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

**CIV-2009-441-000278**

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| BETWEEN | KAWEKA RANCH LIMITED<br>Plaintiff |
| AND | ROBERT JOHN HOLT<br>First Defendant |
| AND | JOHN EVANS HOLT<br>Second Defendant |
| AND | KELLY MCNEIL<br>Third Defendant |
| AND | JOHN ROBERT CHITTICK<br>Fourth Defendant |

Hearing: 4 June 2009

Appearances: D J O'Connor for the Plaintiff
A J Harris and K J Trusler for the First Defendant
R K Blunden for the Second Defendant
No Appearance of or for the Third Defendant
L J Blomfield for the Fourth Defendant

Judgment: 4 June 2009

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**ORAL JUDGMENT OF DUFFY J**

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Solicitors: Elvidge and Partners P O Box 609 Napier 4140 for the Plaintiff
Gifford Devine P O Box 148 Hastings 4156 for the First Defendant
Bannister and Von Dadeleszen P O Box 745 Hastings 4156 for the Second Defendant
Sainsbury Logan and Williams P O Box 41 Napier 4140 for the Fourth Defendant

[1] What I propose to do is give an interim judgment now, giving reasons for the conclusion I have reached; but I reserve the right to add more detailed reasons.

[2] This is an application for interim relief filed by the plaintiff, Kaweka Ranch Limited. It was only filed yesterday. The plaintiff requested that the application be dealt with urgently.

[3] The application is in the form of an application on notice. Since it is not in the form of an application without notice, it does not have the required solicitors' certification that such an application requires. It was called today in circumstances where the defendants had only received notice of the application early this morning. Counsel appeared for the first, second and fourth defendants, but were constrained in their ability to resist the application by the limited notice they had been given. There was no appearance for the third defendant.

[4] Yesterday I determined that the application should proceed in some form today because, after today, there will be no Judge sitting in this Registry of the High Court until 30 June 2009. I have decided to deal with the application as if it was a without notice application heard on a *Pickwick* basis. I am doing so in circumstances where any determination I make will be of limited duration. In order to provide all parties with a proper opportunity to be heard, I have allocated a half day fixture for hearing the application at 2.15 pm on 27 July 2009. This was the earliest fixture available for a duration of one half day, which most of the parties consider is how long it will take to hear the application. Given that today's hearing commenced at 11.00 am and has gone into the afternoon, I consider that the estimate of one half day is realistic.

[5] I turn now to consider whether or not to grant relief on an interim basis to cover the period between today and 27 July 2009.

[6] I have decided not to grant the application. This Court has inherent jurisdiction to appoint a receiver, but the grounds for doing so are limited. An appointment may be made by the Court at the insistence of shareholders or the

company itself where, for instance, there is no governing body, or there are disputes between directors which prevent the management of the company.

[7] In *Steel & Anor v Matatoki International Ltd v Anor* (1988) 4 NZCLC 64,710, Holland J accepted that the Court has inherent jurisdiction to appoint a receiver and manager of property where the circumstances warrant it. Holland J expressed the view that the power should only be exercised so as to preserve property which, but for such appointment, might disappear or be dissipated. He said that the Court's inherent jurisdiction should only be exercised as a last resort and when the Court is satisfied that the existing law and contractual arrangements are such that no other means of achieving the desired object can be obtained. Holland J summarised his view by saying that, for his part, the jurisdiction should be exercised sparingly and only when no other practical solution could be obtained.

[8] In *Lemmon Group Holdings Limited v Gilberd Hadfield Pile Company Limited and Colborne Investments Limited* HC AK M1074/92 30 July 1992, Thomas J refused to appoint a receiver where directors were in a state of deadlock. He did so because he considered the assets of the company were not proved to be in serious jeopardy.

[9] The evidence from the plaintiff reveals the directors are deadlocked. This state of affairs is confirmed by the first defendant. Submissions filed on his behalf acknowledge the existence of an irreconcilable breakdown between the first defendant and other directors. This, in part, would be a reason for appointing a receiver. However, before appointing a receiver, I must also be satisfied that the plaintiff's assets are at risk of serious jeopardy, or that the plaintiff will otherwise suffer serious injury. It is in this respect that I find the present evidence insufficient. This is not to say that such evidence may not exist, it is simply that, as matters stand, the evidence necessary to persuade me that there is a serious risk to the plaintiff's assets, or of some other injury, is not before me.

[10] The action which precipitated the application is the first defendant's solicitor writing to the plaintiff's bankers requesting a freezing of the plaintiff's bank accounts. One of the plaintiff's bankers, the ASB Bank, has acceded to this request.

That action has preserved the plaintiff's property insofar as it consists of bank funds. The plaintiff has not shown in any evidence before the Court today that in the short term (between now and 27 June 2009), the freezing of the ASB bank account will damage the plaintiff.

[11] The plaintiff has an account with another banker and this account has not been frozen, as that banker did not accede to the first defendant's request. Those funds have now been moved to a solicitor's trust account. There is no evidence to suggest that those funds would not be accessible to the plaintiff should they be needed.

[12] It follows that, on the limited evidence before me today, there is nothing to establish, on the balance of probabilities, that between now and 27 July 2009, the plaintiff or its assets are at risk of serious harm should the order appointing an interim receiver not be made.

[13] It has also been said that a Court can consider an application such as this in terms of the tests applied for interim relief. When I consider this application from the perspective of whether there is a serious question to be tried, and where the balance of convenience lies, I still come to the same conclusion. The balance of convenience favours the status quo. There is no evidence to establish that between now and 27 July 2009, the plaintiff is at such risk of harm that its management should be placed in the hands of an interim receiver.

[14] By 27 July 2009, all parties will have had proper opportunity to provide the Court with evidence of the type it needs in order to consider whether or not it should exercise its jurisdiction to appoint a receiver.

[15] The decision I have come to today has been affected by the urgency of the matter. The plaintiff's application was prepared on an urgent basis, and it may well be that the plaintiff can point to other evidence that it has not been able to ensure was before the Court today. The opportunity for doing that will come on 27 July 2009. I am grateful to all counsel today for the co-operation and assistance I have received from them. Each has done his or her best in the circumstances.

[16] In terms of setting a timetable for preparation for the hearing in July, I propose to leave it to the parties to see if they can come to an agreement between themselves about what steps will need to be taken. The manner in which they have approached this case to date shows them to be responsible counsel. It may be that the plaintiff will want to file further evidence. I propose that counsel attempt to agree on a timetable and file a consent memorandum setting it out. If the parties are unable to reach agreement, I suggest that they contact the Registrar for the purpose of arranging a telephone conference with the Court. I reserve leave to the parties to request a telephone conference before me for the purpose of setting timetable directions, should there be a need for the Court to make such directions.

Duffy J