IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-003157

UNDER	the Companies Act 1993
BETWEEN	WHK (NZ) LIMITED Plaintiff
AND	RETAIL MEDIA LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Defendant

CIV-2009-404-3898

AND UNDER	the Companies Act 1993 and the Receiverships Act 1993
IN THE MATTER OF	the receivership and liquidation of RETAIL MEDIA LIMITED (In Receivership and Liquidation)
BETWEEN	WHK (NZ) LIMITED First Plaintiff
AND	APN NEW ZEALAND LIMITED, APN PRINT NZ LIMITED, REACH MEDIA NEW ZEALAND LIMITED, AND BLUE STAR PRINT GROUP (NEW ZEALAND) LIMITED Second Plaintiffs
AND	RETAIL MEDIA LIMITED (IN RECEIVERSHIP AND LIQUIDATION) First Defendant
AND	RAYMOND JOHN BURGESS AND CRAIG ANDREW YOUNG Second Defendants
AND	JOHN MICHAEL GILBERT Third Defendant
AND	EKCO NOMINEES LIMITED Fourth Defendant

Hearing: 9 July 2009

Appearances: L Turner for Plaintiff
RJ Macdonald for Second Defendant
P Mills for Third Defendant
N Farrands for Fourth Defendant

Judgment: 16 July 2009 at 11:30 am

JUDGMENT OF ASHER J

This judgment was delivered by me on 16 July 2009 at 11:30 am pursuant to Rule 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

……
Date

Solicitors:
PK Foster, Fleming Foster & Co. PO Box 75 079 Manurewa, Auckland
RJ Macdonald, Short & Partners, (j.macdonald@short.co.nz)
Copy:
L Turner, PO Box 775 Shortland Street, Auckland, (lewis@lewisturner.co.nz)
P Mills, PO Box 47864, Ponsonby, Auckland (patricia@saintmarys.co.nz)

Table of Contents

Introduction

[1] On 15 June 2009 Ronald Young J, in response to a without notice interlocutory application, issued various orders restraining the third defendant, John Michael Gilbert, and the second defendants, Raymond John Burgess and Craig Andrew Young, who had been appointed as the receiver and liquidators of Retail Media Limited respectively, from various actions including selling or dissipating any property of that company.

[2] Mr Gilbert now applies to be struck out of the proceeding, and to rescind and vary those orders, and is supported in doing so by Messrs Burgess and Young. The first plaintiff, WHK (NZ) Limited ("WHK"), and the second plaintiffs, APN New Zealand Limited, APN Print NZ Limited, Reach Media New Zealand Limited and Blue Star Print Group (New Zealand) Limited ("the second plaintiffs"), have, since the grant of the injunction, sought further orders in a second set of proceedings. In those new proceedings, they seek a continuation of the interim relief granted in the original proceedings, and for orders removing Messrs Burgess and Young as liquidators of Retail Media, and appointing John Cregten and Andrew McKay as replacement liquidators.

Background

[3] Retail Media Limited (in receivership and liquidation) ("Retail Media"), was incorporated on 16 November 1992 and carried on business as a media company. I do not have precise details as to its shareholders, but it appears that a Mr Greg Scott was the managing director and owned 50 percent of the shares, the other 50 percent being owned by a Mr Jason Hall.

[4] By May of this year Retail Media owed approximately $2.4 million to the first and second plaintiffs. The first plaintiff, WHK, carries on business as a provider of accounting taxation and consultancy services, and had been working for Retail Media. On 15 May 2009 it obtained judgment from the District Court at Auckland for $176,040.85 plus interest and costs for accounting and consultancy

services rendered. It issued a statutory demand for that amount, and on 26 May 2009 it filed a statement of claim to put Retail Media into liquidation, being the proceedings CIV 2009-404-003157, (the first proceedings).

[5] Within two weeks, on 5 June 2009, the fourth defendant, Ekco Nominees Limited ("Ekco"), appointed the third defendant, Mr Gilbert, as receiver of Retail Media. Ekco made the appointment under a debenture dated 29 June 2001 ("the debenture"). On 8 June 2009 Retail Media's shareholders appointed Messrs Burgess and Young as liquidators.

[6] On 15 June 2009 WHK, in the first proceedings, sought interim orders by way of a without notice application. Ronald Young J granted the orders on the same day in the following terms:

> 1.(a) Restraining John Gilbert, who was purportedly appointed by EKCO Nominees Limited as the receiver of all of the undertakings, property and assets of the defendant Retail Media Limited ("Retail Media") on 5 June 2009, and Raymond Burgess and Craig Young ("Liquidators"), who were appointed as liquidators of Retail Media by special resolution of its shareholders on 8 June 2009, from:
>
> i. selling or dissipating any undertakings, assets or property of Retail Media;
>
> ii. procuring any subsidiary of Retail Media to sell or dissipate any undertakings, assets or property;
>
> iii. entering into any agreements to sell assets or property of Retail Media;
>
> iv. without limiting the foregoing, selling or agreeing to sell Retail Media's 'Best Buys' or 'Marketing Service' business units, or any other business units;
>
> v. distributing or selling any undertaking, assets or property of Retail Media or any subsidiary to EKCO Nominees Limited, Retail Media Solutions Limited, RSF Limited, Strategic Retail Solutions Limited, John Hatching (or any company or person associated directly or indirectly with John Hotchin) or any other person.

[7] The orders provided that the matter be called in the Duty Judge List in the following week. The matter came before me as Duty Judge. Ms Mills on that occasion, with justification, pointed out that Mr Gilbert and Messrs Burgess and Young were not parties to the original proceedings, but that orders had been made

against them. The first proceedings were liquidation proceedings, and it was not appropriate that they be amended into general proceedings given the particular specialised nature of proceedings under part 31 of the High Court rules. Ultimately I issued a directions judgment, making timetable directions so that there could be a hearing of the defendant's application to rescind the orders, and providing for the issue of second proceedings which would reflect the true issues between the parties.

[8] On 24 June 2009 Mr Gilbert applied to be struck out as a defendant. He applied also for a declaration that he had not been joined to the original proceedings as a defendant, and/or an order striking out the proceedings as they related to him as an abuse of process, or rescinding or varying the orders made on 15 June 2009.

[9] WHK then issued the second set of proceedings, CIV-2009-404-3898, on 1 July 2009. In issuing the second proceedings, WHK was joined by the second plaintiffs, who are a group of large unsecured creditors of Retail Media. Messrs Burgess and Young, the liquidators, were second defendants to those proceedings, and Mr Gilbert the third defendant. Ekco is the fourth defendant. It is those second proceedings that now set out the substantive complaints of the plaintiffs.

[10] In those second proceedings, the first cause of action seeks a review of the appointment of Messrs Burgess and Young as liquidators, and an order removing them as liquidators and appointing a Mr Gregten and a Mr McKay as liquidators. The second cause of action seeks a declaration that the receiver was not validly appointed. The third and fourth causes of action seek an order that Mr Gilbert cease to act as a receiver or an order requiring him to comply with his duties, and other ancillary orders.

[11] On 1 July 2009, as anticipated in the directions order, WHK as first plaintiff and the other unsecured creditors as second plaintiffs, applied to the Court for the same orders that were made in the first proceedings to be continued in the second proceedings, and for this application to be heard with the defendants' application to rescind the orders. In addition the notice of application sought orders under s 214AA of the Companies Act 1993 removing Messrs Burgess and Young as liquidators and appointing Messrs Gregten and McKay as liquidators.

The issues that arise

[12] In my directions judgment of 25 June 2009 I directed that at this hearing the issues to be heard would be:

a) Mr Gilbert's application to strike out and rescind the existing orders;

b) any application on the part of WHK or other creditors to support or modify the orders that were in existence, including any application to have the orders made in the liquidation proceedings issued in the new proceedings; and

c) any directions required in any new proceedings that were issued.

[13] Thus, the crucial issue that immediately arises is whether the existing orders should continue. This will involve the consideration of whether the plaintiffs have established a serious question to be tried against Messrs Burgess and Young as liquidators and Mr Gilbert as receiver in respect of the causes of action contained in the statement of claim filed in the second proceedings, and whether after considering the balance of convenience and the overall justice of the situation, the orders should continue.

[14] A second issue arose when the matter was heard. That was the plaintiffs' application to have orders made immediately, removing the existing liquidators without any further substantive hearing. I will deal with that second issue first.

Application to remove and replace the liquidators

The procedural background

[15] Mr Macdonald for Messrs Burgess and Young objects to this application proceeding at this time. He states that he was not expecting any substantive application to remove the liquidators to be heard at this point, but rather only an application to continue the existing restraining orders. If he had anticipated the hearing of the substantive proceeding on this issue, the liquidators would have filed

affidavits of considerably greater detail, and he would have sought to cross-examine some of the plaintiffs' witnesses. He also has not prepared submissions on the basis that he would have to respond to a substantive application.

[16] Mr Turner for the plaintiffs responded that the hearing of such a substantive application was contemplated by the timetable directions, and that notice was given in the application that was filed that he would seek permanent orders on the date of the rescission hearing of 9 July 2009. He also submitted that elements of urgency, coupled with the strong case of the plaintiffs, warrants the making of final orders immediately.

[17] However, the directions that were made, set out at [12] above, do not contemplate a substantive application to remove the liquidators. It was the application to strike out and rescind, and any other applications on the part of the plaintiffs to "support or modify orders that are presently in existence" that were to be determined. The application to remove the liquidators is not an application which supports or modifies orders already made. It considerably expands them. And it would change the character of the hearing from one relating to the continuation of interim orders, to a hearing where final orders were made.

[18] While the application to remove the liquidators does state, "The first plaintiff will on 9 July 2009 at 10:00 am (if leave is given) apply to the Court for orders …", Mr Macdonald submits that he understood this to mean that the matter would be called on that date as a first call, but not that it would proceed on a substantive basis.

[19] I accept Mr Macdonald's interpretation of the background, which, particularly in the light of the timetable orders, was entirely understandable. He had not anticipated an application for final orders.

[20] The removal of properly appointed liquidators is a significant event. Obviously it defeats the intention of the shareholders who appointed them. Further, any order directing the removal of liquidators can have a damaging effect on the reputations of those involved. Such orders are not lightly made.

The jurisdiction to make the orders

[21] The jurisdiction relied on by Mr Turner for the final orders removing liquidators is that contained in s 241AA of the Companies Act 1993. This section is a new section introduced by the Companies Amendment Act 2006, and inserted as from 1 November 2007. In its initial form as part of the Insolvency Law Reform Bill the new section prevented a company from appointing liquidators after a creditor had applied to the Court to place a company in liquidation, unless the creditor consented in writing (Insolvency Law Reform Bill, No. 14-1, Commentary, p 12). This provision was amended to the present form of restricting a company from going into voluntary liquidation unless this occurs within 10 working days after the notice of the creditors' application is served on the company. The section now provides:

> **241AA Restriction on appointment of liquidator by shareholders or board after application filed for Court appointment**
>
> (1) This section applies if an application has been filed for the appointment of a liquidator of a company by the Court under section 241(2)(c).
>
> (2) A liquidator of the company may only be appointed under section 241(2)(a) or (b) if the liquidator is appointed within 10 working days after service on the company of the application.
>
> (3) If a liquidator is appointed under section 241(2)(a) or (b), the creditor who filed the application referred to in subsection (1) may apply to the Court under section 283(4) for the review of his or her appointment as if the words 'successor to a liquidator' in section 283(4) read 'liquidator'.
>
> (4) Subsection (2) does not apply once the application has been finally disposed of.]

[22] This allows companies to take quick action, after an application has been filed for the appointment of a liquidator, to move into voluntary liquidation where necessary. Nevertheless, it prevents a company from delaying voluntary liquidation until shortly before the Court hearing. A liquidator must be appointed within 10 days of the application being served on the company. The section thus limits in time the ability of shareholders of a company to pre-empt a Court's appointment of a liquidator by appointing their own liquidator.

[23] Section 241AA also gives the creditor who filed the application the ability to apply to the Court to have the appointment of a liquidator by the shareholders of the company reviewed under s 283(4). Section 283(4) reads:

> **283 Vacancies in office of liquidator**
>
> …
>
> (4) The Court may, on the application of the company, or a shareholder or other entitled person, or a director or creditor of the company, review the appointment of a successor to a liquidator and may appoint any person who could be appointed as liquidator under paragraph (a) or paragraph (b) or paragraph (c), as the case may be, of subsection (2) of section 241 of this Act to be the liquidator of the company.

By virtue of s 241AA(3) the words "successor to a liquidator" must read "liquidator" for the purposes of the application. The Court may therefore under the two sections review the appointment of any liquidator appointed by the shareholders or the board of the company within 10 working days after the service of the creditor's application. I interpret s 283 in its context as giving the Court the power to appoint a different liquidator to the liquidator appointed pursuant to s 241AA(2). This is the power that the plaintiffs seek to invoke against the liquidators in this application.

[24] No guidelines are set out in either s 241AA(3) or s 283(4) as to the basis on which a power of review of the appointment of a liquidator is to be exercised. Mr Turner relied on the decision of *Re Trafalgar Supply Company Limited (In Liquidation)* [1991] MCLR 293, where Wylie J considered the situation where two possible liquidators were proposed by different creditors of the company. The Judge held (at 296):

> I take the view that *where there is a body of suspicion*, whether in the end justified or not, *but with some factual foundation on which suspicion may be built*, then it is undesirable that a liquidator should be appointed. There will be left in the minds of creditors a sense of dissatisfaction that an appointee of the Court may not have been totally impartial in the performance of his duties. I have endeavoured to express those views in a recent decision of my own, *Re Halford Ornowski and Associates Ltd* (HC AK M666/90, 15/2/91) this year where the circumstances were rather different, but where nevertheless the anxiety on my part to ensure that total independence and impartiality were seen to have been exercised was a prime consideration.
>
> [emphasis added]

This decision was followed in *Re Hilltop Group Limited (In Liq); Ormond Taylor Ltd v Robertson* (1998) 8 NZCLC 261,505, where creditors sought to review a liquidator's appointment of a successor and replace him under the then s 257(4) (which was the equivalent of the current s 283(4)). Cartwright J, following the "body of suspicion" test of Wylie J, replaced the liquidator.

[25] It could well be that the approach set out in *Re Trafalgar Supply Limited* should be adopted in considering an application under s 241AA, although the matter has not been fully argued before me, and I express no final view on it. Even on such an approach, mere suspicion is not in itself enough. There must be a factual foundation for the suspicion, which could be expressed as there being a serious question to be tried as to whether the liquidators would carry out their duties, and show the requisite objectivity and independence. That objectivity and independence is important where they will have, as here, the role of a watchdog over the activities of the receiver.

[26] Nevertheless, the liquidators are entitled to have the opportunity to explain their actions fully, and to have them analysed with care before any determination is made. The fact that the threshold of suspicion is low may mean that in certain circumstances where the lack of independence is overwhelmingly demonstrated and there is great urgency, that a Court might make orders replacing a liquidator after a truncated hearing. However, I do not consider that the situation here, with the interim orders in place, is so extreme as to deny the existing liquidators the opportunity to fully answer the allegations against them.

[27] I record that since the hearing a further affidavit of Mr Chapman and submissions have been filed for the plaintiffs, in which further criticism is made of the liquidators. Such material cannot be filed without leave. The issues must be determined on the material before the Court at the hearing, and I have not in determining these issues considered the recent affidavit and submissions.

Conclusion on application to remove and replace liquidators

[28] I conclude that it would not be in accordance with the timetable directions, and unfair on Messrs Burgess and Young, to proceed with this application at this point, and that the situation is not sufficiently extreme or urgent to warrant such a step. This part of the plaintiffs' application is therefore adjourned, to be heard with the substantive proceedings. If the plaintiffs wish to seek an urgent hearing, they may wish to apply for an order under r 10.15 for the urgent determination of a question in the proceedings separately, and for timetable directions. They may rely on the new material filed since the last hearing in doing so. If this course is to be taken counsel should confer to see if a consent memorandum can be filed. Any memoranda on this issue may be addressed for my attention.

Serious question to be tried

[29] The Court must determine whether the continuation of the existing orders is justified. The onus is on the plaintiffs, who obtained the orders without notice, to show that they should be continued. *Automatic Parking Coupons Ltd v Time Ticket International Ltd* (1996) 10 PRNZ 538, at 539. Ms Mills argued that the orders sought were freezing orders, under Part 32 of the High Court Rules, and that the test was "good arguable case". I do not accept that submission. The relief sought was interim relief pending the hearing of the claim for substantive relief. Part 32 of the High Court Rules was not invoked. Rather, the substantive provisions of the Companies Act 1991 and the Receivership Act 1993 were relied on. The fact that the orders involved prohibiting the sale of certain assets was incidental. The lower threshold test of serious question to be tried applies.

[30] The cause of action against the liquidators, Messrs Burgess and Young, is, as set out above, based on s 241AA of the Companies Act. Various allegations are put forward in support of the pleading that there is a factual foundation for the plaintiffs' suspicions about Messrs Burgess and Young and the plaintiffs' lack of trust and confidence in them. Much the same matters are put forward to support the application that Mr Gilbert cease to act as a receiver or, as an alternative, comply

with the duties imposed on him. I return to the position of the liquidators at [61]-[68].

The second cause of action

[31] The second cause of action is straightforward. It is that Ekco did not have the power to appoint Mr Gilbert as receiver, as Ekco was not owed any money by Retail Media. The debenture provides that the moneys secured are those:

> which are now or shall hereafter from time to time be owing to the debenture holder:
>
> (i) by the company; or
>
> (ii) by any accommodated person, in respect of any contract arrangement, services or facility provided or entered into by the debenture holder for the accommodation of the company,
>
> and, without limiting the generality of the foregoing includes all money owing in respect of …
>
> (ix) any debt assigned (whether absolutely or by way of security) to the debenture holder;
>
> (x) any guarantee, indemnity, bond, letter of credit or other obligation provided by the company to or in favour of the debenture holder or provided by the debenture holder for or on account of the company or any other person for the accommodation of the company.

[32] Mr Turner presents as an absolute answer to the validity of the appointment, the fact that Ekco at no stage advanced any money to Retail Media.

[33] There is indeed no evidence that Ekco did advance any moneys to Retail Media. However, Ekco is a trustee of a trust known as the Aranui Trust, which, it is claimed, has advanced $1,480,000 to Retail Media. Ekco is not an actual trustee of that trust; the trustees are a shareholder of Retail Media, Gregory Alan Scott, and Julie Maree Scott and Stewart Alexander Combo. I do not have a copy of the actual deed of trust of the Aranui Trust, but an affidavit has been filed annexing a copy of a deed of trust between Ekco and the trustees of the Aranui Trust, whereby Ekco at the request of the trustees of the Aranui Trust, holds the debenture from Retail Media, and acknowledges that the debenture is held on trust for those persons. There is, therefore, the curious arrangement of a trust superimposed on an existing trust.

[34] There is also an unsigned copy of a deed of acknowledgement of receipt of loan that has been presented on behalf of the defendants. It reads:

> Retail Media Limited acknowledges the receipt from you of a loan of $1,300,015.73 on the security of the debenture dated 21 June 2001 from the company to Ekco Nominees Limited (which debenture is held by Ekco Nominees Limited in trust for you) and on terms to be agreed upon by you and the company.

There was provision for signature by Retail Media, and I assume for the purposes of this application that it was signed.

[35] Ekco does not show in the accounts of Retail Media as a creditor. However, on occasions the Aranui Trust has done so, and it is claimed that the amount of the advance has now risen to $1,480,000.00. This is an amount shown owed to the Aranui Trust in the financial statements for the year ended 31 March 2006. Mr R Chapman of WHK, in an affidavit has disputed whether this sum is actually owed, and asserts that it was not shown as owed in some of the earlier accounts. However, there is some prima facie corroboration that the amount is owed, if only that contained in the trust document, and deed of acknowledgement already referred to. The solicitor who appears to have acted for Retail Media or its shareholders, Mr B Town, has filed an affidavit in which it is stated that Aranui Trust provided security to Westpac by way of a mortgage over a private property to support advances of $1.4 million from Westpac to Retail Media. As an alternative it is stated that Aranui Trust raised through the provision of a mortgage over the property, an advance of approximately $1.4 million from Westpac, which moneys Aranui Trust then lent to the first defendant.

[36] It is not possible on the information available to reach any concluded view on the issue of whether the $1.4 million was owed, and whether Ekco was owed money under the debenture and entitled to appoint a receiver. As I have stated, there is some corroborative evidence indicating that there was a genuine debt of approximately $1.4 million, but it is far from overwhelming. Nevertheless, it is difficult to see how Retail Media could have resisted a claim by Ekco that it was owed the money if it was in fact advanced by the Aranui Trust. This is because Retail Media acknowledged that the loan it had received from the Aranui Trust was

on the security of the debenture that it had given to Ekco, and acknowledged that over $1,000,000 was owing.

[37] Thus, the arrangements are unusual and it is difficult to discern their logic or verify their authenticity. No shareholder or trustee, including Mr Hall or Mr Scott, has sworn an affidavit. There is, I conclude, a serious question to be tried as to whether Ekco validly appointed Mr Gilbert under the debenture, and what, if anything, is owed under the debenture to Ekco. That will only be resolved by a detailed analysis of the documents and the financial records, with some more detailed explanatory evidence from those involved.

[38] I record that the new material filed by the plaintiffs since the hearing relates in part to the issue of whether there are moneys owed under the debenture. For the reasons given, it has not been considered in relation to this application.

The third cause of action

[39] The third cause of action rests on s 31 of the Receiverships Act 1993. Section 31(1) and (2) of the Receiverships Act 1993 provide:

> **31 Powers of receiver on liquidation or bankruptcy**
>
> (1) Subject to subsection (2) of this section, a receiver may be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of property of—
>
> (a) a company that is being wound up or that has been put into liquidation; or
>
> (b) a debtor who has been adjudged bankrupt under the Insolvency Act 2006—
>
> unless the Court orders otherwise.
>
> (2) A receiver holding office in respect of property referred to in subsection (1) of this section may act as the agent of the grantor only—
>
> (a) with the approval of the Court; or
>
> (b) with the written consent of the liquidator or the Official Assignee, as the case may be.

[40] Mr Turner submits that the words "unless the Court orders otherwise" gives the Court an unfettered discretion to order a receiver to cease acting. Ms Mills for Mr Gilbert submits that the Court's power is more limited. She submits that it would be very unusual if s 31(1) gave the Court the power to direct a receiver to cease to act on the application of an unsecured creditor. She observes that an unsecured creditor on liquidation has no right to enforce any judgment or claim against the company's assets, relying on *Gosling v Gaskiell* [1897] AC 575 (HL). The unsecured creditors' right is to prove in the liquidation and to be paid in accordance with their priority, together with all the company's creditors including a secured creditor. She submits that the purpose of s 31 is to enable a receiver to continue to trade as the company's agent with the consent of the liquidator or the Court, and that any power to apply to the Court for an order that a receiver cease to act is vested in the liquidator. She submits that s 31(1) should be interpreted to mean that on the application of the liquidator only, a direction can be made preventing a receiver from acting, or perhaps to withdraw an approval given under s 31(2).

[41] It is clear that prior to the enactment of s 31, the receiver's agency ceased entirely upon the winding up of the company. As was stated in *Gosling v Gaskiell* at 587-8 per Lord Watson:

> The company, when in liquidation, although by no means defunct, could no longer act by its directors, and appoint or employ agents capable of binding the corporation or its estate, and was represented by the liquidator, who could not himself carry on its business without the special leave of the Court.

[42] Section 31(1) is discussed in Blanchard and Gedye, *Private Receivers of Companies in New Zealand*, at para 12.04:

> Before the enactment of the Receiverships Act there were two particular problems confronting the receiver of a company in liquidation. The first was that the liquidation of a company put an end to its capacity to carry on business as a going concern … in the absence of a statutory provision relating to receivers, they could have no greater power than liquidators in relation to the business. That was unsatisfactory and s 31(1) of the Receiverships Act was enacted to change the position. It permits a receiver to be appointed or to continue to act as a receiver, and to exercise all the powers of a receiver in respect of property of a company that has been put into liquidation, unless the High Court orders otherwise …
>
> The second problem presented for a receiver prior to the Receiverships Act by the liquidation of the company was that it was generally considered that a

> receiver's right to represent the company as its agent entirely terminated upon the appointment of a liquidator, no matter what may have been said in the security agreement.

Section 31(1) and s 31(2) address the two problems respectively. Ms Mills relied on an article by M Whale and S Cameron "Concurrent Receiverships and Liquidations" (2006) 10 Company and Securities Law Bulletin, 100 at 102 to establish that the Court's power under s 31(1) was limited. It was stated there:

> As noted, the receiver can exercise powers after liquidation unless a Court orders otherwise. In the authors' view, the Court's power is not a substantive change in the law. Under previous legislation, the Court had powers to limit the receivership in the same terms as the powers now set out in s 35 of the Act. Section 35 also gives the Court authority to prevent the exercise of any particular power by a receiver.

[43] Ms Mills has been anxious to limit the rights of unsecured creditors to proving in the liquidation. She wishes to limit the Court's powers to terminate or limit receivership to applications under s 35 by the persons referred to in s 35(2), who do not include unsecured creditors.

[44] It is hardly likely that those who drafted s 31 were not aware of the issue of the different positions of secured creditors, unsecured creditors and grantors after liquidation when they drafted s 31(1). In expressing the Court's power in the broad words "unless the Court orders otherwise" the legislature must be taken to mean what it says. The Court may make orders in relation to appointment or the continuation of the receivership, and there is no limitation upon those who may invoke the Court's power. It is significant that unsecured creditors are given certain rights to seek orders against receivers elsewhere in the Act. They may in any event apply for a declaration on the validity of the receiver's appointment in respect of any property under s 34. They may seek orders that a receiver comply with duties under s 37. There is nothing to indicate an intention to prescribe the rights of unsecured creditors to these sections only. It must be assumed that general words are used in s 31(1) deliberately, rather than words of specific prescription.

[45] The fact that after liquidation the receiver has ceased to be the agent of the company, is a reason why there is no restriction on those who may seek orders under s 31(1). It has been said in England that after a winding up order the receiver is then

a trustee of any assets of the company, first for the secured party and then for the company and its creditors: *Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd* [1982] All ER 655 at 659. A receiver who exercises powers in respect of the company in liquidation without approval or consent to act as an agent, and without authority under s 31(2), does so as a principal party unless some other specific arrangement is made. As a quid quo pro for the power to continue to act after "liquidation", a receiver is vulnerable under s 31(1) to the Court's orders, at the invocation of any party with a legitimate interest, (who are likely to be those listed in s 37(1)).

[46] Thus, I reach the view for the purpose of this interim application that when a receiver is appointed or continues to act after liquidation of a company, persons with a legitimate interest in the conduct and affairs of the company, including unsecured creditors, may seek an order of the Court that a receiver's appointment after liquidation be set aside, or that a receiver be restrained from continuing to act.

[47] The question arises as to the basis upon which the discretion given to the Court to make such orders in s 31(1) is to be exercised. I consider that if a receiver is shown to not be observing the duties set out in ss 18 and 19 of the Act, that could be a proper basis for the Court's interference. I will consider this factual issue of breach of duty in the next section of the judgment, relating to the fourth cause of action.

[48] I was also asked at the end of the hearing to authorise Mr Gilbert to act as an agent of the company. Presumably this was a request for approval under s 31(2) of the Receivership Act 1993. Because of the serious questions raised about Mr Gilbert's appointment and performance I decline to make such an order at this stage.

The fourth cause of action

[49] This cause of action is based on s 37 of the Receiverships Act 1993. Section 37 gives the Court the power to order a receiver to comply with the receiver's duties, and if there are failures to comply with such an order, remove the

receiver from office. The statement of claim as presently drafted seeks an order that Mr Gilbert (if validly appointed) comply with his duties.

[50] It is submitted that on 16 June 2009 a notice of failure to comply was served on Mr Gilbert in the form of without notice orders. The question that arises is whether there is a serious question to be tried as to whether Mr Gilbert has breached his duties. A number of circumstantial factors are put forward to indicate a breach. I do not propose summarising the extensive submissions but, rather, I will set out the relevant factual matters and my views at this stage.

[51] Mr Gilbert, as he admits in the affidavits he has filed, was convicted of trying to defraud the Inland Revenue Department in 1992, and in 1993 convicted of 25 criminal charges including criminal breach of trust, forgery and using a document. On that second occasion he was sentenced to three-and-a-half years in prison, and in 1994 was struck off the Register of the Society of Accountants.

[52] Mr Gilbert states in response that he has accepted his past wrongdoing, which he has long put behind him. He holds a Bachelor of Commerce degree, has 30 years experience in accounting, company directorships and insolvency work, and in the 15 years since he served his sentence has rebuilt a successful insolvency practice. He asserts that he has undertaken over 300 insolvency assignments in that time, and has been appointed by the High Court to act as a receiver pursuant to the Court's inherent jurisdiction.

[53] Another matter raised by the plaintiffs is Mr Gilbert's involvement in the liquidation of a company related to Retail Media. Retail Media, together with its shareholder Greg Scott, beneficially owned a related printing business, Horizon Printing Limited ("Horizon"). That company was placed into liquidation by its shareholders on 21 May 2009. Mr Gilbert was appointed as liquidator.

[54] There is hearsay evidence that the plant and equipment of Horizon was sold to a $1 company controlled by the shareholders of Retail Media approximately an hour before Mr Gilbert's appointment. It is asserted that this sale was at half or less than half of the plant and equipment's book value of $3 million.

[55] The plaintiffs submit that Mr Gilbert concluded that the sale was for a proper commercial value, and it can be inferred that he was colluding with the shareholders of Retail Media in doing so, and not properly observing his duties in good faith and for a proper purpose. By inference, he will do the same to Retail Media now he is receiver.

[56] The defendants, in response, have pointed to Mr Gilbert's first report as liquidator of Horizon. He records the sale of the business to Stannisforth Investments Limited ("Stannisforth") and states that the proceeds of the sale were used to satisfy a specifically secured debt due to Marac Finance Limited. He stated that he had investigated the sale transaction and considered that a fair value had been achieved for the fixed assets sold. He stated:

> However, I consider that stock and work in progress has been transferred at under value and I intend to pursue recovery of further funds from this party.

He also went on to say in his report that the business had been under pressure for some time and he would investigate whether any voidable payments had been made to suppliers or parties associated with the directors. He stated that discussions with at least one secured party indicate that the company may own stock held off premises, which he would investigate. There is no evidence at this point that he has carried out any of these investigations.

[57] It is also said by a creditor (and disputed by Mr Gilbert) that he said he had been appointed by Ekco and Lock Finance Ltd, another creditor which is secured by factoring arrangements.

[58] I accept that the sale of assets of Horizon one hour before the liquidation commenced is highly suspicious. It raises the question of whether it was done as part of an orchestrated plan involving Mr Gilbert, which would have the effect of preserving assets for the shareholders of Retail Media at the expense of the unsecured creditors. However, as against this it must be acknowledged that "hiving down" assets is recognised as a practice that can be legitimate: Blanchard & Gedye *The Law of Private Receivers of Companies in New Zealand,* at para 10.11. However, a legitimate "hiving down" by forming a subsidiary company to carry on

part of the business to achieve a better realisation of the transferred assets does not appear to be what has happened. Rather, assets have been transferred at what may well be an undervalue, to an entity controlled by the shareholders.

[59] I consider that there is a serious question to be tried as to whether this was a legitimate transaction in the company's interests, and whether, if it was improper, Mr Gilbert was involved in that impropriety. I do, however, note that Mr Gilbert's comments in his liquidator's report indicate some dissatisfaction on his part with what took place. If that is a genuine and arms length concern, it may be that there is a satisfactory explanation.

[60] Nevertheless, the fact that Mr Gilbert was appointed as receiver of Retail Media, and the liquidators appointed on the first working day thereafter is surprising. No explanation has been offered by the shareholders or others involved as to why there was this juxtaposition of appointments. That timing must be seen against various statements that Mr Scott is reported to have made in the period prior to the appointment of Mr Gilbert. He indicated to one of the major creditors that if they supported Retail Media then the debts would be able to be repaid, but that on the other hand if the company went into receivership the creditors would get "zero". It was stated to another creditor that there were three options for Retail Media. These were, quoting the creditor's account of what was said:

(i) blow it up - no one gets anything;

(ii) blow it up and get an investor to pick up the pieces; and

(iii) resurrect it in another form.

This remark was made on 5 June 2009, three days prior to Mr Gilbert's appointment as a receiver. This, together with the time of events, could be seen as indicating an intention to manipulate events to the detriment of unsecured creditors.

[61] It was also reported by one of the creditor's representatives that Mr Gilbert had told him on Friday 12 June 2009 that he was looking to "quickly sell" some components of Retail Media, namely the marketing services unit. He was also discussing the sales of other parts of the business. There is a concern on the part of

the unsecured creditors that he does not appear to be obtaining proper valuations and may sell at an undervalue.

[62] As against this there is evidence now provided by Mr Gilbert and the liquidators, that independent valuations are now being obtained. It is difficult to know what weight to place on this, as this development appears to have taken place since these proceedings issued. There is no evidence that initially, before he was challenged, Mr Gilbert was going to get such valuations.

[63] I conclude that the events surrounding the sale of plant and equipment by Horizon Printing Limited, the comments that Mr Scott is reported to have made, Mr Gilbert's initial statements of an intention to have a quick sale, and the apparently syncopated timings of the appointments show a serious question to be tried of breach of duty on the part of Mr Gilbert. I am cautious weighting the strength or weakness of that serious question to be tried, given the scant information at present before the Court.

The liquidators

[64] The liquidators, Messrs Burgess and Young, have not called a meeting of creditors. In their first report they say that this is because of the cost of holding a meeting and the likely result of the liquidation. They state that subject to available funds they will be investigating the background to the liquidation and any potential voidable preferences.

[65] Mr Turner is critical of these statements in the first report. He also submits that they failed to undertake a proper inquiry as to whether the receivership was valid. He submits that the liquidators have not reported to creditors within five working days of their appointment as they are required to do under s 243(2)(a) and s 255(2)(c) of the Companies Act. He criticises the liquidators for not requiring the books of the company from the receiver under s 262(2).

[66] However, there is no doubt that a first report was prepared, although possibly a little late, and has been distributed at least to some creditors. All the liquidators'

actions must naturally be constrained by the funds that are available. They have given notice of their appointment and advertised as they are required to do. The report was filed in the Companies Office in time. The delay in sending it out was only a matter of some days.

[67] Criticism is also made of Mr Burgess personally, but I do not propose repeating that criticism as it is a broad assertion which does not carry any significant evidential weight. Mr Burgess appears to be an experienced and successful insolvency practitioner. Both liquidators state that they have never worked for or had any business or social connection with the shareholders or directors of Retail Media. Messrs Burgess and Young state that they have required Mr Gilbert not to dispose of any assets without reference to them and without valuation support.

[68] I am, of course, mindful of the very serious concerns of the unsecured creditors who are the plaintiffs in this action. However, I must also note the submissions for the defendants, criticising their objectivity. Mr Chapman, who previously acted for Retail Media, clearly now takes a very strong position against his former client. He may be entitled to do so, but he is criticised by the defendants for selectively using confidential information to support the application. The defendants submit that the unsecured creditors have acted in a high-handed manner in refusing to meet with the liquidators, despite invitations do to so. It is also submitted that one of the creditors, APN New Zealand Limited, is involved in media business ventures which are in direct competition with Retail Media, and that APN will benefit from the appointment of liquidators who are particularly sympathetic to the unsecured creditors.

[69] I do not draw any conclusion in relation to these criticisms, save to note that the issues in the case are not straightforward, and there is a danger in making assumptions too readily.

[70] It is necessary to determine whether there is a serious question to be tried in respect of the cause of action against the liquidators. I have already discussed this cause of action and refused to determine it finally. All that can be said is that there is undoubtedly a serious question as to whether there is a proper basis for suspicion of

the objectivity and independence of the liquidators. Although the criticisms really come down to no more than their undue compliance with the actions of Mr Gilbert, in the end that might be enough to justify their replacement. And their apparent failure to thoroughly investigate the serious question of whether Mr Gilbert was properly appointed as receiver is, at the very least, surprising.

[71] I conclude that there is a serious question to be tried as to whether the liquidators should be replaced under s 241AA.

Balance of convenience

[72] Mr Gilbert has stated that he is planning to run the company's business as a going concern while undertaking the sales process. He is currently obtaining a valuation of the business. All the company's significant assets are subject to registered charges. He therefore considers the only saleable assets of the business that might be available for creditors is the goodwill, and that this is being eroded by the actions of the plaintiffs. He has incorporated a company Retail Media Solutions Limited, which continues to trade the company's business. Retail Media owns all the shares in that new company. He has entered into new supply arrangements with that new company, and has arranged a $1 million funding facility.

[73] Mr Gilbert has already rejected one offer for the business. He states that he has been quite open with the present liquidators as to his actions. He states also that he has resigned as liquidator of Horizon Printing, and appointed different liquidators in his place. These are liquidators from a recognised insolvency firm. He sets out difficulties he has had in arranging the printing and distribution of a catalogue that is a major part of Retail Media's business. He sets out what he has paid for wages and salaries and other employment related expenses. He gives details of the valuer who is preparing a valuation, and his efforts to sell. He gives evidence that at least one major creditor is not supporting the company, and that this is causing difficulties. He has to get out another catalogue within a short period of time if the company is to remain in business. He states that he has traded Retail Media profitably and that it will continue to generate a profit while he undertakes the sales process.

[74] There has been no significant criticism about any of the steps taken by Mr Gilbert over recent weeks in running the company. On their face his actions all appear to be sensible, and in the company's interests. He appears to be acting within the constraints of the existing without notice orders.

[75] The plaintiffs have not actually sought to stop Mr Gilbert from conducting the business in the meantime. Rather, they have sought to constrain him from selling the business or dissipating any of its assets, particularly by payments to the shareholders of Retail Media. They have sought the appointment of independent liquidators to effectively act as a check on his activities.

[76] I have found that there is a serious question to be tried as to whether Mr Gilbert is in breach of his duties as receiver, and as to whether a replacement liquidator should be appointed. If the assets were sold by Mr Gilbert in breach of duty, the unsecured creditors might never be able to recover against a solvent defendant. This means that the balance of convenience favours the continuation of the orders constraining Mr Gilbert and the liquidators from selling or otherwise disposing of the assets of Retail Media, or making uncontrolled payments to its shareholders, while being allowed to continue to trade. If, as Mr Gilbert states, responsible and vigorous efforts are being made to sell the business, then no unconditional agreement to sell should be entered into without the approval of the plaintiffs or the Court.

[77] Standing back, I consider that a continuation of the orders, modified to make them more practical and clear, is necessary to meet the overall justice of the case.

The particular orders

[78] Through his counsel Mr Gilbert indicated that he was prepared to accept that he could not sell any part of the business without referral to the Court. He requested that he be able to enter into conditional agreements for sale, so that the initial signing was not subject to Court approval. This proposal was only raised very late in the piece, and the plaintiffs did not have a proper opportunity to consider and respond to it, so I am not prepared to make that qualification to the existing orders at this point.

I am, however, satisfied that Mr Gilbert should be able to continue to trade and to pay trade creditors in the ordinary course of business. He must be able to pay wages and rent.

[79] There is a difficult question as to the payment of wages or fees to Messrs Hall and Scott, the existing shareholders. In submissions the defendants indicate that it is desirable that those existing shareholders be retained, as they know how to run the business and can make a useful contribution. The plaintiffs resist any payments to Messrs Hall and Scott on the basis that they have shown themselves to be untrustworthy and not to be acting in the company's interests.

[80] I do not have any information on oath about the role presently played by Messrs Hall and Scott in the running of the business. Nevertheless, I am reluctant to prohibit payments to them. Their ongoing involvement may be essential to the survival of the business. I think it better to set out some guidelines as to payment, and to maintain their co-operation it must be on the basis that they are senior employees entitled to be remunerated accordingly.

[81] I should also observe that paragraph a (v) of the interim orders is broadly worded, and its meaning is unclear. It requires deletion or at the very least significant amendment.

[82] Given the fact that I have not received detailed submissions on the wording of the orders, I propose leaving the wording of orders a (i)-(iv) in place. I propose, however, replacing order a (v) with the following new order:

> b) The receiver is not restrained from paying trade creditors in the ordinary course of business, including payments for wages and rent. However, no payments will be made to the shareholders of Retail Media, or any persons or entities associated with them, save for payments for services rendered, based on a reasonable salary, but for such payments to be in no circumstances based on a salary of more than $150,000 per annum. Any such payments are subject to the

approval of the existing liquidators who will only approve reasonable payments in the ordinary course of business.

[83] The parties have leave to apply to vary these orders. However, counsel should make every effort to resolve any disagreement.

[84] I propose effectively transferring the orders that were made in the liquidation proceedings (CIV-2009-404-003157) to the new proceedings (CIV-2009-404-3898).

Costs

[85] It cannot be said that any of the parties have been wholly successful in relation to these applications, and costs will be reserved.

Summary

[86] I make the following orders in proceedings CIV-2009-404-3898:

a) The second and third defendants are restrained from:

i) Selling or dissipating any undertakings, assets or property of the first defendant;

ii) Procuring any subsidiary of the first defendant to sell or dissipate any undertakings, assets or property;

iii) Entering into any agreements to sell assets or property of the first defendant;

iv) Without limiting the foregoing, selling or agreeing to sell the first defendant's 'Best Buys' or 'Marketing Service' business units, or any other business units;

b) The receiver is not restrained from paying trade creditors in the ordinary course of business, including payments for wages and rent.

However, no payments will be made to the shareholders of Retail Media, or any persons or entities associated with them, save for payments for services rendered, based on a reasonable salary. Such payments are to be in no circumstances based on a salary of more than $150,000 per annum. Any such payments to shareholders or their associates are subject to the approval of the existing liquidators who will only approve reasonable payments for work done since liquidation in the ordinary course of business.

c) Leave is reserved to any party to apply to vary these orders on 12 hours' notice.

[87] I observe that if I am sitting in Auckland it will save time if any application in relation to the orders is made to me.

……..

Asher J