IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 1088/82

CA 27/87

HIGH PRIORITY

BETWEEN	WILLIAM DAVID HENDERSON	
	Plaintiff	
AND	R.A. PRICE SECURITIES LTD	
	First Defendant	
AND	PRICE VOULK BRABANT & HOGAN	
	Second Defendant	
AND	RAYMOND PRICE	
	Third Defendant	

Hearing: 23-24 June 1986

Counsel: Mr Ennor for plaintiff
Mr Dugdale and Mr Fyers for defendants

Judgment: 28 August 1986

JUDGMENT OF HILLYER J

This is a claim by the plaintiff for indemnity, or in the alternative for damages for negligence. Mr Dugdale appeared for all of the defendants, it being accepted that the third defendant was employed by the second defendants with the status of consultant, and that he acted on behalf of the first defendant.

The plaintiff practised as a chartered accountant in Otahuhu. The third defendant practised as a solicitor in Papatoetoe, which is also in South Auckland. He was the

founder of the firm named as second defendant. The plaintiff and the third defendant had been friends for many years. The plaintiff was the auditor for the third defendant's firm, and would frequently call on the third defendant in his offices at approximately 4 o'clock in the afternoon, and they would go across to the RSA Clubrooms for a drink.

Early in 1976 the third defendant was approached by one of his clients, who said that he was contemplating lending South Sity Motors Ltd, a garage and service station at Takanini, the sum of $10,000. The client asked the third defendant to make an investigation and advise if it was a safe advance. The third defendant duly did so, and being satisfied with the result of his inquiries from South Sity Motors' accountant, passed the information on to his client.

It so happened that at that time the client did not have the $10,000. He was anticipating getting the money from the sale of a business in New Guinea. The client asked the third defendant if he would lend him the $10,000 so that the client could in turn lend it to South Sity Motors. The third defendant said that that seemed a little cumbersome, and that it would be better if he were to advance the money through his solicitor's nominee company. The client was to reimburse the third defendant when his moneys came to hand.

The third defendant therefore, advanced his own moneys through his solicitor's nominee company (the first defendant) to South Sity Motors, and took out a debenture to secure repayment of the money in a year's time. Interest was to be payable by equal monthly payments from the date of the debenture, 24 May 1976. The debenture ranked as a first charge on the company's assets.

The third defendant said that he did not have much experience of debentures, or the procedure for putting a company into receivership. He said however, that some time previously he had had to put another garage business into receivership, and that he had mentioned this to the plaintiff. The plaintiff had lent the third defendant a set of precedents for the appointment of a receiver. The plaintiff said that those precedents included an indemnity for the receiver. The third defendant agreed that the plaintiff had provided him with a set of precedents but said he could not remember whether there was an indemnity included.

The plaintiff said he had on a number of occasions acted as receiver and liquidator. He said that he had always received an indemnity from the debenture holder, and that he was very experienced as a receiver, but I formed the impression that his experience was more practical than based on any real knowledge of what the law was.

On the previous occasion however, the third defendant did not appoint the plaintiff to be the receiver, he said he appointed another accountant, a Mr O'Brien. He said he gave an indemnity from the debenture holder to the receiver at the receiver's request. The third defendant said that he had not at first drawn up an indemnity for Mr O'Brien, but that when Mr O'Brien came into his office to check the papers, Mr O'Brien said that he usually obtained an indemnity. The third defendant said that he did not know what that was. Mr O'Brien wrote one out in longhand which the third defendant had typed, and it was included amongst the various papers signed by the client.

The third defendant said South Sity Motors having made default in payment under the debenture, he was considering appointing a receiver and was thinking of appointing Mr O'Brien, when he casually ran into the plaintiff. He says that on the spur of the moment because it looked like a simple job, he asked the plaintiff if he would like to take on the job of receiver. The third defendant said the plaintiff said receiverships were "right up his alley." The third defendant thereupon prepared a demand in writing and a document appointing the plaintiff to be receiver and manager of the property charged by the debenture. That debenture had been given to the first defendant, the third defendant's nominee company, and the documents were duly executed by that nominee company.

The third defendant said that there was no discussion about an indemnity. He said that the plaintiff called at his offices, and "checked the papers". The plaintiff did not put it quite as high as that. He said that he was given a copy of his appointment as receiver when he called at the third defendant's office. The plaintiff said that there was no discussion about an indemnity, but he assumed that there would be one, and he further said that he did not see a copy of the debenture. The third defendant was not prepared to go as far as saying that the plaintiff saw a copy of the debenture, although he inferred that he could have done. He said at first that all the papers were in a basket that was given to the plaintiff when he came to check the papers. Under cross-examination however, he said that the debenture had been in the tray and that he thought it still would have been, but if it was not, it would have been in the office, and Mr Henderson could have got it in 2 minutes.

The plaintiff was quite adamant that he had not seen the debenture. He said he did not see it until some time later. I formed the impression that even then he did not appreciate the significance of some of the wording of the debenture.

On the question whether the plaintiff saw the debenture at the time that he was appointed receiver, I accept the plaintiff's statement that he did not. In this as in

other matters where there was a conflict between the plaintiff and the third defendant, I reluctantly came to the conclusion that the third defendant's recollection was not accurate.

The third defendant was asked whether it crossed his mind that the plaintiff should have the protection of an indemnity from the debenture holder and he said he did not give it a thought. He then went on to say that the plaintiff was well aware of his view relating to guarantees and indemnities. When he was asked how the plaintiff became well aware, his answers under cross-examination were quite unsatisfactory. I formed the opinion that he did have in mind the desirability from the receiver's point of view of obtaining an indemnity, but that because the third defendant was personally involved in the matter and would have had to give the indemnity himself, he deliberately did not prepare one. He further endeavoured to suggest that the plaintiff knew that the moneys which had been advanced belonged to the third defendant personally, but I am satisfied that the plaintiff had no such knowledge.

The plaintiff received the appointment as receiver at the offices of the third defendant. The plaintiff and the third defendant then went to Papakura and visited the accountant's office there, that being the registered office of the company. Following that, the plaintiff and

the third defendant went to South Sity Motors and served the papers on the directors of the company. This, the third defendant said, was because the accountant contended that his was not the registered office of the company. According to the third defendant, the accountant said that South Sity Motors had put his name down without his authority.

The plaintiff and the third defendant then went together to the bank. There was I gather, some talk about obtaining an overdraft, but the third defendant said that the plaintiff did not get much help in that regard.

From that time onward the plaintiff entered into his duties as receiver. I am satisfied that there was frequent consultation between the plaintiff and the third defendant, usually at the RSA Clubrooms. It was of course perfectly natural for the third defendant to be interested in the progress of the receivership. It was his money that was involved. He endeavoured to suggest that he left it all to the plaintiff, but I am satisfied that he took a full part in the discussions and that the decisions made as to the conduct of the receivership were made by him or with his consent. I think the plaintiff regarded the third defendant as acting as a solicitor for the debenture holder, as solicitor for him as receiver, and as solicitor for the company in receivership.

The plaintiff said that at the time of his appointment the third defendant made it clear that he would expect all legal work to be handled by his firm. I think that the third defendant put himself in the position of the plaintiff's solicitor.

One of the problems the plaintiff initially had in the receivership was that the accountant refused to hand over the books of the company until his fees were met, and the plaintiff was therefore unaware of the full extent of the company's indebtedness.

I do not think either the plaintiff or the third defendant realised just how serious the matter was. It may well be that was because the third defendant had checked on the situation only a year before and had been quite satisfied at that time that the company was a sound one, and one to which $10,000 could be lent without risk.

The shareholders of the company were a Mr & Mrs Carr, and they were kept on as managers of the company. Subsequently it emerged that there were very substantial sums owing to the Oil Company from which the service station obtained its petrol. Initially it appeared that the service station was at least breaking even on its day to day running, and an overdraft was arranged. Some of the difficulties by way of tags on the licence were removed, such as the necessity to keep a mechanic on the

premises, and the parties appeared hopeful that the company would be able to keep going long enough to be able to sell the premises and the business as a going concern.

It seemed that that the plaintiff and the third defendant formed the opinion that that would be the only way in which the debenture holder would be able to recover the moneys owing because the company's substantial asset was its licence to sell motor spirits. That would be lost if the company stopped trading. In the course of operation of the company however, the plaintiff became suspicious of Mr Carr when he found that a sum of $300 had been misappropriated, and on further investigation found that Mr Carr had been defrauding the company. Eventually Mr Carr went bankrupt and left the country. As far as is now known, he went to Australia with his wife.

There then followed lengthy litigation in an attempt to compel the owner of the premises to comply with a term in the lease giving the lessee the right to buy the premises and the business at a fixed figure. The plaintiff and the third defendant found somebody who was prepared to buy the business at a price which would not only pay the amount they would have had to pay to the owner, but would have cleared off the debt to the Oil Company, the amount owing under the debenture and all the other outstanding liabilities. It may even have been that there would have been some surplus.

By the end of 1981 however, the litigation had been concluded and a decision was given against South Sity Motors (in receivership) so that effectually there were no assets available. The business was gone, the company no longer had a lease of the premises, and judgment was taken against the plaintiff, as receiver, for debts incurred by him during the course of the receivership, for $52,373.49, plus costs $500 and disbursements, by the National Bank of New Zealand Ltd, and for the sum of $14,841.69, plus costs $250 and disbursements, by Shell Oil (NZ) Ltd. During the course of the receivership the plaintiff incurred further debts to a total of $8018.25 for legal fees relating to the claim against the landlord relating to the lease and the claims of the National Bank and Shell Oil (NZ) Ltd. The plaintiff further alleged that fees on the receivership amounting to $11,000 were properly payable to him. No evidence was given by the defendants to establish that these amounts were excessive.

The plaintiff claims against the defendants these amounts, together with interest, on the basis that he was acting as agent for and on behalf of the debenture holder and is therefore entitled to indemnity from the first defendant as debenture holder and from the third defendant as contributor to the moneys lent on debenture, and beneficial owner of the debenture.

In the alternative, the plaintiff alleges that there was a breach of duty by the second and third defendant, in that they were acting as his solicitors, and failed to have an indemnity completed by the debenture holder or the contributor in his favour, did not advise him of the provisions of the debenture, or the personal interest of the third defendant, and acted when there was a conflict of interest.

The defendants deny liability and the first defendant counterclaims, alleging negligence by the plaintiff in the conduct of the receivership in the amount of the debenture, together with interest. A claim for fees deducted from the receiver's account was abandoned because no defendant has locus standi to recover such fees.

Mr Dugdale submitted that the plaintiff in his position as receiver, was acting as agent for the company. He pointed to clause 4 of the conditions attached to the debenture which provided:

> "4. At any time after the principal sum shall become payable, the lender may appoint by writing any person or persons whether an officer of the company or not, to be a receiver or receivers, or receiver and manager, or receivers and managers of all or any of the property of the company hereby charged, and may in like manner remove any receiver or receivers or receiver and manager or receivers and managers so appointed and may appoint another or others in his or their place or places, and any such receiver or receiver and manager shall be the agent of the company and the company alone shall be responsible for his or their acts and defaults and for his or their

> remuneration, provided however 48 hours notice is given to the first debenture holder of the intention of appointing a receiver or receivers, or receiver and managers or receivers and managers."

Mr Dugdale in particular pointed to that part of clause 4 in which it is provided that the receiver should be the agent of the company.

Such a provision has been in common use since at least the judgment in Gosling v Gaskell [1987] AC 575 a decision of the House of Lords. It was designed to relieve the debenture holder of responsibility for the very onerous obligations imposed on receivers to act prudently for the company whilst still doing their best to collect the debt owing to the debenture holder. The debenture of course, is a contract between the debenture holder and the company, and the company contracts to accept as its agent the receiver appointed by the company. See the dissenting judgment of Rigby LJ in Court of Appeal, Gosling v Gaskell [1896] 1AC 669 at 691 where the history of the position of the receiver is most interestingly set out.

But where the debenture does not contain a provision that the receiver is agent for the company, he has frequently been held to be the agent of the debenture holder. Re Vimbos Ltd [1900] 1 Ch.470, Robinson Printing Co v Chic Ltd [1905] 2 Ch. 123 and Deyes v Wood [1911] 1 KB 806. What then is the position of the receiver, vis-a-vis the

debenture holder if the receiver does not know at the time he is appointed that he is to be the agent of the company? A contract of agency is the same as any other contract - its terms will depend upon the intentions of the parties, as those intentions may be deduced from what they did or said at the time.

The third defendant approached the plaintiff and asked him to act as receiver. He told the plaintiff what he wanted done, gave the plaintiff his appointment and went with him while the plaintiff took over the company and called on the bank. At that time in my view the actions of the parties were such that the plaintiff was the agent of the third defendant.

> "The relation of agency arises whenever one person called 'the agent' has authority to act on behalf of another called 'the principal', and consents so to act." 1 Halsbury, 4th Ed, p.701 418. And Ibid at 702.
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> "The word 'agent' is also frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as that other's alter ego and merely as an intermediary between the principal and the third party."

Even more importantly however, the third defendant continually kept in touch with the plaintiff and directed his activities. The plaintiff said, and I accept, that at all times he either took his directions from the third defendant or consulted with the third defendant and obtained his approval. This again demonstrates that the

plaintiff was acting as the third defendant's agent. See Standard Chartered Bank v Walker [1982] 3AllER 938. The Court of Appeal in England was dealing with the question, whether a receiver was acting as a debenture holder's agent in realising assets. Lord Denning, MR said at 943:

> "There is a triable issue, whether or not the bank did interfere with the sale in such a way as to take away some of the receiver's discretion, not only by directing him to sell, but also in regard to publicity and so forth."

In American Express International Banking Corp v Hurley [1985] 3 All ER 564, Mann J said at 571:

> "I propose to proceed on the basis that the following propositions represent the law.
> (i) The mortgagee when selling mortgaged property is under a duty to a guarantor of the mortgagor's debt to take reasonable care in all the circumstances of the case to obtain the true market value of the property.
> (ii) A receiver is under a like duty.
> (iii) The mortgagee is not responsible for what a receiver does whilst he is the mortgagor's agent, unless the mortgagee directs or interferes with the receiver's activities.
> (iv) The mortgagee is responsible for what a receiver does while he is the mortgagee's agent and acting as such."

I think the third defendant comes within proposition (iv) above. The plaintiff was his agent and the plaintiff is entitled to indemnity in the way an agent normally is.

That would be sufficient to dispose of the claim, but in deference to the careful argument of counsel, and because the second defendant may be affected, I should say also as

I have previously set out, that in my view the third defendant was acting as solicitor on a general retainer for the plaintiff throughout. If he was not prepared in his personal capacity to give a written indemnity to the plaintiff, he should in his capacity as the plaintiff's solicitor, have told the plaintiff. His failure to do so, his failure to disclose his personal interest and even his failure to draw the plaintiff's attention to the provisions of the debenture amount to a breach of duty towards the plaintiff, such that the plaintiff would have a good action against the third defendant in negligence.

In the statement of defence to the amended statement of claim, and in the counterclaim, the first defendant alleged that the plaintiff had been negligent in the following respects:

a. He represented contrary to the fact that he was an experienced and competent receiver,

b. He failed to take reasonable steps to get in the amount of the debt owed by South Sity Motors Ltd.

c. He proceeded to trade the operation of South Sity Motors Ltd when in the circumstances (including the amount of the debt owed by South Sity Motors Ltd):

   (i) The decision to continue to trade and

   (ii) The nature and extent of such trading; was unreasonable

d. He embarked upon a venture of attempting to acquire and resell the land on which the business was sited, without any or adequate regard to the costs and risks of such a course compared with the amount of the sum owed by South Sity Motors Ltd.

e. He failed to exercise reasonable care and skill in all the circumstances.

The first defendant alleged that any losses sustained by the plaintiff were caused, or alternatively were contributed to by the plaintiff's failure to take care in those ways, and claimed the $10,000 secured by the debenture together with interest.

I have no doubt that a receiver owes a duty of care to his debenture holder. American Express v Hurley (supra) per Mann J at 571:

> "I add that when a receiver is in breach of his duty of care to the guarantor whilst acting as agent of the mortgagee, then insofar as the mortgagee is liable to the guarantor and in the absence of an express exclusion in the contract of agency, the mortgagee would be entitled to an indemnity from the receiver, under an implied term of the agency agreement. I so state because the implication of an indemnity against negligence is an obvious implication."

Certainly the receivership had a disastrous outcome. It seems likely that the trouble was really caused by the activities of Mr Carr. Whatever the reason, as I have said, the third defendant knew throughout the receivership what the plaintiff was doing. The evidence shows that in particular he took a leading part in the venture of attempting to acquire and resell the land.

The decision of Thorp J who was the trial judge in that litigation (South Sity Motors Ltd v P & R Motors (Papakura) Ltd High Court, Auckland Registry, M813/79,

decision 23.11.81) says that in February 1979 the third defendant was not only representing the debenture holder, but was also acting for the plaintiff as receiver. The decision sets out the details of the negotiations, and confirms the opinion that I have come to, that the third party took a leading part in that matter. It seemed the only way in which the first defendant would be able to recover the money due under the debenture. It may well be that there were errors of judgment, and indeed with hindsight it seems clear that the third defendant would have been better off had he abandoned all attempts to recover his $10,000. Any errors of judgment however, were errors in which the third defendant also shared, and I have no doubt that he was taking all due care himself to endeavour to recover the amount of the debt. An error of judgment is not negligence. A receiver does not have to have a crystal ball. The fact of loss does not demonstrate a lack of care.

I do not consider that the third defendant has established that the plaintiff was negligent in any of the ways set out

There will therefore be judgment against the defendants for the sums of $52,373.49, plus costs $500 and disbursements due by the plaintiff to the National Bank of New Zealand Ltd, $14,841.61, plus costs $250 and disbursements, due by the plaintiff to Shell Oil (NZ) Ltd plus $8,018.25 legal fees and $11,000 fees on the

receivership. If counsel are not able to settle the amounts, leave is reserved to bring the matter back before me. There will be interest at 11% on the sums due from 12 October 1982 (the date of issue of the writ) down to the date of judgment, together with costs and disbursements according to scale. Again, if counsel are unable to settle the amounts, they may come back to me.

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P.G. Hillyer J

Solicitors
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