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N.Z.L. Reports.

M.No.254/83

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

295

IN THE MATTER of the Companies Act 1955

AND

IN THE MATTER of MANAWATU TRANSPORT LIMITED, WANGANUI FREIGHTERS LIMITED, RELIANCE TRANSPORT (WGTN) LIMITED

BETWEEN DONALD ROSS GREEN and ROBERT EDWARD ALLAN

Applicants

AND BANK OF NEW ZEALAND

First Respondent

AND BP OIL NEW ZEALAND LIMITED

Second Respondent

AND UDC FINANCE LIMITED

Third Respondent

AND DUNLOP NEW ZEALAND LIMITED

Fourth Respondent

AND MANAWATU TRANSPORT LIMITED

Fifth Respondent

AND WANGANUI FREIGHTERS LIMITED

Sixth Respondent

AND RELIANCE TRANSPORT (WGTN) LIMITED

Seventh Respondent

Hearing: 19/20 September 1983

Counsel: R.A. McGechan for Applicants
P.J. Keane for Third Respondent
E.G. Elliott for Fifth and Seventh Respondents

Judgment: 30/3/84

JUDGMENT OF EICHELBAUM J

The facts are not in dispute. The applicants are the receivers and managers of Manawatu Transport Limited (Manawatu) Wanganui Freighters Limited ( Wanganui) and Reliance Transport (Wellington) Limited ( Reliance). They were appointed pursuant to the following debentures respectively given by the companies :

Manawatu

Debenture in favour of Bank of New Zealand ( BNZ) dated 4 December 1973 (the Manawatu BNZ Debenture), the receivers' appointment being on 23 February 1981.

Deed of Debenture in favour of BP Oil New Zealand Ltd (BP) dated 28 September 1966, as supplemented by deed of debenture dated 21 May 1979 (the Manawatu BP Debentures) .the appointment being on 31 March 1982.

Debenture in favour of UDC Finance Limited ( UDC) dated 14 September 1979 (the Manawatu UDC Debenture) the appointment being on 17 February 1981.

Wanganui

Debenture in favour of BNZ dated 4 December 1973 (the Wanganui BNZ Debenture) the appointment being on 23 February 1981.

Debenture in favour of BP dated 21 May 1979 (the Wanganui BP Debenture) the appointment being on 31 March 1982.

Reliance

Debenture in favour of BNZ dated 9 May 1974 given by the Company under its then name A.H. Allardyce & Co Limited (the Reliance BNZ Debenture) the appointment being on 23 February 1981.

In addition there were certain debentures in favour of Dunlop New Zealand Ltd (Dunlop) but these are not of any present relevance, although for completeness they need to be listed when I refer to the documents conferring priorities, below.

Instruments which regulate or purport to regulate priorities as between certain of the respective debentures are as follows :

Manawatu

A deed dated 5 May 1980 between UDC and BP which confers the following priorities :

(i) For BNZ, priority over the debentures of UDC and BP for the sum of $260,000 together with twelve months interest thereon plus the costs and expenses incurred by BNZ in enforcing its security.

(ii) For BP and UDC, priority over the BNZ debenture beyond the said limit.

(iii) As between BP (for its two debentures) and UDC, priority for BP for the sum of $130,000 plus interest thereon (without limit) and the costs, charges and expenses incurred by BP in realising or enforcing its securities.

Wanganui

A deed dated 21 May 1979 (which appears to have been superceded by the deed dated 5 May 1980 referred to above insofar as it regulates priorities with respect to the Manawatu debentures) made between BNZ, BP and Dunlop which confers the following priorities :

(i) For BNZ, priority over the Dunlop and BP debentures for $260,000 together with twelve months interest and costs of realisation.

(ii) For BP and Dunlop, priority over the BNZ debenture beyond such limit.

(iii) As between Dunlop and BP, priority for the Dunlop debenture to the extent of $20,000 or the balance thereof for the time being outstanding together with interest thereon and other monies secured by the Wanganui Dunlop debenture.

Reliance

BNZ holds the only debenture affecting the Company.

The foregoing priorities do not bear directly on the questions in issue, but knowledge of their existence is necessary to an understanding of the tabulations set out later in this narrative.

The companies gave the following guarantees :

(i) In favour of BNZ by Wanganui and Reliance of the obligations of Manawatu, by guarantee dated 5 February 1979.

(ii) In favour of BNZ by Manawatu and Reliance of the obligation of Wanganui, by guarantee dated 5 February 1979.

(iii) In favour of BNZ by Manawatu and Wanganui of the obligations of Reliance, by guarantee dated 5 February 1979.

(iv) In favour of BP by Wanganui of the obligations of Manawatu pursuant to the Manawatu BP debentures, in particular by clause 35 of the Manawatu BP debenture dated 21 May 1979.

(v) In favour of BP by Manawatu of the obligations of Wanganui pursuant to the Wanganui BP debenture, in particular by clause 35 of the Wanganui BP debenture.

Realisation of the assets of the companies has been substantially completed. The position resulting in respect of each of the three companies is set out in the following statement. This is confined to realisation in respect of the particular company concerned, and debenture indebtedness attributable to advances or accommodation to that particular company alone. It ignores questions of liability as between or amongst the three companies under cross guarantees or otherwise.

(1) Manawatu

| | | $ |
|---|---|---|
| Net realisation after preferential creditors and receivership expenses to 31st October 1982 available to satisfy secured creditors: | | 548,148 |
| Debentures: | | |
| BNZ | 220,980 | |
| BP | 165,558 | |
| UDC | 250,553 | 637,091 |
| Deficiency | | $ 88,943 |

(2) Wanganui

| | |
|---|---|
| Net realisation after preferential creditors and receivership expenses to 31st October 1982 available to satisfy secured creditors: | 302,512 |
| Less Paid Dunlop Debenture | 8,414 |
| | 294,098 |
| Debentures: | |
| BNZ | 55,851 |
| Surplus | $ 238,247 |

(3) Reliance

| | |
|---|---|
| Net realisation after preferential creditors and receivership expenses to 31st October 1982 available to satisfy secured creditors: | 127,215 |
| Debentures: | |
| BNZ | 11,866 |
| Surplus | $ 115,349 |

What is at stake in these proceedings can now be explained by reference to two propositions which I will label (A) and (B) :

(A) If the indebtedness of Manawatu to BNZ and BP is satisfied by payment strictly in accordance with the tabulation just set out, the balance available in the receivership of Manawatu will be insufficient to satisfy the Manawatu UDC debenture.

(B) If the indebtedness of Manawatu to BNZ is spread rateably by net realisations across Manawatu, Wanganui and Reliance, and the indebtedness of Manawatu to BP is spread rateably by net realisations across Manawatu and Wanganui, the balance available to UDC in the receivership of Manawatu will be sufficient to satisfy the Manawatu UDC debenture in full. Correspondingly however, if the latter approach is adopted the sums available after receivership to Wanganui and Reliance (in fact, to their unsecured creditors) will be reduced. To illustrate :

<u>Position upon payment in terms of proposition (A)</u>

| | Manawatu | Wanganui | Reliance | Total |
|---|---|---|---|---|
| BNZ | 220,980 | 55,851 | 11,866 | 288,697 |
| BP | 165,558 | | | 165,558 |
| UDC | 161,610 | | | 161,610 |
| | 548,148 | 55,851 | 11,866 | |

<u>Position upon payment spread rateably - proposition (B)</u>

| | Manawatu | Wanganui | Reliance | Total |
|---|---|---|---|---|
| BNZ | 165,390 | 85,144 | 38,163 | 288,697 |
| BP | 107,099 | 58,459 | | 165,558 |
| UDC | 250,553 | | | 250,553 |
| | 523,042 | 143,603 | 38,163 | |

Some comment is necessary; first,to explain what is meant by "spread rateably by net realisations". The indebtedness of Manawatu to BNZ ($288,697) is apportioned between the three companies in proportion to the amounts of the respective net realisations. The latter total $977,875, so by way of example, the calculation to produce the amount to be borne by Manawatu itself would be $\frac{548,148}{977,875}$ x $288,697. The indebtedness to BP is treated similarly, but spread between Manawatu and Wanganui only. I have set this detail out because, as counsel warned me, the actual arithmetic under tabulation (B) appears suspect. However, the principle will be apparent from the foregoing. Secondly, in support of the "rateable spread" reliance was placed on 16 <u>Halsbury</u> (4th Ed) para 1428, citing <u>Flint</u> v <u>Howard</u> 1893 2 Ch 54, 72-3. If in other respects the contentions for the receivers and UDC should be upheld, I would regard that decision as sufficient precedent for the mode of apportionment proposed.

The receivers have made interim and conditional distributions in accordance with proposition (B), subject to recall and adjustment if the outcome of these proceedings so requires. The final matter that needs to be recorded is that Manawatu and Reliance are now in liquidation, and Wanganui may follow suit. The Official Assignee, represented in these proceedings by Mr Elliott, challenged the

receivers' proposed method of distribution. The latter accordingly applied for directions, pursuant to s 345 of the Companies Act 1955. I am obliged to the receivers and their advisers for the clear and comprehensive way they placed this problem before the Court.

The primary argument for the receivers was that the interim distribution was in accordance with the principles of marshalling. Halsbury succinctly states the terms of the doctrine as follows :

> " Where one claimant, A, has two funds, X and Y, to which he can resort for satisfaction of his claim, whether legal or equitable, and another claimant, B, can resort to only one of these funds, Y, equity interposes so as to secure that A shall not by resorting to Y disappoint B. "

(16 Halsbury 4th Ed para 1426)

As to the machinery by which this is given effect, Halsbury continues that "if the matter is under the Court's control, A will be required in the first place to satisfy himself out of X"; but (as a footnote indicates) equity does not interfere with the right of the mortgagee to select the security on which he will realise. Thus

Meagher Gummow and Lehane, "Equity doctrines and remedies" (1975) p 274 para 1106 say that in Australia at any rate the position appears to be that marshalling is effectuated mainly by the exercise of a remedy akin to subrogation to securities otherwise still on foot, that is to say the claimant with recourse to one fund only will be subrogated to the rights of the claimant who has recourse to another as well. See Commonwealth Trading Bank v CML Assurance Society Ltd 1970 Tas SR 120, per Neasey J at pp 130 and 132. The point however does not call for any fuller consideration in the present case. There are few New Zealand reported decisions on marshalling, but there can be no doubt that the doctrine is part of the law of New Zealand.

Marshalling is subject to various qualifications,one being that the claims must be against a single debtor. That gives rise to the first issue in this case. Halsbury puts the requirement thus :

> " If one creditor has a claim against C and D, and another creditor has a claim against D only, the latter creditor cannot require the former to resort to C unless the liability is such that D could throw the primary liability on C, for example where C and D are principal

and surety. "

(para 1427)

The authority cited is Ex parte Kendall, (1811) 17 Ves 514. In that case there was one set of creditors of five persons, and another set comprising four of the five. The four, who were partners, became bankrupt and their creditors sought to compel the creditors of the five to proceed against the solvent fifth debtor, the estate of a former partner. Lord Eldon LC held that this was not permissible; it was not a case of claims against two funds of the one debtor, but claims against two debtors. He said :

> " . . . (I)f A has a right to go upon two funds, and B upon one, having both the same debtor, A shall take payment from that fund, to which he can resort exclusively; that by those means of distribution both may be paid. That course takes place, where both are creditors of the same person; and have demands against funds, the property of the same person. Here, it is true, there may be creditors, who have demands

against the four, and
others who have demands
against the one : but it
was never said, that, if
I have a demand against
A and B a creditor of B
shall compel me to go
against A; without more;
as, if B himself could
insist, that A ought to
pay in the first instance;
as in the ordinary case
of drawer and acceptor,
or principal and surety;
to the intent, that all
the obligations, arising
out of these complicated
relations, may be satisfied :
but, if I have a demand
against both, the creditors
of B have no right to compel
me to seek payment from A;
if not founded on some equity,
giving B the right for his
own sake to compel me to
seek payment from A. "

( p 520 )

Where there is no common debtor, Lord Eldon was of the view that the first creditor could not be thrown upon a second fund held by a third party, unless the principal debtor could so insist :

> " The creditors of the four have no other right than the four themselves would have had; and the equity of the creditors in these cases is worked out through the equity, which the debtors themselves have. "
>
> ( p 523 )

See also Story on Equity, 3rd Ed (1920) p 272. Thus although the funds belong to different parties, the requirement of common debtor is negatived where as between the owner of the fund charged once and the owner of the fund charged twice, there is an obligation on the former to bear the burden of all charges as between themselves. Equity will enforce that duty at the instance of the second mortgagee of the double charged fund : Meagher Gummow and Lehane, para 1109; or as Halsbury puts it (para 1427, cited above) where the liability is such that D could throw the primary liability on to C, for example where C and D are principal and surety. The facts in the present case are the converse. UDC wishes to throw the Bank of New Zealand on to Wanganui and Reliance, but the relationship of the latter two companies to Manawatu is not that of principal to surety, but of surety to principal. Thus as I see the position clearly it is a case where there is no common debtor, and where not only the recognised exception to that rule (that is, the principal and surety situation) does not apply, but where the facts, being directly

the converse, are a positive obstacle to the applicability of marshalling. These concepts are encapsulated in a passage from the judgment of Orde J in Ernst Bros v Canada Permanent Mortgage Corpn Ltd 1920, 47 O L R 362 :

> " It would be inequitable to permit the securities to be marshalled if in the result one who was not under any obligation to pay both debts should suffer. But, where the owner of the equity of redemption in both funds is the one who ought ultimately to pay both debts, there is clearly a case for marshalling. "
>
> ( p 371 )

The foregoing brief exposition does not do justice to the thorough canvassing of the authorities undertaken by Mr McGechan. On the aspect now under discussion he dealt with The Chioggia 1898 P 1, Re Islip, ex parte Official Assignee 1907, 26 NZLR 1293, and Ernst Bros v Canada Permanent Mortgage Corporation 1920, 57 DLR 500 (where the decision of Orde J was affirmed by the appellate division of the Supreme Court of Ontario) as well as referring to Coote on Mortgages 9th Ed 812 and Fisher and Lightwood's Law of Mortgages 9th Ed 508. I have also been assisted by reference

to two American authorities cited by Meagher Gummow and Lehane, Carter v Tanners Leather Co 1907, 81 NE 902, and Savings and Loan Corporation v Bear 1930, 154 SE 587. In the main these decisions conform to the principles already stated although in some instances there is a degree of difficulty in perceiving that the facts entirely fit the doctrines which the cases seek to apply. It is desirable however that I should deal in greater detail with the New Zealand judgment.

Mrs Islip had mortgaged an hotel property and chattels to A. Her husband who conducted the publican's business became bankrupt. By virtue of the then married women's property legislation the equity of redemption in the chattels became vested in the Official Assignee of the husband. The land and chattels were sold leaving a surplus after payment of the chargeholder A. Stated shortly the effect of the judgment of Williams J is that the Official Assignee was entitled to marshal with the result that as against Mrs Islip he was entitled to have the proceeds of the sale of the land applied first to payment of the mortgage, leaving the proceeds of the sale of the chattels, in whole or in part, available for the general creditors. The learned author of the New Zealand Commentary to the Halsbury title "Equity", in referring to the exposition in the principal text of the common debtor rule, remarks that In re Islip appears to be inconsistent with the text, stating that the two funds were not at the disposal of the same debtor, the husband's assignee owning one property and the wife the other. However, Williams J (see p 1298) equated the facts to the situation where Mrs Islip had transferred

the equity of redemption in the chattels for valuable consideration. On that postulation the position was as if Mrs Islip had charged the hotel and chattels to A and the equity of redemption in the chattels to B. It is unecessary to debate whether in truth the situation was for legal purposes identical. There is nothing in the judgment, in my opinion, that detracts from the theoretical basis of the common debtor rule or its applicability in New Zealand. I should add that apart from drawing attention to the remark in the Halsbury Commentary, counsel for the receivers did not contend otherwise.

In addition to the cases already cited, Mr McGechan discussed several dealing with the priorities of sureties, and their right to marshal. In particular there is the New Zealand decision of NZ Loan & Mercantile Agency Co Ltd v Loach 1912, 31 NZLR 292. Joseph Loach granted a first mortgage over A to Hope. Mrs Loach, who was acting as surety only, gave a mortgage to Hope over B. Loach then gave a second mortgage over A to the plaintiff. The plaintiff company maintained that Hope should realise on Mrs Loach's property and apply the proceeds towards satisfaction of moneys owing to Hope under the latter's mortgages, so far as such proceeds would extend; or, if the property of Loach was realised first, Mrs Loach's property should stand charged with moneys owing to the plaintiff. It was held that the second mortgagee was not entitled to marshal the securities as against the surety. To the contrary the surety was entitled to have the securities marshalled, so as to enable the debt to be paid out of the property of the principal debtor prior to resort to the property of the surety. In his judgment Denniston J does not refer

overtly to the common debtor rule (see the discussion in Meagher Gummow and Lehane at para 1133) although his reference to The Chioggia may be capable of being regarded as such. The judgment concentrates principally on the rights of the surety, which the learned Judge regarded as arising at the time of the contract of suretyship, not from the payment of the guaranteed debt :

> " . . . . I should think that it was both more equitable and more consonant with common-sense to hold that the contract of suretyship, and not the payment of the surety, established against outside and subsequent parties the equitable rights of the contracting parties. As to the equities : As against a security out of the property of the surety, the right of the surety to compel recourse for his benefit in the first instance to the property of the principal debtor ought surely to be superior in effect, as it is prior in time, to a similar right on the part of a puisne encumbrancer who claims to get the benefit, to the prejudice of the surety, of something for which he has given no consideration, and from which the surety has obtained no benefit. "
>
> ( p 304 )

In reaching this conclusion His Honour preferred the judgment of Cozens-Hardy J in Dixon v Steel 1901 2 Ch 602 to that of Sir W. Page Wood VC in South v Bloxam 1865, 2 H & M 457. See also 20 Halsbury (4th Ed) paras 184, 197. Whether Denniston J's decision is regarded as an affirmation of the common debtor rule, or as turning solely on the competing equities as between a surety and a person claiming to marshal, the decision is strongly against the contentions advanced for the receivers and UDC. Manawatu was in a position equivalent to Loach, having given a first charge to BNZ and a subsequent one to UDC. Wanganui, having given a charge to BNZ as surety, identifies with Mrs Loach. In point of time, Wanganui's contract of suretyship preceded UDC's charge. The same equation arises with regard to Reliance, and likewise when the positions of Manawatu and Wanganui are considered vis a vis BP.

My conclusions are that on an application of the principles arising from the cases cited, first UDC is not entitled to marshal so as to compel BNZ and BP to have recourse to Wanganui and Reliance; secondly, effectively the same result is obtained if one has regard to the rights of Wanganui and Reliance as sureties; that is to say, if BNZ's initial recourse was to Wanganui or Reliance, the equities of the latter as sureties would entitle them to priority over UDC in the assets of Manawatu.

I now need to refer to the alternative arguments that were advanced to the contrary. On the assumption that prima facie the common debtor exception applied, Mr McGechan questioned its appropriateness to the situation of a group of companies.

Marshalling promotes fairness as between competing creditors and Mr McGechan submitted that the purpose of the exception was to avoid unfairness where marshalling would adversely affect a stranger to the security arrangements involved. In the present case, if BNZ and BP were required to spread liability across the securities available to them, could the persons adversely affected (counsel asked) rightly be described as "strangers" to the security arrangements? And he submitted that it was inappropriate to describe other companies "within the group", that is Wanganui and Reliance, as strangers to the BNZ - Manawatu arrangements "in any realistic sense" having regard to the interlocking cross-guarantees given to BNZ. The same remarks applied in relation to BP, excluding in that case the reference to Reliance which did not give a guarantee to BP.

No evidence has been provided as to the respective shareholdings of the companies. It would be proper to infer there is some relationship, simply from the security documents. But as to its nature, I could only speculate. Mr McGechan used the term "group" or referred to a group situation rather than one where any of the companies was a subsidiary of any of the others. Without expressing any view as to what might flow from a different set of facts, I am clear that such information as I have does not allow me to lift the corporate veil. On principle I must regard the three companies strictly as separate entities and, for purposes of the present discussion, as "strangers" to one another. If on the real facts (which are not known to me) this is an artificial concept then one must note it is one commonly recog-

nised when securities are obtained from a group of companies, and that in this instance UDC did not have the benefit of any collateral security.

Turning to the submissions on behalf of UDC, counsel prefaced these with the remark that it was not essential to his contentions that marshalling applied strictly or, if I understood him correctly, at all. He proceeded to develop an argument that the receivers were entitled to distribute as they did, and that the scheme of distribution they adopted had the effective concurrence of those concerned, namely (in his submission) the three companies and the secured creditors.

Although this is how I noted the outline of the submission, on reflection I think that the thrust of Mr Keane's argument was that it would be proper for the receivers to distribute on the same basis as used for the interim distribution. If counsel was intending to say literally that the interim distribution should be ruled in order because the payment from each company was made by the respective receivers, with the concurrence of the other two companies (that is, through the same receivers) and the secured creditors (none of whom objected, which is not surprising since they were all paid in full) then I think the essential foundation for such an argument is absent. I say this simply because of the receivers' sworn assertion that the payments made were on an interim and conditional basis subject to recall or readjustment if held to be erroneous. There is no ground for going behind that statement.

I come then to the contention that the Court should approve distribution in accordance with the tentative scheme even if of the view that strictly marshalling does not apply. Shorn to essentials that proposition amounts to this : notwithstanding that UDC does not have any rights in the matter - no equity of the kind required for marshalling to apply - and although, accordingly, the receivers would not be obliged (directly or indirectly) to proceed in a manner that resulted in UDC being paid in full, nevertheless they should follow that course, because it is equitable in the circumstances. Indeed it is not necessary to pitch the submission as high as that; it would be sufficient to say that the receivers are entitled to follow that course. The Court would only interfere if the receivers were acting contrary to law or principle, see Duffy v Super Centre Development Corporation Ltd 1967 1 NSWR 382 per Street J (as he then was) at p 383.

The receivers' position in Manawatu is that they have collected $548,148 as against secured creditors (apart from UDC) totalling $386,538 : $220,980 owing to BNZ and $165,558 to BP. In those circumstances one would normally expect those secured creditors to look to the principal debtor for payment. No question of calling upon a surety would arise. Nevertheless, Mr Keane submitted, a creditor with a choice of securities is entitled to exercise his rights in such order as he pleases. On general principles that cannot be denied. Accordingly, by virtue of the principal debtor clauses the receivers could look direct to Wanganui and Reliance for payment of the BNZ debt, and to Wanganui, in the case of BP.

Before proceeding to the next step, I make two parenthetical comments. First, the meaning of clause 15 of the Wanganui and Reliance guarantees may be open to question. However, for purposes of argument I will treat it as a principal debtor clause. Secondly, the situation appears to open up some interesting questions on the position of receivers acting concurrently as such in a group of companies with overlapping obligations, and the possible conflict of duties to which they may be exposed. Is it proper in law for the receivers, acting on behalf of BNZ and BP, to look first to the sureties when there is no need to do so, in order to benefit UDC, in whose interests they are also acting? Since these aspects were not the subject of argument, except for submissions made by Mr Keane as to the duties of receivers in general terms, I prefer to express no opinion about them. I will proceed on the assumption that pursuant to the principal debtor clauses, it was competent for the receivers to look to Wanganui and Reliance in the first instance, without prior demand on Manawatu.

The fact remains that as between Wanganui and Reliance on the one hand and Manawatu on the other, the position is that of sureties and principal debtor. On ordinary principles, on payment the sureties are entitled to be subrogated to the position of the creditor, and on the authority of Dixon v Steel and N.Z. Loan and Mercantile Agency Co Ltd v Loach their respective equities will rank ahead of UDC's.

Anticipating this conclusion, Mr Keane argued that Wanganui and Reliance must be taken to have waived their rights to subrogation. To support

his position in principle he cited 20 Halsbury (4th Ed) paras 193, 194 and 201 and Waugh v Wren 1862, 1 New R 142. In essence the submission was that by agreeing to distribution in this form Wanganui and Reliance must be presumed to intend it to be meaningful, and not to be defeated by the exercise of rights of subrogation. Of course it may be assumed that the receivers of Wanganui and Reliance, being the same persons as the receivers of Manawatu, will be willing to approve the proposed course, if they lawfully may. I do not accept however that they can validly waive rights of subrogation that would benefit the unsecured creditors or the shareholders of those companies. The position is perhaps clearer if one postulates that the receivers of the respective companies were distinct persons : the powers vested in the receivers of Wanganui, for example, cannot expand, vis-a-vis Wanganui, because they happen also to be receivers of Manawatu. I do not know of any basis in law by which the BNZ-appointed receivers of Wanganui can accede to a request by the UDC-appointed receivers of Manawatu to waive rights with the object of benefiting UDC to the detriment of shareholders or unsecured creditors in Wanganui, a step of no advantage to the latter company in any sense nor to the creditor by whom the Wanganui receivers were appointed. Any balance achieved in a receivership after meeting secured debts belongs to the company, or where applicable, to a liquidator (Gosling v Gaskell 1897 AC 575 per Lord Watson at p 588 and Lord Herschell at p 593); or as Needham J expressed it in his valuable survey of the duties of receivers in Expo International Pty Ltd (in liq) and anor v Chant (1979) 4 ACLR 679, 684 the receiver has a duty to the mortgagor to pay over or surrender the

surplus assets.

Accordingly I make a declaration that in principle the correct and lawful application as amongst the parties hereto of net funds received or receivable by the applicants in the course of the receiverships of the fifth, sixth and seventh respondents is in accordance with the scheme lettered (A) in the statement of facts at the commencement of this judgment. I have said "in principle" so as to preserve these reservations : first as to any matters of arithmetic, secondly as to any outstanding issue as between BP and UDC, and thirdly any consequential matters in general.

As to costs, since the issue concerned the disposition of a fund it is proper that all parties should receive their costs. There may be an issue however as to the fund out of which payment should be made. If the parties are unable to agree I will fix the incidence and amounts upon receiving memoranda from counsel.

Solicitors :

Scott Morrison Dunphy & Co (Wellington) for Applicants and Sixth Respondent

Watts & Patterson (Wellington) for Third Respondent

Jacobs Florentine & Partners (Palmerston North) for Fifth and Seventh Respondent