IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1806
[2022] NZHC 1422

UNDER	Parts 10 and 12 of the Companies Act 1993
BETWEEN	SIR GEORGE VJECESLAV FISTONICH First Applicant
	FFWL LTD (in receivership) Second Applicant
AND	BRENDON JAMES GIBSON and NEALE JACKSON First Respondents
	FFWL LTD (in receivership) Second Respondent
	VILLA MARIA ESTATE LTD Third Respondent

Hearing:	7 June 2022
Counsel:	J Farmer QC and J Carlyon for the Applicants A Ross QC and D J Friar for the First and Second Respondents Appearance excused for counsel for Third Respondent
Judgment:	16 June 2022

JUDGMENT OF VAN BOHEMEN J
[on application for ruling on retention of funds by receivers]

This judgment was delivered by me on 16 June 2022 at 3.00 pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Introduction

[1] The applicants, Sir George Fistonich and FFWL Ltd (in receivership), seek an order that the first respondents, Brendon Gibson and Neale Jackson (the receivers), are not entitled to retain, from surplus funds following the sale of FFWL's assets and payment of its debts, $5.16 million to cover the costs of defending actual and forecast claims by the applicants against the receivers.

[2] The application is directed principally at obtaining a ruling on whether, as a matter of law, the receivers have a right to retain funds to meet the costs of litigation where neglect, default or breach of duty are alleged against them. However, counsel for the applicants also sought to put in issue the reasonableness of the sum the receivers propose to retain.

Relevant background

[3] The application arises in the context of the sale of the business and land associated with the Villa Maria winery, which was established approximately 60 years ago by Sir George Fistonich and which has been owned and operated through Villa Maria Estate Ltd (Villa Maria).

[4] In 2019, ANZ Bank and Rabobank (the Banks), who had extended substantial loans to Villa Maria and were joint security holders over its assets, had concerns about the governance and management of Villa Maria and its debt levels. At the direction of the Banks, Villa Maria was restructured in accordance with recommendations of Advisory 525 Ltd, a company of which the receivers are directors.

[5] Under the restructure, FFWL was incorporated as the holding company for Villa Maria. Sir George ceased to be a director of or involved in the day-to-day business of Villa Maria, despite owning all of the shares in FFWL. He was also a director of FFWL but was not involved in the management oversight of Villa Maria.

[6] In 2020, Sir George agreed to a process by which the business and assets of Villa Maria would be offered for sale. Sir George had no direct involvement in the sale process, which led to offers for the purchase of the Villa Maria business for

$172.5 million by Scales Corporation Ltd and for the purchase of surplus land for $75 million by Goodman Property Trust Ltd. The Banks considered these offers to be acceptable. However, Sir George refused to agree to the proposed sales at those prices.

[7] Sir George's refusal triggered an event of default under the Banks' facility agreement.

[8] In May 2021, Mr Gibson and Mr Neale were appointed receivers of FFWL. They continued the sales process already in train. They agreed to sell the Villa Maria business to Indevin Ltd for $190 million and to sell the surplus land to Goodman Property Trust for $75 million.

[9] Sir George disputes the acceptability of the sales at those prices. He says better prices would have been obtained if the receivers had been prepared to entertain sales to overseas persons.

[10] After the repayment of bank debt from the sale proceeds, there was a surplus of approximately $40 million.

[11] The receivers intend to retire from their receivership by the end of June 2022. They propose to pay the surplus to FFWL, subject to the retention of $5.16 million to pay their fees and legal costs they expect to incur in claims brought or to be brought against them by Sir George and FFWL.

[12] The sum proposed to be retained comprises:

(a) $3.66 million, for estimated legal costs and disbursements for defending the proceedings; and

(b) $1.5 million, for estimated receivers' fees and related costs in defending the proceedings.

[13] The applicants contest the receivers' right to retain any of the surplus.

Proceedings on foot and in prospect

[14] In September 2021, Sir George and FFWL, as authorised by three of its directors, applied for orders that the receivers and FFWL provide the applicants with all documents relating to the sale of the land and business of FFWL (the information application).[1] The information application was set down for hearing on 7 and 8 June 2022.

[15] In November 2021, Sir George and FFWL brought a separate proceeding against the receivers concerning the conduct of the receivership and the sale of the land (the redemption proceeding).[2] In the statement of claim, the plaintiffs allege that the receivers breached duties owed to Sir George as a director and shareholder of FFWL not to frustrate his power to exercise FFWL's right of redemption and to the plaintiffs to exercise their powers in good faith and for a proper purpose. A case management conference for the redemption proceeding has been set down for a date after 29 July 2022.[3]

[16] As confirmed by the applicants' counsel, Mr Farmer QC, the applicants intend to file a further proceeding against the receivers alleging that the receivers negligently sold assets at an undervalue in breach of their duty under s 19 of the Receiverships Act 1993.

[17] There are, therefore, two current proceedings against the receivers and a third proceeding is clearly in prospect.

Procedural issues

[18] The applicants did not formally apply for a ruling on the receivers' right to retain part of the surplus funds. Rather, in a memorandum dated 16 May 2022, the applicants' counsel asked that the receivers' entitlement to the retention be determined at the hearing of the information application on 7 June 2022. The memorandum did not address the reasonableness of the amount of the retention.

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1 *Fistonich v Gibson* Auckland HC CIV-2021-404-1806.
2 *Fistonich v Gibson* Auckland HC CIV-2021-404-2334.
3 Minute of Gardiner AJ of 10 May 2022.

[19] In a memorandum dated 18 June 2022, counsel for the receivers consented to the entitlement to the retention being determined at the hearing on 7 and 8 June 2022. In the absence of a pleading, they proposed that the question for the Court be:

> Whether the receivers have a right to withhold a retention to defend allegations of neglect, default or breach of duty against the receivers.

[20] The receivers' counsel proposed that timetable directions for the hearing be made based on a timetable circulated by the applicants and agreed by the receivers.

[21] The applicants did not respond to this memorandum.

[22] By minute dated 23 May 2022, Toogood J made the timetable directions proposed and ordered that the question of the retention be included in the hearing of the information application on 7 and 8 June.

[23] By joint memorandum dated 3 June 2022, counsel for all parties to the information application advised that the applicants were engaged in reviewing in excess of 12,000 documents recently provided by the receivers. Counsel proposed that the information application be adjourned to a date in August 2022 but that the fixture on 7 June 2022 be used to consider the application for a ruling on the receivers' retention of funds.

[24] By minute dated 7 June 2022, I made the orders requested.

Submissions by counsel for applicants

[25] Mr Farmer says that the applicants accept a receiver is ordinarily entitled to an indemnity and lien in respect of their costs as recognised by the Court of Appeal in *RA Price Securities Ltd v Henderson*.[4] He submits, however, that indemnity is not available in respect of claims concerning a receiver's own breach of duty, especially where the alleged breach concerns the receivers' duty to obtain the best reasonably obtainable price when realising company assets. In support of that submission,

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4 *R A Price Securities Ltd v Henderson* [1989] 2 NZLR 257 (CA).

Mr Farmer refers to ss 19 and 20 of the Receiverships Act; commentary by Blanchard and Gedye in *The Law of Private Receivers of Companies in New Zealand*;[5] a decision of Needham J in the Supreme Court of New South Wales in *Expo International Pty Ltd v Chant (No 2)*;[6] and a High Court decision of Pankhurst J in *Taylor v Bank of New Zealand*, which found that s 20 of the Receiverships Act precluded a receiver's right to indemnity where a breach of the duty in s 19 to obtain the best price reasonably obtainable at the time of sale was alleged.[7]

[26] Mr Farmer says that, as a matter of practicality, both proceedings currently on foot, as well as that in prospect, concern a breach of the receivers' duty under s 19 because it was the receivers' failure to obtain the best price for the assets that necessitated the information application and prevented the exercise of the power of redemption. In addition, the damages sought in the redemption proceeding are the difference between the sale prices the applicants say should have been obtained and the prices actually obtained.

[27] Mr Farmer says that Australian cases relied on by the receivers in support of their asserted right to retain funds are of limited relevance both because there is no equivalent to ss 19 and 20 in Australia and because those cases are particular to their own circumstances. He also notes that some of the Australian cases suggest that any right to retain funds is limited only to Court-appointed receivers and does not extend to receivers appointed privately by a security holder.

[28] Mr Farmer says the effect of the receivers' proposed retention, if approved, would be to require the applicants to fund both their claims against the receivers and the receivers' defence of those claims. He says that if the receivers are concerned about their costs being met if they succeed, they should seek security for costs in accordance with the High Court Rules 2016.

[29] Mr Farmer also submits that, even if the Court should accept that the receivers have a lien over the assets of the company in order to secure costs incurred in

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5 Peter Blanchard and Michael Gedye *The Law of Private Receivers of Companies in New Zealand* (3rd ed LexisNexis, Wellington 2008).

6 *Expo International Pty Ltd v Chant (No 2)* (1980) 5 ACLR 193 (NSWSC).

7 *Taylor v Bank of New Zealand* [2011] 2 NZLR 628 (HC) at [257].

defending proceedings brought against them, the right to retain funds is limited to such amount as may be required to meet their reasonable costs. Mr Farmer notes that the sum of $3.16 million that the receivers propose to retain has not been particularised and submits that that amount is unreasonable. Mr Farmer further submits that any funds retained cannot be spent until the outcome of the litigation is known.

Submissions by counsel for receivers

[30] Mr Ross QC, counsel for the receivers, says it is common ground that a receiver has no indemnity from the property of a company in receivership where it has been held that the receiver has breached their duties to the company or its directors. However, he submits that ss 19 and 20 of the Receiverships Act and the commentators and authorities referred to by Mr Farmer do not support the proposition that a receiver does not have the power to withhold a retention to meet the reasonably anticipated costs of defending allegations of breach of duty prior to the determination of the alleged breach. He accepts, however, that if a receiver is later found to have breached their duties, they must account for the funds retained.

[31] Mr Ross questions whether the redemption proceeding is limited to the receivers' duty to obtain the best reasonably obtainable price and is covered by s 20(b) of the Receiverships Act. However, Mr Ross says that is of no moment because s 20(b) simply restates existing law and does not preclude the receivers from asserting a lien over company funds to meet their costs in defending litigation alleging breach of their duties generally. Mr Ross says s 20 deals only with a receivers' right to an indemnity after it has been found that the receivers have breached their duties under s 19 and does not preclude a receivers' right to retain and use company funds prior to such a finding. Mr Ross says Pankhurst J's comments to the contrary in *Taylor* were obiter, were made without the benefit of argument by counsel and were clearly wrong.

[32] Mr Ross says Needham J's decision in *Chant (No 2)*[8] does not support the applicants' argument. He says that is apparent from an earlier decision in the same proceeding in which Needham J declined to order the return of surplus funds retained

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8 *Expo International Pty Ltd v Chant (No 2)*, above n 6.

by the receivers when litigation against them was in prospect.[9] Mr Ross also says the decisions of French J in the Federal Court of Australia, in *Australian Securities Investment Commission v Lanepoint Enterprises Pty Ltd*,[10] and of Le Miere J in the Supreme Court of Western Australia, in *Korda v Silkchime Pty Ltd*,[11] are on point and confirm there is no barrier to a receiver asserting a lien over company funds and using those funds to defend litigation asserting a breach of the receiver's duties. Mr Ross observes that those decisions concerned privately appointed receivers. In any event, he submits there is no logical basis for distinguishing between the right of a Court-appointed receiver and that of a privately appointed receiver to assert a lien and to retain funds to defend litigation alleging breach of the receiver's duties.

[33] Mr Ross also submits that a receiver's ability to apply for security for costs does not go to the receiver's entitlement to make provision for expenses incurred by them in connection with their receivership, including the defence of proceedings brought against them by the company in connection with their conduct of the receivership. Mr Ross says to accept otherwise would stand on its head accepted law regarding the rights of receivers to have recourse to company funds to meet costs incurred in the exercise of their duties. He submits that public policy supports a receivers' right to retain funds for their costs in defending legal proceedings for their costs, even where breach of duties is alleged.

The Receiverships Act 1993

[34] Sections 18, 19 and 20 of the Receiverships Act provide:

> **18 General duties of receivers**
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> (1) A receiver must exercise his or her powers in good faith and for a proper purpose.
>
> (2) A receiver must exercise his or her powers in a manner he or she believes on reasonable grounds to be in the best interests of the person in whose interests he or she was appointed.
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> (3) To the extent consistent with subsections (1) and (2), a receiver must exercise his or her powers with reasonable regard to the interests of—

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9 *Expo International Pty Ltd v Chant* (1979) 3 ACLR 888 (NSWSC).

10 *Australian Securities Investment Commission v Lanepoint Enterprises Pty Ltd* [2006] FCA 1493, (2006) 64 ATR 524.

11 *Korda v Silkchime Pty Ltd* [2010] WASC 155, (2010) 243 FLR 269.

(a) the grantor; and

(b) persons claiming, through the grantor, interests in the property in receivership; and

(c) unsecured creditors of the grantor; and

(d) sureties who may be called upon to fulfil obligations of the grantor.

(4) Where a receiver appointed under a deed or agreement acts or refrains from acting in accordance with any directions given by the person in whose interests he or she was appointed, the receiver—

(a) is not in breach of the duty referred to in subsection (2); but

(b) is still liable for any breach of the duty referred to in subsection (1) and the duty referred to in subsection (3).

(5) Nothing in this section limits or affects section 19.

19 Duty of receiver selling property

A receiver who exercises a power of sale of property in receivership owes a duty to—

(a) the grantor; and

(b) persons claiming, through the grantor, interests in the property in receivership; and

(c) unsecured creditors of the grantor; and

(d) sureties who may be called upon to fulfil obligations of the grantor—

to obtain the best price reasonably obtainable as at the time of sale.

20 No defence or indemnity

Notwithstanding any enactment or rule of law or anything contained in the deed or agreement by or under which a receiver is appointed,—

(a) it is not a defence to proceedings against a receiver for a breach of the duty imposed by section 19 that the receiver was acting as the grantor's agent or under a power of attorney from the grantor:

(b) a receiver is not entitled to compensation or indemnity from the property in receivership or the grantor in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section 19.

Discussion

[35] It is common ground between counsel for the applicants and the receivers that a receiver is ordinarily entitled to an indemnity and lien in respect of their costs incurred in the carrying out their duties as receiver.

[36] As stated by Blanchard and Gedye in *The Law of Private Receivers of Companies in New Zealand*:[12]

> **6.08 Receiver's indemnity from charged assets**
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> A receiver who in good faith incurs personal liability in the course of carrying out the duties of the receivership is entitled to be indemnified by the company against that liability out of the charged assets. This indemnity extends also to the receiver's fees. Often this indemnity is provided for in the security agreement under which the receiver is appointed but the right to an indemnity, even in the absence of such a contractual indemnity exists under the general law. … The right is both a right to claim indemnity from the company as its creditor and a right of recourse against the charged assets to give effect to the indemnity. … The receiver has an equitable lien on the charged assets as a means of securing and enforcing the company's liability to indemnify.
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> …
>
> An equitable lien … is non-possessory, although it does confer a right of possession, superior to that of a replacement receiver, the secured creditor or the company. Regardless of whether or not the charged, or formerly charged, assets are in the possession of the receiver, the receiver can continue to claim the lien until reimbursed by the company and freed from personal liability. This applies notwithstanding that the receiver is dismissed from office and even when the receiver is replaced by a Court-appointed receiver. …

[37] The above analysis is based on principles of general law and is not contingent on the provisions of the Receiverships Act.

Is there a distinction between Court-appointed and privately appointed receivers?

[38] The analysis in Blanchard and Gedye also makes no distinction between Court-appointed and privately appointed receivers, as is implicit in the final sentence in the above extract. The distinction that was discussed but not applied in *Chant*, *Lanepoint Enterprises* and *Korda v Silkchime* arose out of an earlier decision of the Supreme Court of Victoria about the applicability in that case of particular provisions in the

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12 Peter Blanchard and Michael Gedye, above n 5 (footnotes omitted).

Companies Act 1961.[13] The Victorian decision did not constrain the Courts in *Chant*, *Lanepoint Enterprises* and *Korda v Silkchime* from recognising a general right of a receiver to retain, and to have a lien over, the assets of the company in order to meet a receiver's costs of defending litigation brought by the company, irrespective of whether or not the receiver had been appointed by the Court.

[39] I am satisfied, therefore, that there is no basis for making a distinction between the entitlement of Court-appointed and privately appointed receivers to assert a lien over company assets and to retain funds to defend proceedings brought against them.

The limitation to indemnity

[40] Blanchard and Gedye go on to discuss where the receiver does not have indemnity. They state:[14]

> **6.09 No indemnity in relation to neglect, default etc**
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> Receivers are not entitled to an indemnity from the company in respect of claims against them arising out of any neglect, default, breach of duty or breach of trust on their part, whether the claim is made by the secured creditor or another party. "It is trite law that an agent is not entitled to be indemnified by his principal against losses or liabilities incurred in consequence of his own negligence or default." So the receiver will be to bear his or her own liabilities and expenses to the extent to which they relate to allegations of impropriety which are made out.
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> Section 20(b) of the Receivers Act confirms that a receiver is not entitled to compensation or indemnity from the property in respect of liability for a breach of the duty imposed by s 19 to sell assets at the best price obtainable at the time of sale. It is unlikely that the absence of a comparable provision relating to the general duties under s 18 will mean that the rule under the general law referred to earlier in this paragraph has no operation in such a case.

[41] The quotation in the first paragraph above is from the judgment of Somers J in *RA Price Securities*.[15] That decision concerned a receiver's right to retrospective indemnity for costs incurred in circumstances where the receiver was held to have been negligent. The Court of Appeal's decision did not consider the situation where

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13 *Re High Crest Motors Pty Ltd (in liq)* (1978) 3 ACLR 564 (VSC). See discussion of Needham J in *Expo International Pty Ltd v Chant*, above n 9, at 891.

14 Peter Blanchard and Michael Gedye, above n 5(footnotes omitted).

15 *R A Price Securities Ltd*, above n 4.

negligence had been alleged but had not been determined. In that respect, the decision does not assist the applicant's case.

[42] The sentence following the quotation of Somers J references *Chant (No 2)*, which also concerned the right of a receiver for indemnity after the receiver's impropriety had been made out. In that respect, *Chant (No 2)* also does not assist the applicant's case.

Does the Receivership Act add to or qualify the general law limitation?

[43] It is apparent from the discussion of ss 18, 19 and 20 of the Receivership Act in the second paragraph above that Blanchard and Gedye consider s 20(b) confirms rather than adds to the general law that a receiver has no right to indemnity where there has been a breach of a receiver's duties. It is also apparent that the authors consider the fact s 20(b) addresses the particular situation where a receiver has breached the duty to obtain the best price reasonably obtainable does not mean that a receiver has a right to indemnity where other duties have been breached. There is nothing in the commentary, therefore, that suggests that ss 19 and 20 have changed the law, whether as to the scope of indemnity or the circumstances where it may arise. Nor is there any discussion in Blanchard and Gedye of the essential proposition that the applicants advance in the present case, namely that there is no right to a lien over the company's assets where a breach of duty has been alleged but is yet to be established.

[44] French J discussed that proposition in *Lanepoint Enterprises*.[16] French J accepted that, as a matter of general principle, a receiver has a general entitlement to deduct and to retain, out of funds realised from a company's assets, the receiver's costs charges and expenses, including the costs of defending themselves from unsuccessful claims against them.[17]

[45] In that case, the question arose as to whether the entitlement to indemnity was precluded by ss 199A(2) and (3) of the Corporations Act 2001 of Australia. Those sections provide that a company must not indemnify a person against legal costs

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16 *Australian Securities Investment Commission v Lanepoint Enterprises Pty Ltd*, above n 10.
17 At [47] – [48].

incurred in defending proceedings in which that person is found to have a liability to the company. French J was satisfied the sections did not prevent a company from indemnifying a person from legal costs incurred in successfully resisting proceedings brought against that person and arising out of an asserted liability to the company. French J was also of the opinion that the sections did not prevent a company from making provision for such a purpose.[18]

[46] While the language and focus of ss 199A(2) and (3) of the Corporations Act of Australia differ from ss 19(b) and 20(b) of the New Zealand Receivership Act, the essential point at issue in the Australian cases and in the present application is the same. That is, do the sections preclude the application of the general principle, accepted by the applicants and the receivers, that a receiver is ordinarily entitled to an indemnity and lien in respect of their costs incurred in the carrying out their duties as receiver?

[47] French J was satisfied the Australian provisions did not preclude the application of that general principle. It is implicit in His Honour's analysis that the right to indemnity can be determined only at the point the liability of a receiver has been established. If the receiver is found not to be liable, they are entitled to be indemnified for their costs. If the receiver is found to be liable, they have no right to indemnity and must account to the company for any company funds expended in defending the claim against them. But until that liability is established, the receiver has indemnity and an entitlement to a lien over the company's assets and is entitled to retain sufficient funds to defend the proceeding brought against them.

[48] I am satisfied that the same analysis and conclusions apply in New Zealand. Sections 19(b) and 20(b) do not change the general law. That there is no direct equivalent of the section in Australia is of little consequence. The analysis in the Australian decisions applies equally in New Zealand. It supports the receivers' case that they are entitled to retain a portion of the surplus funds for the purpose of defending the proceedings the applicants have brought and have made clear they intend to bring against the receivers.

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18 At [46].

What about Taylor?

[49] The above analysis and conclusion differ from those in *Taylor*, in which a relevant issue was whether the receivers were entitled to retain a sum from the proceeds of the receivership to cover the costs of defending proceedings brought against them by a major shareholder of the company in receivership and by the guarantor of the debt owed by the company.

[50] As Pankhurst J acknowledged, the application of s 20(b) of the Receivership Act in that proceeding had not been raised in argument by counsel.[19] Pankhurst J raised the question himself after reviewing a number of Australian decisions, including the first *Chant* decision and *Flexible Manufacturing Systems Pty Ltd v Fernandez*,[20] a decision also discussed by counsel in this case. In the first *Chant* decision, Needham J declined to make an order requiring the receivers to account for the surplus when litigation was clearly in prospect. The issue in *Flexible Manufacturing* was whether the receiver could claim a lien and retain funds to defend litigation that had not been in prospect when the receivership had ended.

[51] Pankhurst J concluded that those authorities showed that where litigation was actually pending against a receiver, a lien in respect of future costs was likely to be recognised. However, he considered those decisions had to be read subject to s 20 of the Receivership Act.[21]

[52] In *Taylor*, the claim against the receivers had been made before the receivership had ended. Pankhurst J was of the view that, because part of the claim alleged failure by the receivers to obtain the best price reasonably obtainable, to that extent an indemnity was not available, and a lien could not be asserted.[22] However, because the statement of claim alleged other failures by the receivers that fell outside s 19, Pankhurst J held that the receivers could reasonably have concluded that an indemnity for fees and expenses in defending those claims remained available.[23] Accordingly,

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19 *Taylor v Bank of New Zealand*, above n 7, at [254].
20 *Flexible Manufacturing Systems Pty Ltd v Fernandez* [2003] FCA 1491, (2004) 22 ACLC 47.
21 *Taylor v Bank of New Zealand*, above n 7, at [257].
22 Ibid.
23 At [258].

he dismissed the claim alleging a failure by the receivers to account for the retained sum upon the termination of the receivership.[24]

[53] Mr Farmer submitted that I should accord appropriate weight to *Taylor* and follow its analysis, even if that analysis did not affect the final decision. I consider, however, that the analysis in *Taylor* decision does not pay sufficient attention to the language of s 20 and I respectfully decline to follow its analysis.

[54] Section 20(b) deals only with the issue of compensation or indemnity. It provides that a receiver is not entitled to indemnity "in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section 19." It is inherent in those words that a breach of the s 19 duty has been found and, consequently, there is no indemnity.

[55] However, until a breach of duty has been found, the right to a lien subsists. That right arises before the question of the receiver's liability has been determined. As Blanchard and Gedye state in the passage reproduced at [36] above, a receiver has an equitable lien on the charged assets as a means both of securing and of enforcing the company's liability to indemnify.

[56] It would be contrary to well-established principles if the right of a receiver to secure the liability to indemnity could be abrogated simply by an allegation of a breach of duty. In that regard, for the reasons given at [43] above, I do not accept that an allegation of breach of the s 19 duty should have different consequences than allegations of breach of other duties owed by a receiver. As Blanchard and Gedye make clear in the passage reproduced at [40] above, the right to indemnity is lost where there has been any breach of duty by a receiver.

[57] If the analysis in *Taylor* was correct, therefore, a receiver would be required to fund their own defence to any allegation of breach of duty, no matter how trivial, and bear the risk that, if the claim were found to be without substance but the company had no funds, the receiver would not be able to recover costs incurred in the exercise of the receivership.

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[24] At [260].

[58] I agree with Mr Ross that that result would be contrary to public policy as well as the accepted principle that a receiver is ordinarily entitled to an indemnity and lien in respect of their costs incurred in the carrying out their duties as receiver.

[59] I also agree that the ability of a receiver to seek security for costs does not bear on the operation of that principle.

Conclusion on the issue of principle

[60] For all these reasons and having regard to the question stated by counsel for the receivers in their memorandum of 18 May 2022, I am satisfied that the receivers have a right to withhold a retention to defend allegations of neglect, default or breach of duty against them.

Reasonableness of the sum retained

[61] As noted above, Mr Farmer invites me to find that the sum of $3.16 million that the receivers propose to retain in respect of estimated legal costs is unreasonable.

[62] The difficulty with that submission is that is not anchored to any assessment of the scale of the claims that the applicants have made in the redemption proceeding or intend to make in the proceeding in prospect. It is not possible, therefore, for the Court to assess whether the sum that the receivers propose to retain is reasonable – which counsel for both sets of parties agree is the essential criterion. In circumstances where the receivers are entitled to recover all of their costs if the claims are unsuccessful, a comparison with scale costs provided for in the High Court Rules does not assist.

[63] In this situation, I am not able to assess whether the sum the receivers propose to retain to cover their own costs and their legal costs is reasonable. In the absence of a formal application and evidence, therefore, I limit this decision to the question framed by the receivers' counsel in their memorandum of 18 May 2022.

Are the receivers obliged to hold on to the funds pending the outcome of the litigation?

[64] I do not accept Mr Farmer's submission that, if the receivers have a lien over the retained funds, they must not spend the funds until the outcome of the litigation is known.

[65] The lien is not the equivalent of security for costs. Its purpose is to ensure that there are funds available to defend proceedings brought against the receivers in their capacity as receivers. The costs the receivers incur in defending the proceedings are costs incurred in the exercise of their receivership and can be met from the funds of the company in the usual way. However, if the receivers are found to have breached their duties, they will be obliged to account for the costs incurred in defending the proceeding, even if they have spent some or all of the retained funds.

Result

[66] I find that the receivers have a right to withhold a retention to defend allegations of neglect, default or breach of duty against them.

[67] I dismiss the application for an order that the receivers are not entitled to retain $5.16 million to cover the costs of defending actual and anticipated claims by the applicants against the receivers.

Costs

[68] Given the above findings, I make no order as to costs.

G J van Bohemen J

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