IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1617
[2012] NZHC 3540

UNDER	section 17A Judicature Act 1908
IN THE MATTER OF	an application to appoint liquidators to a trust
BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	DAVID INGRAM ROWLEY AND BARRIE JAMES SKINNER AS TRUSTEES OF TPS ASSET TRUST Defendant Trustees

CIV-2012-485-1618

UNDER	section 17A Judicature Act 1908
IN THE MATTER OF	an application to appoint liquidators to a trust
BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	DAVID INGRAM ROWLEY AND BARRIE JAMES SKINNER AS TRUSTEES OF TPS ASSET NO 2 TRUST Defendant Trustees

Hearing: 12 December 2012

Counsel: J Toebes for plaintiff
No appearance for defendant trustees
G Caro for Official Assignee

Judgment: 19 December 2012

RESERVED JUDGMENT OF DOBSON J

[1] In these proceedings, the plaintiff (the BNZ) has applied for orders to place the defendant trusts into liquidation. The BNZ invites the Court to invoke a jurisdiction in s 17A of the Judicature Act 1908 to take what would appear to be a novel step in ordering that relief.

[2] The factual background and my provisional acceptance of the availability of s 17A to make such orders are recorded in my interim judgment issued in the proceedings on 29 October 2012.[1] I will not repeat those matters here and this judgment should be read with that interim one, which for ease of reference is attached as an annexure to this judgment.

[3] I directed that interim judgment to be served on the Official Assignee, given the nature of the orders I then contemplated. Since then, Mr Caro has filed a series of helpful submissions on behalf of the Official Assignee and Mr Toebes has responded to them on behalf of the BNZ, leading to the hearing I convened on 12 December 2012.

[4] The defendant trusts were used by Messrs Rowley and Skinner as a component of their business structure, which notionally provided accounting services, but, as found in criminal proceedings against them, were also used as a vehicle for conducting fraudulent transactions.[2]

Identity of the trustee(s)

[5] Subsequent to the conviction and imprisonment (and bankruptcy) of Messrs Rowley and Skinner, when served with these present proceedings, Mr Rowley responded that "some time ago" the trusts had appointed a substitute trustee, St George Towers Trustees Limited (St George). In my interim judgment, I recognised that there were doubts as to whether the steps necessary to remove

1 *Bank of New Zealand v Rowley and Skinner* [2012] NZHC 2835.
2 *R v Rowley & Skinner* [2012] NZHC 1778.

themselves and appoint St George as a replacement trustee could have been, or had been, taken in a manner that was legally effective. I suggested then that an appropriate course was to treat Messrs Rowley and Skinner and St George as the trustees of the two trusts for the time being.

[6] Having heard argument from Mr Toebes on the point, I now consider it preferable to treat Messrs Rowley and Skinner as the trustees and to presume that their purported substitution by St George has not occurred in a way that could be legally effective. As Mr Toebes pointed out, the power of appointment is vested in each trust deed in "the parents", an expression which was presumably intended to be defined elsewhere in the deed, but was not. Assuming that the trust deeds intended "the parents" to be Mr and Mrs Rowley and Mr and Mrs Skinner in the case of the respective trusts in which they and their issue were beneficiaries, then there is no evidence to suggest that they completed the necessary deeds to effect the appointment of a new trustee.

[7] There is no evidence to suggest that legal ownership of any assets belonging to the trusts has been transferred to St George, nor has it taken any steps to advance the interests of the trustees, despite being served with papers in these proceedings indicating the type of orders sought and a likelihood that such orders would be made.

[8] Accordingly, I propose that those having any dealings with the trusts for the purpose of implementing the orders in these proceedings should proceed on the assumption that Messrs Rowley and Skinner remain the trustees of each trust. That will remain the position until those with authority to advance the interests of either the trustees or beneficiaries of either trust apply to me on a sufficient evidentiary basis for recognition that St George has indeed been validly appointed as a trustee of either or both trusts.

Jurisdiction to liquidate a trust

[9] The case for appointing liquidators to the trusts (or persons having powers equivalent to those of liquidators) is a compelling one. Messrs Rowley and Skinner guaranteed the repayment of substantial advances made by the BNZ to their

accounting business, not only in their personal capacities but in their capacities as trustees of the trusts. Mr Toebes advised that they procured advances from the BNZ on a representation of assets comprising very significant debtors whom it now seems were a component of their fraudulent schemes. The reasons for verdicts in relation to their fraud convictions identify at least one occasion on which a component of monies paid in relation to fraudulent invoices were channelled to the trusts.

[10] As analysed in my interim judgment, creditors of a trust do not have a direct claim on its assets.[3] Instead, liability for all the trust's debts is attributed to the trustees and they enjoy an indemnity for liabilities assumed out of all trust assets. In the practical sense, an agent for creditors of the trust relies on the indemnity enjoyed by the trustees in seeking recovery out of the assets of the trust to reduce or extinguish the trustees' liability. A trustee's indemnity survives even after they cease holding that position.

[11] The extent and status of any assets of the trusts remains unclear. There is a real risk that the BNZ will not even recover the costs of an actual or quasi liquidation, but Mr Toebes put it in terms that the BNZ has zero tolerance of fraud, and is prepared to commit resources to clarifying the extent of assets and liabilities of the trusts and, if at all possible, reducing the substantial indebtedness owed to it.

[12] On the basis of Mr Toebes's present understanding, it seems likely that the full range of powers available to a liquidator might be necessary to effectively resolve the extent of assets that have been in the trusts, and which potentially have been moved out of them within the relevant period. The prospects of both tracing and following assets are likely to arise.

[13] I am satisfied that the plaintiff's entitlement to the relief sought is made out, but the difficulty lies in the jurisdictional basis for ordering that relief.

[14] Mr Toebes relied on s 17A because, he argued, the literal scope of entities that could be liquidated under that section extends to trusts.[4] He argued that trustees

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3 At [24].

4 The terms of s 17A are set out in [8] of the interim judgment.

appointed to exercise responsibilities under a trust deed constitute an "unincorporated body of persons", and that they are not within any of the excluded categories in s 17A(1)(a) to (c). He urged me to ignore the anomalies that would arise by virtue of the jurisdiction depending on the number and identity of trustees involved. For example, he accepted that if a trust had a single individual as a sole trustee then s 17A would not create jurisdiction for liquidation of that trust, and similarly that the section could not apply if there was a combination of a corporate trustee and one or more individuals. He argued that those limitations on the scope of the jurisdiction created by s 17A should not lead to its exclusion in situations where the trustees comprise two or more natural persons who (so he argued) must be seen as "an unincorporated body of persons".

[15] Mr Caro analysed the origins of s 17A. It came into force on 1 July 1994, to coincide with the coming into force of the Companies Act 1993. Under the prior Companies Act 1955, s 387 and 388 had provided for the winding up of unregistered companies, but those provisions were not brought forward into the 1993 Companies Act. Mr Caro invited me to infer from the coincidence between these provisions that Parliament's intention in s 17A was to address the situation of unregistered companies. Given that context, he argued that there was no basis for attributing to Parliament an intention to use the qualifying notion of an "association" in the different and broader sense that would be needed to cover trusts. This is particularly so as Parliament could have expressly recognised its extension to trusts if it intended to do so, but has not.

[16] Mr Caro invited analogy with the approach adopted by the English Court of Appeal in *Re International Tin Council*.[5] In that litigation, creditors had sought to treat the International Tin Council as an "association" for the purposes of a provision under the United Kingdom Companies Act 1985 allowing for unregistered companies to be wound up. Although in a literal sense, the Tin Council appeared to constitute "an association" as that expression was used in the relevant section, the Court of Appeal identified a range of reasons for excluding it from the scope of entities to which the relevant provision would apply.

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5 *Re International Tin Council* [1989] Ch 309 (CA).

[17] As Mr Toebes observed in reply, the interpretative analysis of the relevant section was not critical to the outcome because the Tin Council constituted an international organisation with sovereign recognition outside the United Kingdom and that status was seen as sufficient to take it outside the scope of "associations" that might be wound up.

[18] However, there is an analogy in assessing the scope that should be attributed to "association" in s 17A. Notwithstanding submissions that "association" was an ordinary word in the English language with a plain and unambiguous meaning which was apt to describe the Tin Council, that approach had been rejected by Millett J at first instance in the following terms:[6]

> It is one thing to give effect to plain and unambiguous language in a statute. It is quite another to insist that general words must invariably be given their fullest meaning and applied to every object which falls within their literal scope, regardless of the probable intentions of Parliament.

[19] In adopting this reasoning on the interpretation issue, the Court of Appeal considered that the word "association" did not include an association which Parliament could not reasonably have intended should be subject to the winding up process.[7]

[20] In the same way, it would be forced and somewhat artificial to describe trustees of a trust as an association merely because in literal terms they constitute an unincorporated body of persons.

[21] Mr Caro also argued that recognising two or more natural persons in their capacity as trustees of a trust as constituting an "association" for the purposes of s 17A would lead to an entirely arbitrary result. Some trusts would be vulnerable to liquidation under s 17A depending on the status of its trustees, but others – being those with either a sole trustee or a corporate trustee – were outside the section. As I have foreshadowed, Mr Toebes responded that such an inconsistency should not deter the Court from assuming jurisdiction, where it applied on its literal terms.

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6 At 329B.
7 At 330.

[22] I agree with Mr Caro that whether any particular trust was, or was not, caught by s 17A would be determined by a criterion that is entirely irrelevant to the rationale for the exercise of an insolvency jurisdiction. Such an outcome adds weight to the submission that Parliament did not intend trusts to come within s 17A.

[23] Mr Caro also argued that a recent review of the law affecting trusts in New Zealand by the Law Commission has adopted the stance that the Court does not have jurisdiction to order the liquidation of a trust.[8] If s 17A did apply to trusts, it is reasonable to infer that the Law Commission's review would have acknowledged that. Instead, its Issues Paper proposes that the law should be amended to clarify that the Court can appoint a receiver to deal with a trust and the trust fund, and provide that a liquidator may also be appointed.[9] The Commission's proposal acknowledges submissions on behalf of the New Zealand Law Society and the Inland Revenue Department, treating this as a gap in the current law on insolvency.

[24] Mr Toebes was persuasive in arguing that s 17A should be treated as extending to the position of trusts because of what he described as their increasing use by unscrupulous debtors to separate assets from those liable for debts incurred, at least in part, in reliance on the apparent availability of the assets to secure repayment. However, I am not persuaded that s 17A can be invoked to address that mischief.

Appointment of receivers

[25] Rejecting the application of s 17A does not leave the BNZ without an appropriate remedy. Mr Caro's submission was that resort to s 17A was unnecessary because of the Court's jurisdiction, either invoking equity or its inherent jurisdiction, to appoint receivers to a trust in circumstances such as the present. Mr Toebes was inclined to resist that alternative as having substantial limitations, for instance in receivers not having the statutory powers of liquidators to compel an examination on oath of the trustees and more generally on account of the limited powers of receivers

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8 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [8.70].

9 At [8.71].

to preserve assets, as distinct from chasing assets, securing them and ultimately distributing them for the benefit of creditors.

[26] Mr Caro's rejoinder was that the scope of any additional powers for a receiver where he or she is appointed not pursuant to the terms of a contractual commitment, but by the Court, is a matter for the Court. He cited proceedings in the Auckland Registry of this Court involving one of the directors of Five Star Consumer Finance Limited.[10] There, receivers over all the trust property were, after a period of appointment on more limited terms, authorised to exercise the powers conferred upon liquidators pursuant to ss 261 to 267 and ss 273 to 274 of the Companies Act 1993 as if the trust were a company in liquidation and the settlor, trustees (past and present) and beneficiaries of the trust were the directors and shareholders of a company in liquidation.

[27] The more limited powers generally enjoyed by receivers in comparison with the range of powers available to liquidators is entirely appropriate. Receivers are usually appointed pursuant to a contractual commitment made by the debtor in favour of a particular secured creditor. Receivers' powers derive essentially from that contractual bargain and they have the substantially narrower focus of preservation of the interests of the appointing creditor. In contrast, liquidators are empowered by statute to undertake a wider range of activities in the interests of all unsecured creditors, subject to their ability to seek directions from the Court that orders their appointment in the first place. Although receivers will be appointed in this case at the behest of a specific creditor, the exercise of additional powers more usually available to liquidators should not produce any advantage for the creditor taking the initiative over others who share an equal entitlement to any distributions from the receivership. I intend to make orders on terms that will reflect that position.

[28] I raised with Mr Toebes the prospect of an appointment of receivers on terms granting them all of the powers of a company liquidator under Part 16 of the Companies Act 1993, to the extent that the exercise of such powers may become appropriate. On reflection, I consider that the slightly narrower order conferring

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[10] *Yates as Trustee of the Bowden No 14 Trust ex parte Five Star Consumer Finance Ltd (in rec)* HC Auckland CIV-2007-404-7927, order granting additional powers to Court appointed receivers, 7 April 2008.

powers under the sections identified in the Five Star Consumer Finance proceedings is appropriate.

[29] The Court's jurisdiction to appoint receivers tends to be confined to an appointment in respect of particular assets, or to circumstances in which the assets are ascertained. I am mindful that neither the BNZ as a vitally interested creditor, nor the Official Assignee as the trustee in bankruptcy of Messrs Rowley and Skinner in their personal capacities, can identify any existing assets, in respect of which a receivership could be ordered on more specific terms. I am satisfied that, in the present context, that should not deflect the Court from invoking its inherent jurisdiction. A case has been made out for intervention in the nature of a quasi liquidation, and ascertainment of the assets is itself an appropriate component of the rationale for making orders.

[30] A further relevant consideration is that conferring powers for an external authority to deal with trust assets has the potential to affect the interests of beneficiaries which is an important additional category to the interests of debtors and creditors that arise in company liquidations. In the present case, it seems more likely that different interests may arise for creditors with claims against trust assets, as compared with creditors of Messrs Rowley and Skinner in their personal capacity. Messrs Caro and Toebes agreed that that contingency can be adequately provided for. It seems most likely that the trusts will be insolvent in the sense that valid claims against the trustees in respect of which they will have a right of indemnity out of trust assets will exceed the value of trust assets. In that event, it is most unlikely that there would be circumstances in which there would be a contest between liquidators seeking to maximise the return to unsecured creditors, and beneficiaries. It appears from the terms of the trust deeds that no beneficiaries have a vested interest in any property and all those identified are merely discretionary beneficiaries who could not assert claims to specific assets.

[31] An obvious expedient is to rationalise the process so that unnecessary expense involved in referring the matter back to the Court can be avoided as much as possible.

[32] The BNZ originally proposed two identified insolvency practitioners as liquidators. In my interim judgment, I indicated a provisional view against appointing those who had been nominated, and instead contemplated the appointment of the Official Assignee. In doing so, I was not intending to suggest any adverse judgment against the character or relevant skills of either of those insolvency practitioners. I had no view on relatively how well they would do the job, and preferred an appointment of the Official Assignee solely on the basis that, as advised at that stage, it appeared to be more efficient to have the same person in control of the insolvency of Messrs Rowley and Skinner in their personal capacities, and in control of what is effectively their insolvency in their capacity as trustees of the trusts. Notwithstanding that, on the present argument Mr Toebes was instructed to advance alternative names. Without opposition from Mr Caro, I am prepared to make orders in relation to the currently proposed insolvency practitioners, to have standing as receivers although the nature of their work is likely to be akin to that of quasi liquidators.

Orders

[33] Accordingly, as discussed with counsel at the conclusion of the hearing, I decline to make orders appointing liquidators to the trusts. Instead, I invoke the Court's inherent jurisdiction to make orders in the following terms:

(a) Appointing John Howard Ross Fisk and Jeremy Michael Morley, both chartered accountants of Wellington, to be Court appointed receivers of all assets of the TPS Asset Trust and the TPS Asset No 2 Trust.

(b) The Court's appointment of the receivers is on terms that they are empowered to exercise, in respect of each trust, the powers conferred upon liquidators pursuant to ss 261 to 267 inclusive and ss 273 to 274 inclusive of the Companies Act 1993 as if the trusts were a company in liquidation and the settlor and the trustees (past and present) were the directors of a company and the beneficiaries of the trusts were the shareholders of a company in liquidation.

(c) The exercise by the receivers of such powers under those sections of the Companies Act may be subject to challenge on application to the Court by any person claiming that his, her or their interests are adversely affected by the exercise of such powers.

(d) The receivers are to have the powers to identify, trace and follow assets of the trusts, and to realise all such assets.

(e) The receivers will require a Court order prior to making any distribution to creditors out of net realisation of trust assets and any such application is to be on notice to the Official Assignee. The appointment of receivers on the application of the BNZ is not to give that creditor any priority over other creditors having the same ranking of claims against the trusts, except in respect of (f) below.

(f) The BNZ is entitled to costs on the present proceedings, such entitlement being limited to recourse to assets of the trusts that are realised in the course of the receivership.

Dobson J

Solicitors:
JT Law, Wellington for plaintiff
Office Solicitor, Ministry of Business, Innovation and Employment for Official Assignee

Annexure

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1617
[2012] NZHC 2835

UNDER	section 17A Judicature Act 1908
IN THE MATTER OF	an application to appoint liquidators to a trust
BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	DAVID INGRAM ROWLEY AND BARRIE JAMES SKINNER AS TRUSTEES OF TPS ASSET TRUST Defendant Trustees

CIV-2012-485-1618

UNDER	section 17A Judicature Act 1908
IN THE MATTER OF	an application to appoint liquidators to a trust
BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	DAVID INGRAM ROWLEY AND BARRIE JAMES SKINNER AS TRUSTEES OF TPS ASSET NO 2 TRUST Defendant Trustees

Hearing: 18 September 2012

Counsel: J W G Grant for plaintiff
No appearance for defendant trustees

Judgment: 29 October 2012

INTERIM JUDGMENT OF DOBSON J

[1] This interim judgment addresses the first stage of what appear to be novel proceedings in which the plaintiff (the BNZ) invokes s 17A of the Judicature Act 1908 in seeking orders for the liquidation of two trusts, or alternatively for orders operating against the trustees of those trusts to effect the same outcome.

[2] The individuals who were originally sued as defendants in the proceedings (Messrs Rowley and Skinner) were at the relevant time in business as tax advisers. For the purposes of their business, they used an incorporated company, TPS Accounting Limited (TPS Accounting), as a relevant vehicle. In January 2003, they formed two trusts, one each for the interests of the other of them and that individual's wife and family, to which it was intended that proceeds of the business be transferred.

[3] TPS Accounting borrowed certain amounts from the BNZ and that indebtedness was the subject of guarantees granted by Messrs Rowley and Skinner, both in their personal capacity and in their capacity as trustees of the trusts.

[4] On 17 August 2012, Messrs Rowley and Skinner were convicted of numerous counts of fraud, tax evasion and attempting to pervert the course of justice. They have subsequently been sentenced to eight years' imprisonment and eight and a half years' imprisonment respectively.

[5] TPS Accounting was placed in receivership on 25 August 2011 and subsequently placed in liquidation on 7 May 2012.[1] Messrs Rowley and Skinner were adjudicated bankrupt on 30 July 2012.

[6] It is clear, however, that the orders for their bankruptcy operate only to vest in the Official Assignee property that was not held by the bankrupt in trust for another person.[2]

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1 *Bank of New Zealand v TPS Accounting Ltd* [2012] NZHC 899.
2 Insolvency Act 2006, s 4.

[7] In the present proceedings, the BNZ has sought to invoke the Court's jurisdiction under ss 17A, 17B and 17C of the Judicature Act 1908.

[8] The first of those sections provides as follows:

> **17A Jurisdiction as to liquidation of associations**
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> (1) In this section, association includes any partnership, company, or other body corporate, or unincorporated body of persons other than—
>
> (a) A company or an overseas company, as defined in section 2 of the Companies Act 1993; or
>
> (b) A company as defined in section 2 of the Companies Act 1955; or
>
> (c) A body corporate that may be put into liquidation in accordance with the provisions of any Act under which it is constituted.
>
> (2) The Court has jurisdiction to appoint a named person or an Official Assignee for a named district as the liquidator of an association.
>
> (3) An application for the appointment of a liquidator may be made by the association or a director or member or creditor or the Registrar of Companies.
>
> (4) The Court may appoint a liquidator if it is satisfied that—
>
> (a) The association is dissolved or has ceased to carry on business or is carrying on business solely for the purpose of terminating its affairs; or
>
> (b) The association is unable to pay its debts; or
>
> (c) It is just and equitable that the association be put into liquidation.

[9] There is no definition in the Judicature Act of "association" or "unincorporated body of persons" but in other contexts the expression is defined as including trustees of a trust.[3] Provisionally therefore I accept that s 17A of the Act creates the jurisdiction to appoint a liquidator if the Court is satisfied of one of the conditions for doing so in s 17A(4).

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[3] See, for example, Goods and Services Tax Act 1985, s 2 and Child Support Act 1991, s 2.

[10] I am also satisfied that the trusts are unable to pay their debts. In July 2011, the BNZ made demand on the trusts by their trustees pursuant to their guarantees in respect of the indebtedness of TPS Accounting. Then, in April 2012, the BNZ obtained judgment against the trustees as trustees of these trusts for the sum of approximately $509,700. The BNZ contends that at no stage have the trustees denied or disputed their liability and the full amount remains outstanding.

[11] The jurisdiction for making orders of the type sought therefore appears to exist.

[12] Initially, the BNZ sought orders that liquidators be appointed to the trustees, Messrs Rowley and Skinner. That is understandable, given that legal ownership of all assets of the trusts, and the assumption of liabilities in relation to the trusts, must be in the names of, and assumed by, the trustees. Given the absence of separate legal identity for the trusts as entities able to enjoy legal ownership of assets, there is an artificiality about contemplating liquidating "the trusts".

[13] However, more recently the BNZ has filed amended statements of claim in which it seeks that the trusts be placed in liquidation. That change may be motivated, at least in part, by each of the trustees apparently conveying to those responsible for serving the original documents on them in Rimutaka Prison that they had purported to resign their position as trustee.

[14] When the proceedings were called on 18 September 2012, I invited Mr Grant to provide me with copies of the trust deeds. On the basis of the terms of the trust deeds, it appears at least to be arguable that the trustees cannot unilaterally or informally "resign". The trust deeds appear not to make specific provision for "resignation" and a somewhat narrower provision for trustees to surrender powers, authorities or discretions reposed in them would require the completion of a deed.

[15] It is to be expected that the trust deeds would be interpreted in a way promoting continuity, and certainly to avoid the possibility that the trusts might fail in the absence of duly appointed trustees, in which case any assets would become vulnerable to assignment to the Crown on *bona vacantia*.

[16] After I had traversed the matters reviewed above, and others, with Mr Grant at the hearing on 18 September 2012, I had drawn to my attention a letter written by Mr Rowley from Rimutaka Prison dated 16 September 2012. The letter was apparently received by the Court Registry on 19 September 2012.

[17] In that letter, Mr Rowley advised that he and Mr Skinner had been replaced as trustees "some time ago" by a sole corporate trustee, namely St George Towers Trustees Limited (St George). I directed that a copy of the letter was to be referred to solicitors for the BNZ, and subsequently received a memorandum from them dated 27 September 2012. In that memorandum, counsel addressed impediments to the relief sought that had been raised by Mr Rowley's communication, and reiterated the application that the orders be made as sought.

[18] Notwithstanding the content of the memorandum of 27 September 2012, I directed that all the documents filed thus far in the proceedings be served on St George at its registered office, including a copy of my Minute of 2 October 2012 which directed that step. I indicated that that company would have a period of 10 working days after service to file and serve documents making out grounds for opposition to the orders sought on behalf of the BNZ.

[19] Solicitors for the BNZ have confirmed that service was effected on 9 October 2012. Accordingly, any steps were required to be taken by St George by 23 October 2012. No documents have been filed.

[20] In those circumstances, the prospect remains that either or both of Messrs Rowley and Skinner have taken steps purporting to resign as trustees and appointing a new corporate trustee, but that such steps are legally ineffective. The appropriate course to adopt, until the lawfulness of any change of trustees is clarified, is to treat Messrs Rowley and Skinner and St George as the trustees of the two trusts for the time being.

[21] I was advised by Mr Grant at the hearing on 18 September 2012 that the trusts do not operate bank accounts with the BNZ, and that the BNZ has no reliable

information as to the extent of assets of the trusts. Nor does it have information in relation to debts owed by the trusts to other creditors.

[22] There is a similar dearth of information as to the identity and ages of beneficiaries. Although it may be possible to deduce indirectly the scope of the immediate families apparently intended by the settlors as the discretionary and final beneficiaries of each of the trusts, that is also not entirely clear. It may be that the draftsperson of the trust deeds intended to include a definition of "parents" that appears to have been omitted. For present purposes, I assume that the beneficiaries include the wives and children of Messrs Rowley and Skinner. It is also appropriate to assume that the beneficiaries of the trusts include minors.

[23] Depending on the financial position of the trusts, a range of issues may need to be addressed as to how the interests of other creditors of the trusts are appropriately recognised and protected, and similar issues arise in respect of the beneficiaries of the trusts.

[24] As a matter of law, creditors of a trust do not have a direct claim on its assets. The route to satisfaction of a creditor's claim is to assert subrogation to the rights of indemnity that the trustee has, in respect of liabilities assumed by the trustee in relation to the conduct of the business of the trust.[4] Here, the trust deeds include an indemnity for the trustees to resort to the assets of the trust in respect of liabilities they incur, except in the case of fraud.[5] I proceed on the provisional assumption that the trustees would, in present circumstances, be entitled to rely on that indemnity, but acknowledge that this is also an issue that may need closer consideration, given that Messrs Rowley and Skinner appear to have involved the trusts in the criminal conduct leading to their convictions.

[25] In these circumstances, I am minded to order that liquidators be appointed in respect of the assets and liabilities held by all or any of the trustees of the trusts, on terms requiring the liquidators to ascertain promptly:

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4 See, for example, Paul Heath and Michael Whale *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [46.4(b)].

5 See para 20 of the trust deeds.

- the status of trustees of the trusts;

- the state of assets and liabilities of the trusts by reference to the last set of financial statements prepared for each trust, together with all accounting and other records available to reflect movements of financial position since the last balance date;

- the pattern of any distributions from the trusts to creditors and beneficiaries of the trusts; and

- the identity and ages of the beneficiaries of each trust.

[26] I am minded to direct that such steps be taken by the liquidators within 42 days of their appointment and that, depending on the outcome of those steps, the liquidators are to report to the Court on their view as to:

- the identity of creditors and/or beneficiaries with a sufficient interest to warrant their being served with the proceedings and the liquidators' report;

- the liquidators' recommendation for future steps in the liquidation; and

- any additional initiatives the liquidators consider appropriate and for which additional court orders may be required.

[27] As to the identity of the appropriate liquidators, the BNZ's applications seek the appointment of insolvency practitioners in private practice, Messrs Barry Phillip Jordan of Wellington and Grant Stephen Jarrold of Christchurch. In the submissions I heard from Mr Grant, he acknowledged that solicitors for the BNZ have been liaising with personnel in the office of the Official Assignee who are responsible for administering the estates in bankruptcy of Messrs Rowley and Skinner in their personal capacity. Risks of inefficiency or duplication arise if those charged with liquidating the assets held in the legal ownership of Messrs Rowley and Skinner in their capacity as trustees are separated from the administration of their personal

bankruptcies. I accordingly would propose the appointment of the Official Assignee in lieu of the form of order sought by the BNZ.

[28] However, in the first instance, I direct that all the pleadings filed on behalf of the BNZ, together with the terms of this interim judgment, be served on the Official Assignee. A copy of this interim judgment is also to be served on St George. I invite written submissions be filed and served within seven days after service of the documents and/or this judgment on behalf of any of the BNZ, the Official Assignee or St George, to the extent that they would propose a course different to that which I have set out.

Dobson J

Solicitors:
JT Law, Wellington for plaintiff