit-titled properties in Glover and Waimarie Streets in St Heliers, Auckland. The Waimarie Trust contributed capital and the Glover Trust contributed property.

[14] In March 2011, Ms Sparks established the Glover No 2 Trust. As the Company's director, she transferred title to four of the properties from the Company to the Glover No 2 Trust, which also replaced by novation the Waimarie Trust as joint venturer with the Company. The properties were transferred back to the Company in accordance with court orders.[2]

[15] The Company has issued proceedings against Ms Sparks and the Waimarie Trust, seeking to recover cash advances allegedly made to both by the Company, and losses incurred by alleged breach of directors' duties in the transfer of the Company's properties.

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1 *Commissioner of Inland Revenue v CIT Holdings Limited* HC Auckland CIV 2015-404-0997, 4 March 2016.

2 *Glover Trust Ltd v Glover Trust Corp Ltd* [2013] NZHC 545; upheld in *Glover No 2 Ltd v Glover Trust Ltd* [2013] NZCA 608.

*—the Company's liabilities*

[16] The Bank is the Company's first secured creditor. The Company has defaulted on the Bank's demands for repayment of its current account (overdrawn by nearly $9m, on expiry of the Bank's loan facility) since 12 December 2012. The liquidators understand any payment since made from the Company's bank account was "effectively funded by Bankhouse".

[17] In January 2014, the CIR issued the Company a Notice of Proposed Adjustment. The Company's GST and income tax debt amounted to almost $550,000, primarily relating to GST liabilities arising in March 2009, but also since 31 October 2012. The Company's failure to remedy the CIR's resulting statutory demand led to appointment of the liquidators. Other creditors have claimed in the liquidation, including various professional services firms on invoices tendered for services in August and September 2013, August and December 2014 and July 2015.

[18] Claims have also been made in the Company's liquidation by entities associated with each Mr Olliver and Ms Sparks. Bankhouse, associated with Mr Olliver, claims as a secured creditor to recover $2.5m plus interest in advances made to the Company. The claim is made under the general security deed. The advances included $1,283,145.72 made prior to execution of the general security deed on 23 January 2014.

*—process of the Company's liquidation*

[19] The liquidators consider the Company has been unable to pay its due debts since 12 December 2012, when it was unable to renew or extend its banking facilities. On 28 April 2017, the liquidators issued a notice to set aside the general security deed as a voidable transaction and charge under ss 292 and 293 of the Companies Act 1993, insofar as it purported to secure lending predating the charge. Bankhouse objected, on unsubstantiated grounds the company was able to pay its due debts.

[20] The liquidators have made repeated requests of Mr Olliver for the Company's financial and management accounts. They have not been provided. Without that

information, the liquidators have been unable to verify the use to which the Company put Bankhouse's advances. But they have identified nearly $125,000 in payments which they considered "should not have been paid by the Company", as paid in Mr Olliver's or other entities' interests.

[21] The liquidators also identified the Glover and Waimarie Streets properties as the Company's "only major asset available to repay creditors". One of the liquidators, Mrs Fatupaito (whose evidence was unchallenged), said she had "made a concerted effort" since March 2016 "to have the properties sold to repay creditors".

[22] In early March 2016, the Bank advised Mrs Fatupaito it was very unlikely the Company could repay its debt from sale of the properties. However, Mr Olliver's solicitor later advised the liquidators Mr Olliver and Ms Sparks were in discussion regarding a settlement which would meet all creditors' claims. That same day, 10 May 2016, the Bank issued the liquidators with default notices under s 119 of the Property Law Act 2007 ("**PLA**") of its intention to enter into possession of and sell the properties if the Company's then debt of $12.3m was not remedied by 15 June 2016. Meanwhile, interest on the debt was accruing at a rate of over $2,700 a day.

[23] On 13 May 2016, Mrs Fatupaito proposed to the Company's secured creditors she seek a valuation of the properties. On 18 May 2016, Mr Olliver's solicitor advised Mr Olliver believed it was in the interests of creditors to avoid a mortgagee sale, and an associated entity, Kohimarama Trust Limited, was prepared to make an offer for the Company's assets which would be at "a significant premium to any valuation". He noted the Bank was understood to be considering meeting the liquidators' valuation and other costs.

[24] Thinking the liquidators best placed to commence a sale process, Mrs Fatupaito contacted real estate agencies on 20 May 2016, seeking their proposals for sale of the properties. The agencies responded, identifying an average indicative market value of roughly $20.4m including GST, incurring marketing costs of $25,000-$35,000, and 1.25-1.75% commission (say, $250,000-$360,000) if sold. But the Bank would not consent to the liquidators undertaking sale of the properties, as the Bank's own mortgagee sale process was then underway (for finalisation on

expiry of the PLA notices). And Mrs Fatupaito was not prepared to continue without the BNZ's consent. The liquidators also had no funding for any valuation or marketing process.

[25] On 15 July 2016, the liquidators received a formal offer from another entity associated with Mr Olliver, GMO Trust, to acquire the properties at a price structured to meet secured and third party unsecured creditors, and the liquidators' costs, in full. The offer included meeting claims raised in the liquidation by entities associated with Mr Olliver, but omitted claims raised in the liquidation by entities associated with Ms Sparks. On 21 July 2016, the liquidators' solicitors rejected the offer as likely being below market price, and a higher price likely being achievable through a public sales process. They noted the liquidators were unlikely to entertain any offer requiring the proceeds to be paid otherwise than in accordance with the applicable legal priorities. This Court's necessary approval of the sale was likely to require the same. GMO Trust could make a compliant offer, or could participate in any public sales process. On 1 August 2016, GMO Trust's solicitors (also acting for Mr Olliver) advised a revised offer would be forthcoming.

[26] Despite expiry of the Bank's PLA notices, no further steps appeared to have been taken to put the properties on the market. Concerned by the continuing accrual of penalty interest, the liquidators reiterated to the Bank their offer to sell the properties. On 10 August 2016, Mrs Fatupaito issued a notice to the Bank under s 305 of the Companies Act 1993 to choose whether to realise the properties subject to its charge, to value the properties subject to the charge and claim in the liquidation as an unsecured creditor for any balance, or to surrender the charge to the liquidators for the general benefit of creditors and to claim in the liquidation as an unsecured creditor for the whole of the debt. On 15 August 2016, the Bank elected to realise the properties, noting its efforts to realise the properties had been delayed by significant litigation, and it was awaiting the Court's confirmation the sales process may proceed.

[27] On 24 August 2016, the Bank's solicitors advised further steps could not be taken until the Bank had obtained an order requiring removal of a caveat. Such orders were obtained on 27 September 2016, and were subject to a condition any sale

of the properties to people or entities associated with Mr Olliver or Ms Sparks was conditional upon the Court's approval.

[28] In mid October 2016, Mr Olliver advised the liquidators he intended to make an offer for the properties. Mrs Fatupaito therefore asked the CIR to fund an independent valuation of the properties. The CIR agreed. On 11 November 2016, the liquidators received a further offer from GMO Trust and another entity associated with Mr Olliver, Old Schnapper Rock Limited, together to acquire all the Company's assets (including the properties) for $20,100,000 including GST.

[29] Mrs Fatupaito instructed Darroch Limited to conduct a valuation of the properties. On 8 December 2016, Darroch Limited advised the combined market value of the properties was $20,950,000 or $15.5m-$17.9m on their forced sales, or $16.7m if sold at market value in one line or $13.15m on a forced sale in one line,[3] all including GST. Mr Olliver's solicitors satisfied the liquidators one of the properties, amounting to approximately one-third of the properties' combined values, was not acquired for the purpose of making taxable supplies. Its sale was therefore exempt from GST, meaning total market value, including GST, of all the properties was only minorly in excess of $20m, or approximately $18.34m net of tax.

[30] The liquidators considered the latest offer from GMO Trust/Schnapper Rock was thus consistent with that corrected market value, after accounting for costs that would be incurred in a market sale. It was also substantially better than the forced sale values, as proposed by the Bank, which would result in a significantly worse outcome for unsecured creditors. Despite seeking offers from real estate agencies, none was forthcoming. By early December 2016, there were indications Auckland property prices had begun to fall. And the Bank's interest continued to accrue, meaning less net proceeds would be available from sale for unsecured creditors. The liquidators decided progressing the GMO Trust/Schnapper Rock offer was in the best interests of creditors as it would result in full repayment of secured and preferential creditors and at least partial repayment of unsecured creditors.

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3 "In one line" appears to mean valued as on a sale in a single transaction to a single purchaser.

[31] But the offer was also incapable of acceptance in its terms. While expressly conditional on the Company seeking and obtaining Court approval to enter into the agreement, it proposed payment otherwise than in statutory priority to an unsecured creditor associated with Mr Oliver (BBG Holdings Limited ("**BBG**"), the eighth respondent in this proceeding). And Mrs Fatupaito had made it plain the Company's claim against Ms Sparks and the Waimarie Trust were not to be included in the sale, as the offer sought. Mr Olliver nonetheless demanded the liquidators sign the original GMO Trust/Schnapper Rock offer by 12 noon on 23 December 2016, or the offers would be withdrawn and Bankhouse would appoint receivers to carry out a forced sale to commence over the Christmas/New Year break.

[32] On 24 December 2016, the liquidators proffered revised terms to Mr Olliver. After further negotiations, on 20 January 2017, the liquidators provided an executable sale and purchase agreement to Mr Olliver and his solicitors. In the course of those negotiations, Mr Olliver also agreed to pay $100,000 on account of the liquidators' fees and disbursements incurred in relation to the proposed sale of the properties (including on the necessary application for Court approval). If the transaction did not settle, the payment would be recoverable by Mr Olliver as a preferential creditor;[4] if it did settle, the payment would be treated as a deposit paid toward the properties' purchase price.

*—Bankhouse's appointment of receivers*

[33] On 27 March 2017, Mr Olliver withdrew from the sale process. He advised the liquidators he had acquired the BNZ's debt, and would be appointing receivers. On 31 March 2017, under the general security deed, Bankhouse appointed the applicants as receivers of the Company.

[34] Mr Harris took the leading role in the receivership. Mr Nellies explained his involvement in the receivership mainly related to reviewing documentation and advising Mr Harris on procedural matters. Mr Harris has no formal accountancy or legal qualifications, and is not an accredited insolvency practitioner. He had no direct

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4 Companies Act 1993, clause 1(1)(e) of Schedule 7.

experience as a receiver or liquidator until joining Insolvency Management (Auckland) Limited in June 2013, from which he now works.

[35] In a former role with New Zealand Guardian Trust Company Limited ("**Guardian Trust**"), managing its mortgage portfolio, Mr Harris had dealings with Mr Oliver as sole director of BBG, which then owned the properties the subject of this proceeding. BBG was indebted to Guardian Trust in an amount of approximately $11.5m, which Mr Olliver had personally guaranteed.

[36] In Mr Olliver's subsequent bankruptcy proceedings,[5] in which the guarantee to Guardian Trust formed part of Mr Olliver's $92.6m debt to creditors, Mr Olliver said he had no assets apart from shares in three companies, which had no appreciable value because they were bare trustees. Mr Olliver proposed a compromise by which he would pay $100,000 to the trustee on the Court's approval of his proposal, and further sums of at least $100,000 on the first, second and third anniversaries of that approval. The third anniversary would have been in May 2012.

[37] Before the compromise was approved, Guardian Trust sold the mortgages to Taurus Capital and Finance Limited ("**Taurus**"), which immediately sold them on to the Company. The Company then raised loans over the properties from the Bank. One of Taurus' directors and shareholders was also director and shareholder of Bailey Trustee Services Limited, which is one of the Company's current shareholders. In the compromise approval judgment, Associate Judge Faire noted:[6]

> What is of considerable significance is that the first mortgagees involved in that property, that is the New Zealand Guardian Trust and Westpac New Zealand Limited, in each case, were prepared to transfer their securities for a figure less than the amount paid by the purchaser from the entity which actually exercised the power of sale under the respective mortgagees.

The effect of those last non-arm's length transactions was to bring the properties back within the Company's control. Mr Harris believed Mr Olliver had not paid anything under the compromise to Guardian Trust.

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5 *Re St Laurence Lending Ltd ex parte Olliver* HC Auckland CIV 2008-404-7417, 13 May 2009.
6 At [63].

[38] Under cross-examination, Mr Harris accepted Bankhouse was one of the three companies to which Mr Olliver had referred. He also accepted Bankhouse's claim in the liquidation included substantial advances to the Company during the period of Mr Olliver's compromise. To Mr Harris' knowledge, Mr Olliver was the only person involved with Bankhouse. He had not investigated the source of Bankhouse's funds claimed to have been advanced to the Company. Neither had he investigated Bankhouse's ability to meet its indemnity of the receivers. He accepted the likely point of the receivers' appointment was to facilitate sale of the properties to an entity owned or to be owned by Mr Olliver.

[39] On 6 April 2017, Mrs Fatupaito and the liquidators' counsel met with Mr Harris to discuss the receivers' appointment and how they proposed to sell the properties. Mr Harris advised he intended to conduct a marketing campaign for the properties, was likely to use a Registrar sale, and would keep the liquidators apprised of any further developments.

[40] Instead, on 11 May 2017, the receivers entered into a sale and purchase agreement with GMO Trust to acquire the properties for $17.5m plus GST (roughly, $19.25m including GST (not due on 22 Waimarie Street)). The offer thus was materially below both the GMO Trust/Schnapper Rock offer and the Darroch Limited market valuation. The agreement omitted any settlement date. The agreement was conditional on, among other things:

(a) the purchaser acquiring the Bank's mortgages over the properties "on terms acceptable to it in all respects", for the lack of satisfaction with which the purchaser is not required to give any reason; and

(b) the parties agreeing on the sale and purchase of such of the other assets of the vendor (including debtors) as the vendor wishes to sell and the purchaser wishes to purchase at a price and on terms acceptable to them.

The agreement was also conditional on the vendor's satisfaction as to the properties' valuation. On 20 April 2017, the receivers had separately obtained a draft valuation

for the properties at $20.1m (including GST). (The draft valuation was confirmed on 8 June 2017.)

[41] The liquidators were not apprised of the agreement until a case management conference on the following day, 12 May 2017, in other proceedings to which the liquidators were party. Mr Olliver there described the agreement as being of the same value as the previous agreement with the liquidators. The liquidators obtained a copy of the agreement later that day.

[42] On 26 May 2017, the liquidators raised serious concerns with the receivers over the content of the agreement, including its price, its conditionality, its purported scope, its favourability to Mr Olliver (who would remain with access to and in possession of the properties, without payment of either deposit or rent), and the receivers' inability to cancel the agreement, and therefore to sell the properties to any other person, until early August 2017 at the earliest.

[43] The liquidators considered the receivers were in breach of their general statutory duties under s 18 of the Receiverships Act 1993. Those duties are to exercise their powers in good faith and for a proper purpose, and in a manner the receivers believe on reasonable grounds to be in the best interests of Bankhouse. To the extent consistent with those duties, the receivers are also required to exercise their powers with reasonable regard for the interests of the Company and of its secured and unsecured creditors.

[44] On 26 May 2017, the liquidators gave notice to the receivers of their failure to comply in terms of ss 36 and 37 of the Receiverships Act 1993. Specifically, the liquidators alleged:

> 1. We consider that you have not had reasonable regard to the interests of the Company in breach of section 18(3) of the Receiverships Act 1993. You have not marketed the Properties and sold for a price less than market value and what was previously agreed between the liquidators the GMO Trust Limited and Old Schnapper Rock Limited. The Agreement provides no certainty of settlement and for the reasons set out above is not in the best interests of the Company.
>
> 2. We consider you have not entered the Agreement exercising your powers in good faith and for a proper purpose in breach of section

> 18(1) of the Receiverships Act 1993. It is apparent that you have entered the agreement for the purpose of allowing interests associated with Mr Olliver to control the Properties, and not for the purpose of obtaining repayment of the debt allegedly owed to the Bankhouse Trust Limited.

[45] On 1 June 2017, the receivers' solicitors advised the liquidators' counsel the receivers disputed they had breached their duties, and their instructions were the GST inclusive price under the 11 May 2017 sale and purchase agreement would be $20.1m.

[46] The receivers later acknowledged the purchase price under the 11 May 2017 agreement did not accurately reflect the properties' valuation. They amended the agreement to provide for a $20.1m purchase price including GST, and stipulated a settlement date as the later of 31 August 2017, or 10 working days after removal of the last of specified caveats affecting the properties. GMO Trust appears to have accepted the amendments.

[47] The liquidators remained concerned the effect of the amended agreement was effectively nothing more than an option to purchase, very much in conditional terms favouring GMO Trust's position. They say the receivers' appointment has come with a significant increase in cost, but without value to creditors and leading to an uncommercial sale and purchase agreement. The liquidators say the receivers' actions make it clear their appointment was only to effect sale of the properties to interests associated with Mr Olliver and to ensure Mr Olliver's interests had control of the properties.

—*this proceeding*

[48] This proceeding was brought by the receivers to obtain the Court's approval of them acting as the Company's agent for the purposes of the sale to GMO Trust, and of the sale as an entity associated with Mr Olliver. The receivers also sought orders, in entering into the sale and purchase agreement, they were in compliance with their statutory duties, removing the caveats over the properties, and directing the sale proceed.

[49] The liquidators responded with their own application for directions and orders setting aside the general security deed in whole or in part, declaring the receivers not to be validly appointed and not entitled to take any remuneration, setting aside the agreement for sale to GMO Trust, directing the receivers cease to act and no other receiver be appointed by Bankhouse over the Company's assets, and prohibiting the receivers from acting as receivers for a period not exceeding 5 years.

[50] In the course of hearing the applications, the parties sought and obtained consent orders in the following terms, by reference to the agreement for sale and purchase between the Company and GMO Trust dated 11 May 2017 (as amended):

> 3. In the event that the following both occur:
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> a. the conditions set out in clause 19.2 to 19.5 have been unconditionally waived by both parties to the Agreement and/or completely satisfied on or before 16 August 2017; and
>
> b, the full purchase price under the Agreement of $20,100,000 including GST if any is paid in full on or before 31 August 2017 by the purchaser in cleared funds free of any deduction or set off to the solicitors for the Applicants' trust account:
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> then
>
> a. approval is granted by this Honourable Court to the terms of the Agreement pursuant to section 31 of the Receiverships Act 1993; and
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> b. the Caveats (as defined in the Agreement) be removed.
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> 4. The funds in the Applicants' (the **Receivers**) solicitors' trust account shall remain undisbursed on interest-bearing deposit until written agreement between the ninth respondents (the **Liquidators**) and the Receivers, except that sufficient funds may be released to pay:
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> a. in full the mortgage held by the Bank of New Zealand over the properties the subject of the Agreement and any other security it holds;
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> b. any GST payable as a result of the sale;
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> c. rates due and owing up to and including the date of settlement;
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> d. LINZ fees associated with the settlement, including fees for guaranteed searches prior to settlement and post registration searches; and

e. the Applicant's reasonable solicitor's legal fees associated solely with the settlement of the Agreement.

5. In the event that either the condition set out in 3(a) above is not satisfied by 17 August 2017 or the condition set out in 3(b) is not satisfied by 1 September 2017 then:

a. the Receivers will discontinue their interlocutory application for directions under the Receiverships Act seeking agency dated 22 May 2017 (the **Receivers' Application**);

b. the Receivers will immediately retire as receivers of the Company and to the extent approval can be granted by this order, that is given by the Court.

6. The terms of the order are made expressly without prejudice to the following:

a. any matters raised in the Liquidators' originating application dated 16 June 2017 (as amended), including the Liquidators' claim against the Receivers for damages;

b. the Liquidators' contention that there is no prospect that the purchaser will settle the agreement as set out above;

c. the ability of this Court to make an order on the Receivers' application before 1 September 2017 in which case this order shall cease to have effect; and

d. costs in the proceedings.

However, neither condition was met, with the result the receivers discontinued their application and retired from their appointment as receivers with effect from 1 September 2017.

**Companies Act 1993** (the "**Act**")

[51] The liquidators first seek:

> that the Court give directions pursuant to section 284 of the Companies Act (the **Act**) and/or section 34 of the Receiverships Act 1993, in respect of the quantum of the debt claimed by the second respondent, the Bankhouse Trust Limited (**Bankhouse Claim**) and to the extent that it is an unsecured claim whether it should be admitted or rejected in whole or in part, pursuant to section 304(2) of the Act, and that pursuant to section 299 of the Act the general security deed granted by the Company to Bankhouse Trust Limited (**Bankhouse**) dated 23 January 2014 (the **GSD**) be set aside.

[52] The application partly puts the cart before the horse. Unless the general security deed is set aside under s 299 of the Act, there is no basis on which to treat

Bankhouse as an unsecured creditor under s 304. Only once an unsecured creditor must Bankhouse's claim meet s 304's requirements. That includes any requirement by the liquidator to have Bankhouse produce documents evidencing or substantiating its claim. Instead, Bankhouse's rights and duties as a secured creditor presently fall to be considered under s 305.

[53] Even if the general security deed is to be set aside, I am not prepared to make consequential directions on treatment of Bankhouse's claim as if from an unsecured creditor, when the liquidators' actions in accordance with the direction provide a defence to any subsequent challenge.[7] If the general security deed is to be set aside, the liquidators must then deal with Bankhouse under s 304. I do not pre-empt exercise of the liquidators' obligations then to consider whether to admit or reject Bankhouse's unsecured claims in whole or in part.

[54] I turn instead to the Act's s 299, which relevantly provides:

> **299 Court may set aside certain securities and charges**
>
> (1) Subject to subsection (2), if a company that is in liquidation is unable to meet all its debts, the court, on the application of the liquidator, may order that a security or charge, or part of it, created by the company over any of its property or undertaking in favour of —
>
> (a) a person who was, at the time the security or charge was created, a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or
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> (b) a person, or a relative of a person, who, at the time when the security or charge was created, had control of the company; or
>
> (c) another company that was, when the security or charge was created, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or; or
>
> (d) another company, that at the time when the security or charge was created, was a related company,—
>
> shall, so far as any security on the property or undertaking is conferred, be set aside as against the liquidator of the company, if the court considers that, having regard to the circumstances in which

[7] Companies Act 1993, s 284(3).

> the security or charge was created, the conduct of the person, relative, company, or related company, as the case may be, in relation to the affairs of the company, and any other relevant circumstances, it is just and equitable to make the order.
>
> (2) Subsection (1) does not apply to a security or charge that has been transferred by the person in whose favour it was originally created and has been purchased by another person (whether or not from the first-mentioned person) if,—
>
> (a) at the time of the purchase, the purchaser was not a person specified in any of paragraphs (a) to (d) of that subsection; and
>
> (b) the purchase was made in good faith and for valuable consideration.
>
> (3) The court may make such other orders as it thinks proper for the purpose of giving effect to an order under this section.
>
> …

[55] The threshold questions are whether the Company is in liquidation, is unable to meet all its debts, and Bankhouse is a relevant related party:

(a) the Company was placed in liquidation because it was unable to pay its debts. Nothing has changed in those respects. Its financial position has only worsened since, through at least the accrual of interest on the Company's debts; and

(b) the Company's general security deed was created in favour of Bankhouse. At the time the general security deed was created on 23 January 2014, Mr Olliver was director of each Bankhouse and the Company, and indeed the only signatory to the general security deed in each of those capacities.

The general security deed accordingly qualifies for consideration under s 299(1)(c).

[56] That consideration is whether the general security deed should be set aside as against the liquidators. The question is whether – having regard to the circumstances of the general security deed's creation, Bankhouse's conduct in relation to the affairs of the Company, and any other relevant circumstances – it is just and equitable for

the general security deed, so far as it confers any security on the Company's property, to be set aside as against the liquidators.

[57] The consideration requires assessment of "the substance of the transaction".[8] The context for that assessment is the Act's voidable transaction regime, a key purpose of which is:[9]

> … to protect an insolvent company's creditors as a whole against a diminution of the assets available to them resulting from a transaction which confers an inappropriate advantage on one creditor by allowing that creditor to recover more than it would in a liquidation. The pari passu principle requires equal treatment of creditors in like positions… and facilitates the orderly and efficient realisation of the company's assets for distribution to creditors.

[58] In *David Browne Contractors Ltd v Petterson*,[10] the Supreme Court noted the Court of Appeal's findings:[11]

> [The company in liquidation's] directors and advisors knew at the time the GSA was granted that the company would face a substantial claim from McConnell Dowell exceeding [the company's] net worth, that there was a real risk that [the company] may be found liable and that no insurance cover would be available.… [The] evidence strongly pointed towards the conclusion that the transactions and the GSA were entered into as an attempt to safeguard [the company's director] and his related interests from the McConnell Dowell claim.

[59] The Court of Appeal had found it just and equitable to set aside the GSA in favour of the director because he knew of the company in liquidation's precarious financial position at the time he created the security, which promoted his previously unsecured lending to have first claim on the company's assets, leaving McConnell Dowell with no prospect of recovery:[12]

> The transactions were "clearly designed by Mr Browne's advisors to protect him and his related interests from the risk of liquidation if the claim succeeded and no insurance was available to cover it".

None of that was challenged in the Supreme Court.

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8 *Re Manson and James Ltd (in liq)* (1984) 2 NZCLC 99,092 at 99,095 (cited in *Petterson v Browne* [2015] NZHC 866 at [56]).

9 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [1], affirmed in *David Browne Contractors Ltd v Petterson* [2017] NZSC 116 at [94].

10 *David Browne Contractors Ltd v Petterson* [2017] NZSC 116.

11 At [64].

12 At [66].

[60] Similar considerations apply here. Bankhouse's first advance to the Company is contended to have been made on 20 February 2009. The Company has been in increasing financial distress, ultimately leading to the Company's liquidation in reliance on the CIR's claim for unpaid GST from March 2009. The CIR's statutory demand was made on 20 January 2014, and appears to have been a trigger for the general security deed created three days later. Bankhouse claims in the liquidation its advances made between February 2009 and January 2014 (when the general security deed was entered) amount to more than $1.28m.

[61] Whether or not the general security deed also secures any future advances is beside the point, because the general security deed itself was intended to secure Bankhouse's priority, enabling Bankhouse to receive more than otherwise it would have in the liquidation, and at the expense of the Company's creditors as a whole. The general security deed confers 'inappropriate advantage' on Bankhouse. That is particularly so given Mr Olliver's sole directorship of both companies, the obviousness of his knowledge of the Company's financial position, and his use of Bankhouse as a conduit for the Company's funding. I am also mindful of the evidence Bankhouse's claimed advances extend to payments that appear not to be legitimate business expenses of the Company, in relation to which neither the Company nor Bankhouse has provided adequate substantiation to the liquidators.

[62] It is just and equitable the general security deed be set aside as against the liquidators.

[63] I do not therefore need to address the liquidators' alternative application for orders under the Act's ss 292 and 293, setting aside the general security deed to the value of Bankhouse's prior advances. Had I been required to do so, I would have held:

(a) in terms of s 292, the general security deed was entered into at a time when the Company was unable to pay its due debts,[13] and enabled

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[13] *Brookers Insolvency Law & Practice* (looseleaf ed, Brookers) at [CA292.04(1)(b)]: "A company that only can pay its debts by borrowing money on a secured basis will not be considered solvent: *Re RHD Power Services Pty Ltd (in liq)* (1991) 9 ACLC 27; (1990) 3 ACSR 261; *Re Mike Electric (Aust) Pty Ltd (in liq)* (1983) 1 ACLC 758; 7 ACLR 600."

(that being the key concept) Bankhouse to receive more toward satisfaction of the Company's debt than Bankhouse would, or would be likely to, receive in the Company's liquidation;[14]

(b) in terms of s 293, immediately after the general security deed was given, the Company was unable to pay its debts; and

(c) in either case, the general security deed was voidable by the liquidators.

[64] Last, Bankhouse sought to have Mr Olliver appear personally for it in his role as Bankhouse's director, to oppose the liquidators' claim. I dismissed that application.[15] The receivers then made oral application to rely on Mr Olliver's supporting affidavit. Mr Olliver's affidavit essentially recited, without further substantiation, the statutory grounds for Bankhouse's opposition: in reliance on ss 293 and 296(3) of the Act, the Company was solvent at the time Bankhouse was granted its security; Bankhouse, through Mr Olliver, acted in good faith in providing the advances; Mr Olliver had no reasonable grounds for suspecting the Company would become insolvent; and Bankhouse gave value for its security, which was accepted in good faith. The liquidators opposed, unless they had opportunity to cross-examine Mr Olliver, which Mr Tingey indicated he expected could not also be concluded within the time allocated for the fixture.

[65] I also declined the receivers' oral application, with reasons to follow. My reasons were:

(a) the affidavit, affirmed the day before the hearing of the applications commencing 10 August 2017, was not helpful in itself, but largely conclusionary;

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[14] At [CA292.04(3)(b)]: "[Section 292(2)] requires the degree of any preferment arising from an impugned transaction to be measured against what the creditors would receive in the actual liquidation and not by reference to a hypothetical liquidation occurring at the time of the transaction…. [T]he Court need only satisfy itself that the transaction has given the creditor the means to improve its position over that of other creditors, not that it will necessarily succeed in doing so."

[15] *Harris v Bank of New Zealand* [2017] NZHC 1931.

(b) although the receivers indicated they expected Mr Olliver to file and serve evidence on which they would rely, the receivers would have known it had not been filed and served in accordance with timetable orders by the end of June 2017, and had good opportunity but failed to take steps in advance of hearing to secure that evidence; and

(c) in those circumstances, I was not prepared to risk adjourning the applications part-heard, for the liquidators' cross-examination of Mr Olliver.

**Receivership Act 1993** (the "**Act**")

*—validity of receivers' appointment and remuneration*

[66] The liquidators also seek declarations the receivers were not validly appointed, and are not entitled to any remuneration.

[67] The liquidators rely on the Act's s 34, entitled 'Court supervision of receivers'. Section 34(2) expressly provides:

> The court may, on the application of a person referred to in subsection (3),—
>
> (a) in respect of any period, review or fix the remuneration of a receiver at a level which is reasonable in the circumstances:
>
> (b) to the extent that an amount retained by a receiver as remuneration is found by the court to be unreasonable in the circumstances, order the receiver to refund that amount:
>
> (c) declare whether or not a receiver was validly appointed in respect of any property or validly entered into possession or assumed control of any property.

[68] The liquidators have standing to apply under s 34(2), as the anticipated applicants are those who can source their interest through the 'grantor', defined as "the person in respect of whose property a receiver has been appointed", and includes expressly at s 34(3)(f) "If the grantor is a company, a liquidator", meaning a liquidator of the grantor company. Here, the receivers have been appointed in respect of the Company's property, which the liquidators otherwise control.

[69] The liquidators say the receivers' appointment is invalid as made in breach of the Personal Property Securities Act 1999's s 25(a), which provides "All rights, duties, or obligations that arise under a security agreement… must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice". (The general security deed is such a 'security agreement', defined as meaning "an agreement that creates or provides for a security interest".)

[70] The liquidators say good faith means the receivers are to be appointed for the purposes of the security, which is to obtain repayment of the debt. But the liquidators allege the purpose of the receivers' appointment here was to effect the properties' sale to interests associated with Mr Olliver, which is not in good faith and is improper.

[71] Be that as it may, I do not think Bankhouse's purpose can invalidate the receivers' appointment, at least not on application against the receivers alone. At common law, a secured party's decision to exercise in a valid manner a power of appointment of a receiver cannot be challenged at all, unless it is exercised in bad faith.[16] But then that is a challenge of the secured party's decision, and not of the validity of the receivers' appointment in itself.

[72] It is long accepted receivers are responsible to satisfy themselves as to the validity of their appointment.[17] That is broadly seen a responsibility to affirm the process and subject of appointment:[18]

> The appointment of a receiver may be invalid because the security agreement has been issued by the company invalidly… or because it did not extend to the asset in respect of which the appointment was made. Even if the security agreement is valid and does extend to the asset in question, the appointment of the receiver may not be valid, because no event has occurred justifying an appointment or because the appointment was not made in the manner prescribed by the security agreement or the person appointed was disqualified….

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16 *BNZ v Patrick* [2017] NZHC 1184 at [90], citing Blanchard and Gedye *Private Receivers of Companies in New Zealand* (3rd ed, LexisNexis, Wellington, 2008) at 3.03.

17 *R A Price Securities Ltd v Henderson* [1989] 2 NZLR 257 at 263

18 Blanchard and Gedye *Private Receivers of Companies in New Zealand* (3rd ed, LexisNexis, Wellington, 2008) at 4.14.

[73] It is implausible receivers should be responsible also to satisfy themselves their appointments were not tainted by ulterior motive on the part of their appointer. They have no power to enter into such an enquiry, or to compel the appointer to respond to such enquiries. It would be an impossible onus to discharge. But receivers are able to assess the process and subject of their appointment, for example, by examining the terms of the agreement entered into by the creditor with the company.

[74] Section 33(1) enables the Court to relieve a receiver of any liability incurred solely by reason of a defect in his or her appointment, if the receiver nonetheless "acted honestly and reasonably and ought, in the circumstances, to be excused". The person in whose interests the receiver was appointed is then liable to the extent the receiver is relieved.

[75] Section 33(1) points to determination of validity of appointment being a mechanical rather than moral exercise. That is reinforced in a liquidation setting by "the need to differentiate between the validity or otherwise of the appointment of a liquidator (on the one hand) and the liquidation process (on the other)".[19] Any ulterior motive of Bankhouse is better measured in consideration of the receivers' conduct as against their general statutory duties in the process of receivership.

[76] It is also unclear why, under s 33, a receiver's relief from liability if incurred solely by reason of his or her appointment being invalidated by the appointer's lack of good faith, should turn on the receiver's honesty and reasonableness. That suggests an appointer's lack of good faith is not a defect in the receiver's appointment susceptible to determination under s 34 only as against the receiver (the section being about "Court supervision of receivers").

[77] For those reasons, I do not make the declaration sought. To the extent the sought declaration of the receivers' entitlement to take remuneration turned on the (in)validity of their appointment, I also make no declaration. Otherwise, I doubt I have express power to make the sought declaration of no remuneration, s 34(2)(a) only entitling me "to review or fix remuneration at a level which is reasonable in the

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19 *Zhang v Kamal* [2017] NZHC 1943 at [52].

circumstances". If the receivers' appointment is not invalidated, a level of 'reasonable' remuneration anticipates something above $0.

—*prohibition orders*

[78] The liquidators also seek orders under s 35 of the Act, prohibiting appointment of any other receiver in respect of the property in receivership, and prohibition orders against the receivers under s 37 of the Act.

[79] Section 35(3) of the Act requires that orders prohibiting appointment may only be made when the purpose of the receivership has been satisfied so far as possible, or circumstances no longer justify the receivership's continuation. The latter is applicable here. The general security deed has been set aside as against the liquidators, meaning any receivership sourced in it is pointless for the duration of the liquidation, which concludes with readiness for removal of the company from the New Zealand register.

[80] I therefore prohibit the appointment of any other receiver in respect of the property in receivership under the general security deed.

[81] The prohibition orders sought against the receivers under s 37 of the Act build on the liquidators' service on the receivers of a notice of failure to comply with relevant statutory duties under s 18(1) and (3) of the Act.[20] Under s 37, I am required to be satisfied the receivers are unfit to act as receivers by reason of either their persistent failures to comply or the seriousness of a failure to comply, and if so "must make" a prohibition order.[21]

[82] Prohibition orders self-evidently are a last resort in disciplining receivers. The orders are assessed separately to any failure to comply in itself, which persistent failures (in the plural), or a failure's singular seriousness, must establish the person's unfitness to act as a receiver.

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[20] See paragraph [43] above.
[21] Receiverships Act 1993, s 37(6).

[83] However, even if the receivers have failed to comply with their statutory duties, those failures are not persistent in the sense required by s 37(6). The liquidators have evidenced only a single notice of failure to comply (and within that only two complaints, both arising from the alleged inadequacies of the circumstances and content of the 11 May 2017 agreement for sale and purchase between the Company and GMO Trust). By 'persistent', the Act anticipates at least repeated failures to comply with a notice, if not successive notices.[22] 'Persistent failures', in the plural, does not capture only continuing failure to comply with a single notice.

[84] I also have no basis on which to hold the seriousness of any failure to comply by the receivers renders them unfit to act as a receiver, such that I must prohibit them from acting as receiver in any current or other receivership for a period of up to five years. I would have required evidence of the seriousness of the relevant failure, and its causative quality in making the receivers unfit to act as such.

[85] I therefore make no orders under s 37 of the Act.

**Orders**

[86] Under s 299 of the Companies Act 1993, I set aside the whole of the General Security Deed entered into between CIT Holdings Limited (in liquidation) and the second respondent dated 23 January 2014 as against the ninth respondents.

[87] Under s 35(1) of the Receiverships Act 1993, I prohibit the appointment of any other receiver in respect of the property in receivership under the General Security Deed entered into between CIT Holdings Limited (in liquidation) and the second respondent dated 23 January 2014.

[88] Costs are reserved for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily recovery rate – to be filed and served by any party

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[22] Comparatively, s 286(7) of the Companies Act 1993 states evidence of two or more failures by liquidators to comply with orders made under s 286 is prima facie evidence of a persistent failure to comply. (See also *Brookers Insolvency Law & Practice* (looseleaf ed, Brookers) at [CA286.05(2)]: "[I]t is likely that the Courts will be reluctant to make a prohibition order [under s 286] on the basis of a single breach of duty unless there is clear evidence of dishonesty or fraud....").

claiming costs within 10 working days of the date of this judgment, by any party opposing costs within 5 working days of service of the claiming party's memorandum, and by any claiming party strictly in reply within 5 working days of service of the opposing party's memorandum.

[89] The Registry is to establish a case management conference at a time convenient to the parties to progress the liquidators' claim for damages against the receivers in the present proceeding, and associated questions arising in CIV 2017-404-1338.

Jagose J

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|---|---|
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