ALISTAIR R McDONALD

HIVING DOWN IN RECEIVERSHIP

LLM RESEARCH PAPER
BODIES CORPORATE (LAWS 532)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1992

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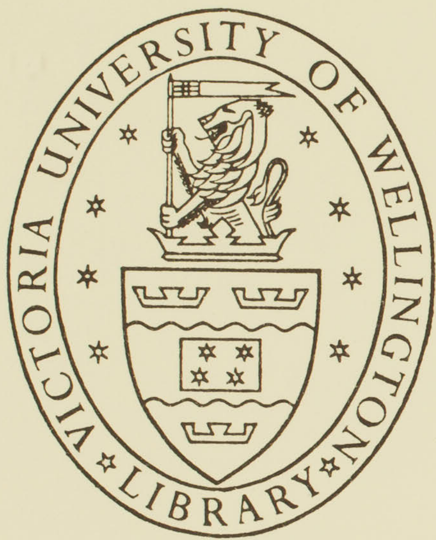
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ABSTRACT

Receivers have become corporate undertakers. Their primary function is to carry out the secured creditors rights of recourse to property by reason of the debtor's default. Abuses of receiver's powers have been regulated reactively in case-law by development of duties of care. An appropriate balance is needed between the rights of creditors and debtors. After reviewing policy issues and introducing hiving-down, the paper looks generally at duties of care.

Hiving-down is presented as meeting the legitimate interests of security and property law as an efficient "self help" device facilitating realisation of property. Other parties affected may be incidentally benefitted by the use of this device: such external benefits are a consequence not a purpose of the technique.

The advantages of hive-down are reviewed. In the course of more detailed review of common methods of hive-down, selected issues are discussed including tax aspects. The regulating duties and standards of care are briefly applied to the process. The impact on and rights of other persons affected by hive-down are reviewed with main emphasis on remedies of unsecured creditors and arrangements with employees. A recent example of efficient use of the process is used as a case study. Incidental references to changes enacted in the Receiverships Bill are raised throughout the paper.

The conclusion is that the device may be useful as an alternative to breakup sale where a short-term sale is unlikely and the core business, if separated from its debt-burden or mismanagement, is likely to trade profitably until sale can be carried out at a more propitious time.

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Specific statutory authority to transfer undertakings would legitimise the process. Otherwise given its necessarily flexible application, the present duties of care and clear development of flexible objective standards of care, based on good faith and reasonableness, provide adequate regulation to achieve balances.

The text of the paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16,100 words.

1.0 INTRODUCTION

1.1 Background

It has been said that the prime purpose of the company structure is to reward the capital invested in it by the shareholder. However, "where the company is insolvent or even doubtfully solvent, the interests of the company are in reality the interests of the existing creditors alone"[1].

The receiver is a creature of English equity law whose appointment out of court by contract was first recognised in 1897[2], with subsequent reactive development by case law in parallel with development of the floating charge[3]. Receivership law is piece-meal and substantially unregulated in parts; even where principles can be located, useful objective criteria are often unavailable. New Zealand is said to be in "dire need of good law"[4] in this area. Part VII of the Companies Act 1955 enacted limited statutory duties on receivers with further provisions added in 1980. Legislative intervention is increasing in recognition of strains and inequities in the system with impetus from the perceived benefit of trans-Tasman harmonisation in which insolvency law is seen as a testing ground[5]. In England the Cork Report[6] lead ultimately to enactment of the Insolvency Act 1986 creating and regulating a new office of "administrative receiver". In Australia the Harmer Report[7] also isolated objectives of insolvency law and proposed corporate rehabilitation measures. In 1989 the New Zealand Law Commission[8] recommended repeal of Part VII and its replacement by amendment to the Property Law Act 1952. Expanded receivership provisions are now to be enacted as a separate Receiverships Bill with some amendment to the Property Law Act in respect of mortgagees remedies. The Bill's provisions will apply to companies registered under the

Companies Act 1955 and under provisions to be enacted from the Companies Bill and will apply to existing receiverships except in certain specified respects[9].

The vast majority[10] of receivers in New Zealand are believed to be appointed out of Court pursuant to standard trading bank debentures granted by private limited liability companies, principally to provide floating charge security over undertaking as a requirement of the bank providing working capital. This paper does not accordingly address receiverships of assets of individuals, or appointments by Courts or under enactments other than the Companies Act 1955: statutory references are to that Act unless otherwise stated.

1.2 Enter The Receiver

The receiver has been likened to a corporate doctor[11]. A tendency is emerging to promote receivership as having capacity to effect corporate rescue and suggesting legislative promotion of that function. In reality the receiver is invariably a corporate undertaker[12] involved essentially in orderly liquidation of assets. Few receiverships trade out: many undertakings are buried as paupers[13]. Trading on involves significant risks but carries little incentive: claims of preferential creditors and costs will dominate recovery. "The practical result is that a receiver sometimes decides to close a business, abandoning the possibility of selling it as a going concern, merely to protect himself against claims by preferential creditors"[14]. Proof of loss caused by ongoing trade can be readily found; the receiver may be criticised but rarely sued for a decision to realise assets immediately[15]. Sale as a going concern is likely to be impractical unless the core business is viable and debt can be retired. Break-up sale will invariably be at less than

market value, in effect transferring wealth from unpaid general creditors to the purchaser/investor. Receivers complain of being appointed too late to rescue the undertaking. Receivership has become a last resort for financiers after informal arrangements have failed; write-off of debt is seen as inevitable. Management, particularly of smaller undertakings, will delay flagging difficulties, viewing receivership as unnecessary corporate liquidation usually impacting on their own personal solvency.

1.3 Hiving-Down Introduced

Into this gloomy picture comes hiving-down, not as a kindly doctor but as an arbitrary debt-remission device focussed on improving realisation of assets for the secured creditor. Essentially, the viable core of the undertaking is identified and transferred to a wholly-owned subsidiary company, with a view to later sale to a third party as a solvent going concern with recovery of goodwill potentially maximised. This technique is essentially a company reconstruction in its simplest form whereby the trade survives the death of the company.

The practice, familiar to receivers in New Zealand, appears to be in extensive use elsewhere to the extent of express statutory recognition in England/Wales and in Scotland[16]. Initially borrowed from techniques used in bankruptcy, hiving-down became popular in England by 1954 when trading in loss companies became possible. Hiving-down remains "the sharpest sword in the receiver's armoury" and is recognised as fulfilling, in appropriate cases, the objectives of insolvency law. The Cork Report (para 495), for example, stated:

"Hiving-down enables companies which would be profitable if only they could shed their accumulated debt burden to start

a new life. Businesses are thus saved from closing down, jobs are preserved, and the economy as a whole benefits"[17]. Similarly:

"[Hiving-down is] one economic benefit which most critics [of the floating charge] would be happy to concede"[18]. The device is largely unregulated except through imposition of duties on the receiver. This paper reviews duties of care relating to hive-down from the premise that the proper entitlement of the secured creditor is orderly realisation of a debtor's assets in the event of significant default for the primary purpose of repayment of its debt; the receiver historically and today is appointed for the prime purpose of converting property into cash. It is an equally proper function of insolvency law to prevent abuse of that process by imposition of duties. In that the duties themselves may discourage rescue, they may in fact have some deadening effect acting to the disadvantage of those parties intended to be protected. Hiving-down may, in appropriate cases, have incidental benefit to some of those persons.

The sources of law on hive-down are fragmented: the process has appeared in case-law infrequently only and tends to be put aside without detailed comment. Incidental and often brief references are found in texts but no extensive review appears to have been undertaken.

1.4 The Nature of Corporate Receivership

1.4.1 Sources Of Authority

The original source of the receiver's authority is the company's power in its constitution to create mortgages and charges[19] and to confer on the debentureholder by contract the right to appoint a receiver contingent on the occurrence of a specified event. From the date on which the

receiver has been appointed and has taken possession of the charged assets, the powers of the company (excluding director's "residual" powers) are vested in the receiver, invariably as agent and attorney of the company with power to control, manage and sell the undertaking. The receiver separately contracts with the debentureholder. Corporate receivership is accordingly a hybrid emerging from the relationship of the law of contract and the law of property with aspects of company law and insolvency law grafted on.

1.4.2 Ownership And Realisation Of Property

Once the receiver is appointed, the law of property becomes first among equals. The corporate structure, the receiver's pre-liquidation agency, and the principles of insolvency law are essentially mere parameters within which the receiver's primary function of property realisation is carried out. Fundamental within that proposition are the proprietary rights available to the debentureholder as assignee of beneficial interest in that property. The charge embodies the concept of hypothecation[20] being security rights available on default. Those rights arise from powers granted irrevocably in the contract and from operation of the debenture charge as a conditional equitable assignment by way of security in favour of the debentureholder, conditional on the company's equity of redemption. Such assignment under the fixed charge is immediate on creation or on acquisition of future property. The assignment under the floating charge is suspended until crystallisation. Once it beneficially holds the undertaking the debentureholder is entitled as a prima facie proposition of property law to sell it and apply the proceeds to its debt and the costs of realisation. This right is subject to any restrictions in the contract and is further subject to any reservations, defects, liens or equitable rights or title having priority to the charge:

until any realisation the equity of redemption remains the property of the assignor or, if insolvent, the assignor's general creditors. The real significance of security is this right to contract out of insolvency by direct recourse to property. Essentially then, receivership is not an insolvency process but a device to facilitate exercise of proprietary rights. The ongoing policy issue is to what extent the law should interfere with the rights of sale of an owner (in the sense of equitable mortgagee) of its own property.

1.5 Policy Issues

(1) The Immovable Object

Two competing policies are apparent. The narrow contractarian policy involves protection of individual rights: Courts have been reluctant to intervene in contracts or conduct incidental to the powers of sale unless dishonesty or bad faith are evidenced; in granting the charge the company loses the right to dictate what can be sold[21] . The policy is founded on the pre-eminence of secured credit; "Every creditor is entitled to get and hold the best security the law allows him to take"[22] . There will always be corporate failure; creditors are entitled to assess risk and advance to an appropriate level based on any security they may, by "prudence and foresight"[23] require; lenders require certainty of priority when assessing risk finance; curtailment of remedies erodes freedom of contract. Uncertainty will dry up credit sources and increase finance costs with subsequent effect on supply[24] .

(2) The Constant Force

collectivist?

The broader utilitarian view is based on the pari passu rule in equity that creditors should share "equality of suffering"[25]. Essentially insolvency law is an exercise in determining apportionment of damage and minimising the inevitable danger of chain failure. The floating charge maximises such danger by transferring loss to non-preferential creditors while allowing the receivership first, benefit of pre-receivership supplies without obligation to pay and secondly, to "sweep off everything: and a great scandal it is"[26]: the company is financed as much by suppliers induced to wait for payment as by the bank which can monitor cashflow[27] . The floating charge dries up other credit sources by absorbing the company's equity but does not necessarily increase bank lending. The equality principle is enhanced by any measure promoting corporate rehabilitation; this is seen as "not sufficiently encouraged by present law"[28] .

1.6 Creating A Balance

Security law requires balance first, between ability to borrow and expectation of repayment plus right of recourse, and secondly, between enabling the lender to carry out such recourse while ensuring protection of those perceived, in economic terms, to be weak. The contractarian view has traditionally dominated insolvency law with the pari passu policy operating principally within classes. While the pre-eminence of secured credit is currently assured[29], some signs of policy movement towards a broader view are evident particularly at advisory levels. Cork (para 1485)for example, was "convinced that a proper balance has not yet been achieved". Such policy assessment has given rise to comparatively recent creation and rapid expansion of duties of care on receivers; each step necessarily places further

restrictions on rights of realisation of property by secured creditors and, the contractarian would contend, further erodes freedom of contract, Interference with fundamental property rights is the more extra-ordinary; effectively the equitable mortgagee as "owner" of a beneficial interest in property intending sale of that interest must have regard (without obligation to account) to third parties whose interest is in the estate of the property's former owner rather than directly in the property itself. Nonetheless such development of duties, now far beyond protection of the equity of redemption, is firmly established and is further expanded in the Receiverships Bill to a duty to unsecured creditors, albeit at a low level. In policy terms however, increasing risk to the receiver of personal liability may promote conservative realisation policies which will not necessarily create the balance being sought.

2.0 RECEIVERS DUTIES

2.1 Overview

The receiver's overlapping duties are founded:

(a) In contract and agency
(b) In equity, in particular fiduciary and good faith duties
(c) In tort, in particular in negligence
(d) In statute, in the Companies Act 1955

2.2 Range Of Persons Owed Duties

The range of persons owed duties has been developed in New Zealand, on the more expansionist Anns[30] "proximity and policy" approach as "a straight forward application of the neighbour principle"[31]. Retreat from that approach by the House of Lords in favour of development "incrementally and

by analogy with existing categories" has now been reconciled in New Zealand. In contending for "a comprehensive review of relevant factors, and the exercise of a judicial judgment to achieve a reasonable and just result"[32]. New Zealand Courts are unlikely to change their present approach.

The range of persons to whom a duty is owed was recently stated by Gault J in First City Corporation Limited v Downsview Nominees Limited (No 2)[33]:
"A receiver owes a duty of care to his appointing debentureholder, the company of which he is an agent, a guarantor of the debt, and to subsequent debenture holders. In each case the reasoning is identical. All have an interest in the assets of the company, all are directly affected by the receiver's action, all will suffer foreseeable loss if the receiver fails to exercise reasonable care"
The duties have since been extended to guarantors[34] and assignees[35] of the subsequent debentures. Somers J in Henderson v Price[36] stated that a receiver "is required to carry out his duties with the interests of the company, its creditors, and shareholders in mind". Extension to unsecured creditors and shareholders may not have been intended on the facts and, in the case of shareholders, appears inconsistent with prior case-law. Holland J in Rogers v Bullen[37] has since found (obiter) that there is no duty to shareholders: while the company is interested in surplus assets after payment of debts, the interest of shareholders lies behind the corporate veil. This view appears correct on Foss v Harbottle[38] principles: the company through director's residual powers is the proper plaintiff where its agent is in default. While no duty of care to general unsecured creditors has yet been found, this now appears an inevitable development despite conceptual anomalies[39].

2.3 Duties On Trading On

On appointment the receiver may elect to trade on briefly before determining whether the likely sale price as a going concern justifies risks of further trading. In any particular business the decision may be self-evident, say, against trading a construction company with overruns on quoted current work.Although case-law is unclear[40], there may be a positive duty to trade on in some rare circumstances. In electing to trade on the receiver is not a "White Knight or a mere substitute for the previous management[41]" and should not overlook that the purpose of appointment was to protect and recover the sum owed to the debentureholder. In Price v Henderson[42] a receiver who elected to trade on "hypnotised" by a perceived need to preserve the company's goodwill was liable for trading losses where the debt could have been readily recovered. The Harmer Report's logical recommendation to extend duties of care to management (as well as sale) of assets is adopted in the Receiverships Bill[43].

2.4. Duties On Sale

The receiver's paramount duty under section 345B on realisation of charged assets is to "exercise all reasonable care to obtain the best price reasonably obtainable at the time of sale". The duty applies to the means not the end; provided proper processes are undertaken, the receiver need not necessarily obtain such price, The formula recognises that, notwithstanding best endeavours, the receiver will seldom achieve a market value for assets: Harmer's initial suggestion that the duty be linked to market value has, rightly, not been adopted in the Receiverships Bill. The duty has been extensively discussed elsewhere: in brief, the receiver may choose the

timing of sale irrespective of market conditions but should test the market by proper advertising and contact with prospective purchasers having regard to the local, national or international scope of the market for that business, by use of specialist agents/brokers and by choice of the proper method of sale[44], What is 'proper' will vary from case to case but the "onus on receivers is not a heavy one"[45]. This duty is presently owed to the company alone[46].

2.5 Standard Of Care

The commercial realities overlie. In Downsview Gault J said:

> "It is well recognised that a receiver occupies a difficult position being required to make commercial decisions on behalf of a company which is already in extreme financial difficulty ... the receiver's duty must be set at a realistic level bearing in mind the commercial exigencies of the situation. If there is clear conflict the receiver is entitled to favour the interests of the debentureholder who appointed him"

and further:

> "the complex situation usually existing at time of appointment of a receiver means that he must have the widest discretion as to the manner in which he chooses to act in achieving the objective"[47].

Subject to the fundamental duty of good faith, the standard of care expected of the receiver is:

> "that of a person skilled and experienced in receivership work, but examined carefully in light of the primary duty he has to the debentureholder, his duties to the company, and the state of affairs with which he is presented"[48].

Courts have been reluctant to impose liability for professional or commercial decisions made in good faith. In

the medical negligence case of Maynard[49] Lord Scarman considered there was no negligence "if at the time the decision was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper", notwithstanding that an equally competent body of opinion might consider the decision to be wrong. Similarly in Downsview, Gault J said:[50]

> "I accept that another accountant at that time might have formed a different view in good faith. If, in his judgment, it was appropriate to trade on, it could not be said that it would have been negligent to do so".

A multi-layer "reasonable receiver" test may be emerging.

2.6 The Receiverships Bill

The Bill[51]:

1. Preserves the best price duty owed to the company as the receiver's paramount obligation. The receiver's failure to comply with the directions of the debentureholder is not a breach of duty to the debentureholder.

2. Confirms the receiver's secondary duty to the debentureholder to exercise powers "in a manner he or
she considers to be in the best
interests" of the debentureholder. The expected standard should not trouble any prudent receiver.

3. To the extent consistent with the above, the receiver must have "reasonable regard" to the interests of
   - (i) The company
   - (ii) Persons claiming an interest in the property through the company
   - (iii) Unsecured creditors
   - (iv) Sureties

Use of 'regard' (equivalent to 'not recklessly disregard') in place of 'care' and 'interests' instead of 'best interests' point to a low standard of care to this group.

3.0 THE HIVE-DOWN

3.1 Overview

There are various methods of hiving-down. Most commonly :

(a) A 'clean' company is formed, purchased, or co-opted by the receiver as an independent subsidiary usually wholly owned by the company in receivership of which the receiver is a director not a receiver.

(b) A 'hiving-down' agreement transferring assets is signed between the parent (through the agency of the receiver with power to affix the common seal) and the subsidiary (through the receiver's control of the board of directors).

(c) The sale and purchase price is entered in a loan account as inter-group liability owed by the subsidiary to the parent. Repayment of principal may be 'on demand' but deferred until sale of the subsidiary and/or the transferred assets. Interest may be set at a market rate with payment either from any trading profits or again (if group losses cannot be used) deferred until ultimate sale. Security by way of debenture granted by the subsidiary can be completed if the circumstances require.

The purpose of the hive-down, as Phillips J. has put it, will be:

> "to segregate the saleable assets of the company into a clean package, free of obligation whether to staff or creditors, which will be more saleable and which, if the transaction is correctly effected, may bring to the purchaser certain fiscal advantage"[52].

The subsidiary will independently trade, preferably without resort to further third party security. At an appropriate time the subsidiary will advertise its business[53] for sale, completed either through sale of shares or by sale of the assets and winding up the subsidiary. On settlement, the purchaser will usually advance capital to the subsidiary sufficient to discharge the hive-down loan account. After settlement, the receiver will be able to apply the net proceeds in the prescribed priority and might then terminate the receivership.

Hiving-down will often be completed within a short period from appointment of the receiver and may be pre-planned as part of the debentureholders's realisation strategy. Before examining the procedure in greater detail it is appropriate to review the receiver's powers and factors likely to be facing the receiver on appointment.

3.2 Advantages Of Hive-down For The Receivership.

1. Any pressure of potential liquidation proceedings by a dissatisfied unsecured creditor is largely removed. Various considerations are examined later.

2. The work in progress can be completed and/or the viable assets can be traded to potentially reduce the debt owed to the appointing debenture holder.

3. Trade is further facilitated in that:
   (a) The undertaking is freed of all onerous contractual obligations of the parent to third parties and of much of its bad debt.
   (b) Ongoing suppliers to the subsidiary have a clearer picture independent of the tangle of pre-receivership creditors of their ability to recover any credits or goods supplied.
   (c) The demands of pre-existing creditors can more readily be postponed to immediate needs; the receiver may devote more input into profitable operation of the subsidiary.
   (d) The subsidiary is solvent and can operate in accordance with its Articles
   (e) The subsidiary can transact its business without the requirement in s346(2) to state in all documents that a receiver has been appointed[54].
   (f) The subsidiary will be a new occupier/consumer which may be entitled to require essential supplies[55] without the receiver's guarantee or responsibility for payment of arrears.

4. Reconstruction by way of hive-down might be required by a franchisor/licensor as a condition of allowing continued operation of the franchise/licence after the insolvency has surfaced.

5. The trade can be eventually sold at a time likely to provide maximum return. This may be useful where cashflow for the business is seasonal or where tax advantage can be taken.

6. A 'neat commercial package' where a purchaser can gauge value more accurately is created. The value of goodwill might be protected from the stigma of receivership, perhaps assisted by the subsidiary using a similar trading name to that of the parent. Balance sheets for the independent unit will more readily demonstrate to the market that the business can and is trading profitably. The perception that 'fire sale' bargains are available will be reduced.

7. The benefit of the parent's tax losses might be retained. Some considerations are reviewed later.

8. The subsidiary is liable for debts incurred in the course of ongoing trade. The receiver will not be personally liable under s345(2)[56] for that trade unless s/he elects to take on personal liability or remotely in respect of obligations as director. Unless it intervenes extensively in the operation of the subsidiary the appointing debenture holder will not be liable for any trading loss by the subsidiary but will take the benefit.

9. The statutory duties, particularly section 348 reporting[57], and their costs are substantially avoided. The subsidiary's financial position can be more confidential from competitors and prospective purchasers although "receipts and payments" to and from the subsidiary must be disclosed.

10. While rationalisation of staff is possible and may indeed be essential, hiving-down will generally offer prospects of continued employment in a viable concern for as many employees as practical or at least allow the employees time to consider alternatives without being dependant on the State.

11. Apart from the technical advantages a hive-down "can in appropriate cases be of immense psychological importance in that it can offer the prospect of a fresh start for employees and those who deal with the business"[58]. If the core reasons for business failure are accepted as mismanagement and under-capitalisation and such problems are seen to be addressed by appointment of a professional receiver/manager and by capital input or indulgence from the debentureholder, in either case with a view to rescue of the business, then renewed enthusiasm and improved productivity may well be anticipated.

3.3 Inappropriateness/Difficulties

Even if the core business appears viable, hiving-down will not always be appropriate (inter alia):

1. If cost and risk are not justifiable where the business is small-scale and/or trading on is likely to be brief: liquidation at the State's expense may be preferred[59].

2. There may not be premises nor suppliers nor personnel available to trade further.

3. Where immediate trading loss is reasonably anticipated even if the longterm prospects are favourable.

4. If finance/cashflow is not available.

5. Where ownership of any significant proportion of the assets is in dispute.

6. Where there is no realistic prospect of ultimate sale or the margin between likely sale values on a break-up or

going concern basis (allowing for obligations to employees and preferential creditors) do not justify the risks, delay and cost of further trading.

7. If group tax losses may not be fully useable by the subsidiary. The receiver may be under a duty to take maximum advantage of those losses[60] (unless other considerations are more beneficial).

8. Where use of the assets to continue the business depends on consents of other creditors or chargeholders including, (for example) lessors, franchisors, or persons having copyright and trademark entitlements.

9. If the interests of any third party contractor or subsequent chargeholder would support an injunction or a remedy in damages against the receiver personally and/or the debentureholder and such action is likely. Costs of defending litigation may be an influence.

10. Where a prior chargeholder is likely to appoint its own receiver, or reap most of the benefit, particularly where interest is accruing at penalty rates.

3.4 Powers Of Receivers To Hive-Down

To conduct a hive-down the receiver must as a minimum have first, power of sale of the viable assets and secondly, power to establish, manage and sell a subsidiary or assets held by a subsidiary. Such powers are subject to any limits in the company's constitution: the receiver as agent can do no more than the company itself. The consent of any other secured creditor may be necessary. The Receiverships Bill will confer on the receiver (subject to the terms of the debenture) powers to manage the property in receivership and to carry on an associated business[61]. There is no

statutory power of sale in either the Companies Act 1955 nor the Receiverships Bill. Ordinarily broad powers of sale and management of the company's assets as agent are conferred by the debenture along with a host of incidental powers. Most receivers will have full power to carry out the hive-down.

3.5 The Hive-down Process

For present purposes the hive-down process is divided into 6 stages, namely:

(1) formation of the subsidiary
(2) gathering the assets
(3) the hive-down agreement and transfer of the assets
(4) trading the subsidiary
(5) sale of the subsidiary or the assets
(6) accounting to the debenture holder

Each process can now be reviewed in greater detail.

3.5.1 Formation Of The Subsidiary

Even if forward planning has not been possible, acquisition of a shelf company can be quickly completed. Use of an existing subsidiary will be desirable if group tax losses can be carried forward but may otherwise be impractical. Such subsidiary will be likely to be tainted by the receivership and the associated suggestion of insolvency. Change of name may ameliorate the problem. An ultimate purchaser is likely to be concerned at the prospect of unregistered or unrecorded debt or liability[62] (actual or contingent) or undisclosed offences on the part of the subsidiary compounded by the understandable reluctance of the receiver and debentureholder to provide any warranties. Use of a clean and untraded company previously unconnected with the insolvent parent will assuage some of these concerns.

The ordinary rules of company law apply to the relationship between the companies. The parent will usually wholly-own the subsidiary. The receiver may be governing or co-director of the subsidiary or, if distancing is preferred, may appoint and control directors in the capacity of agent for the majority shareholder. This control together with ownership of more than half of the subsidiary's share capital creates the legal relationship of 'holding company' and 'subsidiary' for the purposes of s158. The assets of each company are ordinarily treated (except for some tax purposes) as owned by them, beneficially and legally, as distinct legal entities. The subsidiary will trade and be accountable to its own creditors and members. The essence of the hive-down is of course this separation of legal entities. The receiver will accordingly be cautious to maintain clear separation of functions, particularly to avoid any implication that assets are held by the subsidiary as a trustee.

3.5.2 Gathering Assets

Difficulties in identifying and gathering assets will invariably arise, particularly in businesses based on turnover in supply of goods. Typically, the company will not be in actual possession of some of its assets and will be in possession and even have legal ownership of assets held as trustee or bailee for the beneficial owner, in particular goods supplied to it on hire purchase or retention of title 'Romalpa' terms. The Courts have also been regularly concerned with identification and establishment of trusts in respect of moneys or assets held by insolvent companies for investors. Some considerations are examined later.

Gathering assets may also prove difficult where beneficial ownership of assets held by any related company not in receivership is not readily verifiable. Control might be possible through voting rights. Apart from giving directions as to rights of ownership, Courts are reluctant to exercise their jurisdiction to extend the receivership to related companies except "in the most exceptional cases" and only when no other practical solution is available. In Rea v Chix Products (California) Ltd[63] the receivers of seven companies in a group applied for appointment over five related companies. Evidence of intermingling and interdependency of assets, undertaking, and business dealings was adduced. Williamson J reviewed and accepted jurisdiction in statute and in Equity to preserve property involved in proceedings. Orders appointing receivers were made on the basis that no power of sale of assets would be available until further evidence of the subject companies' assets and liabilities was given together with the receivers' proposals for sale. In a similar situation in Bullen v Tourcorp Developments Limited[64] Williamson J granted the orders without conditions as to power of sale but on condition that the receivers made a full report to the Court within 60 days. In Steel v Matatoki International Limited[65] Holland J granted the receivers application where ownership of goats between three related companies was unclear, The Court was influenced by the urgency needed to facilitate sale to avoid substantial loss to creditors, the commonality of shareholding between the companies, the extent of inter-company indebtedness, and the absence of opposition from shareholders of the related companies.

The cases demonstrate the use of Courts to assist the receiver to assert proprietary rights: in that the receiver's appointment is over property rather than the corporate structure having possession of it the receivership device is appropriate to the problem. Costs of

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rectifying the problem, to an extent created by the lender, must impact on recovery for it and other creditors.

3.5.3 The Hive-down Agreement And Transfer.

(1) Timing

The threat of winding up will often precipitate receivership to protect the secured creditor against dissipation of charged assets. The fait accompli which preplanned and immediately completed hive-down presents to creditors, particularly those whose pre-receivership contracts are not likely to be 'adopted' by the receiver, may pre-empt injunctions, if only by reason of the cost factor.

Can the receiver validly hive-down after the date of filing of a petition and/or after an Order is made?. If a petition results in a final winding-up order, section 224(2) deems the winding up to commence from the time of filing. Winding up terminates the company's beneficial ownership of its property, including its shareholding in any subsidiary and equity of redemption of security. Subject to any charge, such property becomes trust property to be collected and realised by the liquidator for the benefit of the company's general creditors (Ayerst(Inspector of Taxes) v C and K (Construction) Ltd)[66]. Winding up is said variously to automatically terminate the receiver's agency of the company Gosling v Gaskell[67] and to "necessarily limit" the receiver's authority to act as agent Re Landmark Corporation[68], In either case, the receiver's power to carry on the business remains: the agency is not the essence of the receiver's power (Re Northern Garages Limited)[69]. The post-liquidation receiver becomes in effect a fiduciary for assets and proceeds and will become

personally liable as principal but retains indemnity from company assets (Bacal Contracting Ltd)[70]. Such receiver will not automatically be agent of the debentureholder (Re Wood)[71] unless the debentureholder interferes in the conduct of the receivership (Standard Chartered Bank v Walker)[72]. In such case agency may be implied and the debentureholder accordingly may become liable for any breach by the receiver (American Express v Hurley)[73].

It follows that a receiver can carry out post-liquidation hive-down. Section 222 provides that "any disposition of the property of the company, including things in action ... made after the commencement of the winding up shall be void unless the Court otherwise orders at any time ...". The section applies only to dispositions within the company's powers and does not prevent the debentureholder from more direct exercise of powers of sale conferred on it by the contract, subject to statutory notice requirements and the section 226 requirement for Court consent to "proceedings". As Goulding J said in Sowman v David Samuel Trust Limited[74];

> "Winding up ... does not in the least affect [the receiver's] powers to hold and dispose of the company's property comprised in the debenture, including his powers to use the company name for that purpose, for such powers are given by the disposition of the company's property which it made (in equity) by the debenture itself. That disposition is binding on the company and those claiming through it, as well in liquidation as before liquidation ...."

In that winding up brings to an end the company's ability to trade, such application automatically crystallises the floating charge as a matter of law, and thus completes equitable assignment to the debentureholder. Further, the rights and powers given by contract are themselves property but not company property[75]. Hive-down by the receiver

therefore is not a disposition of company property after commencement in terms of section 222: the receiver may proceed at any time, as principal if necessary, without incurring costs of applying to the Court for directions. The post-liquidation receiver is entitled as of right to leave of the Court to take possession of charged assets from the liquidator for the purpose of realising such assets for the benefit of secured and preferential creditors in priority. It is suggested that a properly conducted hive-down is unlikely to meet with objection from a liquidator in any event, first because the liquidator must defer to the debentureholder's paramount right of recourse to charged assets; secondly because the receiver must ultimately account to the liquidator in respect of dealings with the company's assets and repayment of the secured debt; thirdly because preserving and realising goodwill may ultimately benefit the general pool of creditors; and fourthly the receiver may achieve a better price through ability to manage the assets (although fees may detract from this).

A liquidator has a seldom-used power to hive-down as a method of beneficial realisation. Under the Receiverships Bill[76] the receiver is prohibited from acting as the company's agent post-liquidation unless authorised by the liquidator of the Court, intended so that advantage of the receiver's ongoing powers of management can be taken.

(2) Transfer

The transfer will be conducted, pre-liquidation at least, by the receiver as the agent of the company rather than as agent of the debentureholder:

(a) If the debentureholder conducts the sale, it becomes liable for the receiver's acts, defaults and remuneration

(b) The debentureholder's common law duties of care over the property as mortgagee in possession resurface
(c) Proof of the receiver's agency for the company is readily evidenced by simple production of the debenture deed containing irrevocable power of attorney and documents of appointment.

If hiving-down as the company's agent, the receiver can be in no better position than the company to override existing charges. Consent to the hive-down from the appointing debentureholder and all other secured creditors will be needed, either on the basis that the subsidiary will grant securities so that interests are retained in the same priority or by extending existing charges to secure the shares. Release of any subsequent security may be sought.

Hive-down will be possible without such consents. Property transferred by way of enforcement of security will remain subject to prior charges but subsequent charges will lapse. The debentureholder in any capacity as mortgagee might appoint a receiver where, for example, part of its security comprises collateral mortgages over land or chattels. Where no debenture has been taken, a receivership clause in such mortgage might entitle the receiver to deal with the business conducted on that land[77]. The right to sell the mortgagors business with the land might be implied in some circumstances[78]. If the terms of any security were inadequate, directions would no doubt be sought before any hive-down was appropriate.

Particularly problematic for receivers is the statutory requirement that notice be served on any mortgagor before its land is sold and on any guarantor before action is possible to recover any deficit arising from such sale. The problems have been canvassed in three recent cases[79] which appear to establish the following propositions in respect

of corporate borrowers. By operation of s348(8) Companies Act 1955 the receiver need not give notice under s92(1) Property Law Act 1952 to the company before any moneys secured by the debenture are payable nor is the receiver required to serve a s92(1) notice before taking possession of the company's property, including its land. Section 348(8) does not apply however on sale of land such that the receiver must serve a s92(1) notice before exercising power of sale. Failing such service, the receiver might attempt to argue that the hive-down of land was conducted in the ordinary course of business as the company's agent. The fact that this sale might be exceptional or comprise nearly all the assets of the company will not preclude this argument provided the purpose is other than closing down the business[80]. The argument will fail however on the mandatory wording of sections 92 and 348(8). The receiver will deliver notice to the company's registered office (which may well now be care of the receiver) and must wait the statutory period before conducting the hive-down. Rather than risk proceeding on a purported waiver by the company of its rights created by section 92, the receiver might consider hiving that land down at a later date. Strictly, an assignment of an unregistered lease by a receiver as part of hive-down of the business will also require service of a s92(1) notice on the company. In practice, this requirement appears to be conveniently overlooked.

A mortgagee of land is precluded by s92(6) from recovery from a guarantor of any deficit arising after sale of land unless notice of intention to sell and to recover any deficit has been served on that guarantor at least one month before sale. Use of "mortgage of land" in s92(6) however suggests that a neither a debenture holder nor a receiver who exercise powers of sale under the debenture (as distinct from any mortgage) need comply. In summary,

while the policy of the provisions is clear, their application appears unduly technical with traps for an unwary secured creditor.

(3) Choice Of Assets

The decision as to which assets to hive-down is almost self evident: those selected tangible and intangible assets charged by the debenture which are of value, saleable, and necessary to continue and ultimately sell the trade as a going concern. These will invariably include goods, stock in trade, plant and equipment together with the undertaking, goodwill, and all necessary and assignable intangible rights, patents, and contractual licences. The receiver's ability to obtain assignment or novation of an essential licence may be crucial, whether statutory, (for example supplies of liquor or motor vehicles) or contractual(for example, rights under franchising, trading, or manufacturing agreements or under leases of essential premises). Existing contracts may be assigned to the subsidiary, particularly if completion of work in progress is intended, subject to the consent of other contracting parties and sureties. Employment contracts might be retained with employees subcontracted to the subsidiary. Book debts might be hived-down to provide working capital for the subsidiary, with capacity for factoring as a further incentive for any purchaser: if not transferred the subsidiary might collect debts on behalf of the parent for transfer to the receiver.

Where there is doubt as to whether an asset is essential to the undertaking, the better policy may be not to transfer it: the asset can be hived-down later or sold direct to the purchaser before or after sale of the subsidiary. Tax consequences will be reviewed in choosing assets. Freehold and leasehold land might be excluded except where critical

to the ongoing concern. Prospects of assessable gain on ultimate sale, liability for stamp duty on transfers, and delay while Property Law Act notices expire will militate against immediate hive-down. Further, inclusion of such land will diminish saleability by increasing the necessary sale price. Any freehold premises can be leased to the subsidiary on commercial terms in the interim and hived-down later if required. Unless leased premises are unique, the subsidiary may not benefit from taking on the obligations of lessee: the receiver will be reluctant to provide guarantees to the lessor on assignment. Finally an obvious point: even if all assets are transferred (except rights to call unpaid capital), the debenture as source of the receiver's powers is inviolate until the debt it secures is paid.

(4) Consideration

The consideration may be stated as:

(i) Cash of a specified amount, perhaps payable on demand by the parent with demand deferred
(ii) Issue of the subsidiary's shares to the parent
(iii) A cash amount to be satisfied by such issue of shares
(iv) Cash in an unspecified amount with an agreed mechanism to fix a fair value

Three possibilities for use of shares as consideration are suggested:

(a) The receiver (or the majority shareholder in the shelf company) agrees to transfer those shares to the parent in consideration of the parent transferring assets to the shelf company and paying the par value.
(b) New shares in the subsidiary are issued and allotted to the parent which pays cash for existing shares. As such allotment is deemed to have been made in consideration of the transfer of the assets by operation of section

60(3), the hive-down agreement must be filed at the Companies Registry pursuant to section 60(2).

(c) The receiver and/or the debentureholder takes shares in the subsidiary and the purchase price is reduced. The improved debt-equity position will be comforting to future creditors, particularly where a floating charge is taken, but s60(2) disclosure will apply.

In Great Britain a mechanism is commonly provided in the hive-down agreement for fixing the price in the event of default (say, on failure to meet demand by the parent) or on ultimate sale, typically such sum as a specified firm of accountants (perhaps that of the receiver) "acting as experts and not as arbitrators shall in due course upon request of either of the parties [to the agreement] certify to be a true and fair consideration"[81]. Assets are brought to account at nominal levels with adjustment on certification. This method appears preferable to issue of shares as less likely to attract assessment by IRD on ultimate sale of the shares and in restricting the ability of trading competitors and likely purchasers to inspect the hive-down agreement.

<u>3.5.4 Trading The Subsidiary</u>

The subsidiary can now continue the essential trade. The receiver will have clarified terms of continuing employment and supply with employees and suppliers/customers respectively. Trading profits will be claimed by the receiver/directors for fees and expenses with surplus distributed by way of dividend or subvention payment to the receiver as agent of the parent or applied to the loan account to reduce the inter-company debt, or expended to improve the business to facilitate its sale.

As director the receiver may exercise the subsidiary's powers to borrow moneys on security but will resist multi-banking. The intercompany debt, representing most of the value of the subsidiary's assets, will deter any third party financier in any event. In practice the receivership will be totally dependant on continuing indulgence from the debentureholder, particularly in the early stages with its cashflow. Trading losses will need to be monitored carefully. The debentureholder will depend heavily on the receiver's business skills at this stage but will no doubt have pre-set ceilings on that indulgence.

3.5.5 Sale Of The Subsidiary/assets.

A purchaser is sought through proper advertising, consideration of the method of sale, and testing of the market for the appropriate value, If a purchaser cannot be found or trading losses accumulate, the hiving-down agreement can be expressly revoked and the subsidiary liquidated. Even if this occurs within 12 months, any debenture securing the intergroup debt will not be voidable by any liquidator under s311 since at its execution the subsidiary was solvent and valuable consideration was given. On liquidation, the eventual proceeds of sale would be paid out under the statutory regime of section 308.

A purchaser is located and terms agreed. If the purchaser rejects part of the undertaking or requires additional charged assets from the parent such assets can either be hived-down for sale or transferred independently. The purchaser will buy the issued shares in the subsidiary at a value representing par plus any increase in the value of the business after hive-down. The purchaser will also inject capital by way of advance to the subsidiary sufficient to payout intercompany loan account. Alternately, the purchaser may take title to assets only.

The subsidiary is then liquidated at the cost of the receivership or abandoned.

A ready market may exist. Directors/management may offer to purchase assets either through a separate company (with tax advantage if related) or by purchasing the subsidiary or at least such proportions of its shares as will retain commonality for use of tax losses, the phenomena known to the displeasure of unsecured creditors as the "phoenix syndrome".
Lightman and Moss comment[82]:

> "Frequently the existing management, despite any responsibility it may bear for the failure of the company, can raise more finance for the purchase of the business (occasionally even from the appointing bank) than can outsiders, and thus pay a high price, the only justification for such sale".

Payment by instalments from trading profits might be offered by a purchaser wishing to strengthen cash flow at commencement. The receiver is at risk if the repayment regime comes unstuck and will battle at considerable cost even to return to the hive-down status quo. If it proceeds, an exchange of cheques on settlement will provide valuable consideration adequate to make use of the existing debenture with appropriate collateral guarantees/securities taken from the new proprietors. Existence of the debenture before serious negotiation is transacted with the purchaser will help avoid suggestions that the subsidiary is financing the purchase of its shares in breach of section 62.The debenture can readily be assigned to a new financier and readvances made without section 311 problems.

3.5.6 Terminating The Receivership

After settlement, the receiver will apply the net proceeds of sale towards satisfaction of the original debt (subject to priorities and preferential claims and after deduction of costs) and must then account for any surplus to the parent or liquidator. If the parent has no further assets worth realising, the receivership may then be terminated, the company left for unsecured creditors to pick over and/or liquidate, and the debentureholder might look to other remedies to recover any deficit. The receiver might retain funds for a time against, for example, liability under warranties for goods traded during the receivership or retention funds for subcontracted works. At the appropriate time the receiver will file final statutory notices of vacation of office under s346(3).

3.6 TAX ASPECTS

3.6.1 Goods And Services Tax Act 1986

The receiver may be deemed a registered person in respect of the parent's continued trading (section 58). The two companies may form a group (section 55) so that the hive-down supply will either be "disregarded" as a taxable supply within the group (section 55(7)(c)) or will be zero-rated provided the assets are "capable of separate operation" as a going concern (section 11(1)(c)). The supply on ultimate sale will, in the case of share transfer, be exempt under section 14 as a "financial service" or zero-rated provided going concern status is retained. Section 58 is to be amended to ensure the Department has first priority for any net GST payable on proceeds of asset sales, trading, and related activities.

3.6.2 Grouping Losses[83]

The hive-down is not a cessation of the parent's trade for tax purposes: the receiver may use all or part of the parent's current and (if section 188 applies) carried-forward losses to offset any assessable income of the subsidiary. To qualify as a group for loss offset purposes under section 191, the lowest proportion of "common voting interests"[84] held by a group of persons (or their nominees) in relation to the parent must be not less than 66% at all times from the beginning of the parent's income year of loss to the end of the income year in which offset is sought. The parent's 100% shareholding in the subsidiary creates such commonality.

Since 1 April 1992 the group can offset by simple election at year end (without adjusting accounts) or by making cash subvention payment (recorded in accounts) or by a combination. Such payment will not be treated as a dividend. If the subsidiary is wholly-owned, payment by way of dividend will remain exempt until 1 April 1993 (discussed below).

Under section 188, the parent's losses from earlier income years can only be carried forward and offset if a group of persons maintained at least 49% continuity of shareholding from the beginning of the year of loss to the end of the year in which offset is sought. A new subsidiary established for hive-down will not have this continuity: losses incurred by the parent for the current past year after the subsidiary's incorporation or acquisition may be offset but prior losses cannot be used. While otherwise undesirable, use of an existing 'clean' subsidiary having such continuity will confer significant benefit in appropriate cases.

3.6.3 Consolidation

It is proposed that from 1 April 1993 the parent and any wholly-owned subsidiary may elect to be treated as a consolidated group whereby income and expenditure arising from hive-down and all intergroup transactions are deferred until ultimate sale of assets. The parent's depreciation and amortisation deductions are passed to the subsidiary. On sale of assets or shares to a non-group member, the subsidiary is deemed to have acquired the assets when the parent did and at the same price. This applies to provision of services, payment of interest, distribution of dividends, and transfer of assets/stock.

Each group member is jointly and severally liable for any assessable gain on the sale. Provided there is 49% continuity of holding, losses (including those incurred in the year prior to consolidation) can be carried forward. The 66% commonality test will still apply to restrict use of group losses by a newly created subsidiary. Overall, the regime will simplify hive-down but is unlikely, in itself, to cause the process to be more widely used.

3.6.4 Depreciation Clawback

Unless consolidation applies, where assets are hived-down at greater than book value the parent must write back the difference into assessable income. If there are insufficient losses available in the year of sale to offset, major asset sale will create more tax debt for the parent which, while not preferential, might be criticised by general creditors. If the subsidiary sells assets rather than shares, any later gain is taxable in the hands of the subsidiary as the hive-down purchase was for the purpose of resale. Available group losses and/or certification of

price on hive-down, and/or consolidation will remove concerns.

3.6.5 Interest Clawback/Accruals

Hive-down of land, including any interest under a lease, may trigger a 'clawback' under section 129. Any deferred interest payments may need to be structured to avoid the accruals rules.

3.6.6 Sale Of The Subsidiary

If more than 34% of its shares are sold, the subsidiary will leave the group. Its pre-sale current profits can be offset against the parent's losses as above. As post-sale profits for the remaining current part-year may be offset by any purchaser against post-sale current part year losses of its own group, a premium sale price might be available. The parent's losses cannot be transferred for the purchaser's benefit: section 195A(7) disallows use of trusts or buy-back arrangements intended for such use, If the subsidiary proves difficult to sell, staged buy-out (say, by existing management initially to 33%) becomes an option.

If the existing proprietors use a 'clean' related company in the group for a full buy-out, the commonality and continuity elements will be satisfied to retain group losses: section 106(1)(h)(ii) will allow such related company to claim interest deduction on money borrowed to complete such purchase. These advantages, allowing a higher offering price, will suit the receivership but are curious policy in an insolvency context.

3.6.7 Liquidation

On liquidation the parent holds its assets (including losses) in trust for creditors Ayerst[85]: the subsidiary is unable to take further benefit. The debt/asset might later be converted into shareholding to avoid remission of the debt to assessable income in the subsidiary's hands. The receiver is retained as agent of the debtor, for tax purposes at least, under section 275 and is assessable for tax on income from the property. Proceeds of sale of the property are not deemed income: the receiver must now account for GST on such proceeds but will be able to return at a zero-rating.

3.7 Scheme Of Arrangement-Section 205 Companies Act 1955

Hive-down can also be achieved by a scheme of arrangement. Although this method provides more protection for the receiver, it is slower, more costly and requires public disclosure.

4.0 IMPACT OF DUTIES ON HIVE-DOWN

4.1 Trading On

Although not clear in case-law, there may be a limited positive duty to trade to preserve goodwill provided the company can fund trade itself, goodwill would otherwise be jeopardised, and sale with goodwill is likely in the short term[86].

If the core business cannot be sustained profitably then hive-down is not advisable. If early sale is likely then short-term losses while preparing assets for sale may be acceptable. Monitoring and regular review are vital to avoid breach.

4.2 Sale

A hive-down is a "sale" in that property is transferred to a separate legal entity in consideration of cash or value represented by shares. Hive-down of assets in exchange for shares is readily reconciled with the 'best price' duty in section 345B. The value of the assets is represented at any time by the fluctuating value of the shares plus the fixed nominal capital of the subsidiary . "Price" for this purpose is "the sum of money or its equivalent at which a thing is valued" Johnston Fear v CPH[87]

Difficulties arise in applying section 345B to cash consideration. Strictly, the receiver must exercise all reasonable care to obtain the best price reasonably obtainable at the time of sale. Without testing the market, setting a maximum cash amount which might be achieved for the assets will be difficult. Further, market valuations may not be an accurate guide to the best price available. In Lynall v IRC[88] Lord Reid said:
" the best way to determine the value in exchange of any property is to let the price be determined by economic forces - by throwing the sale open to competition when the highest price will be the highest that anyone offers".

A price set too low might breach the duty. If the price is too high, the subsidiary must be injected with capital in consideration of the ultimate purchaser agreeing to pay off that set price as represented in the loan account debt. The apparent loss in value will promote discontent amongst general creditors. The certification process is also difficult to reconcile with section 345B: if there is delay between hive-down and sale and/or values do not remain static, then the ultimate sale price will not be the same as the "best price" available at hive-down and could not strictly be so certified at the later date. Further, sales

to a related party where the market is not properly tested have been held to breach the duty. In Tse Kwong Lam v Wong Chit Sen[89], for example, a mortgagee sale of property to a company of which the mortgagee was a member was not barred in principle but could not be supported unless the mortgagee proved good faith and proper procedures including advertising, choice of method of sale, obtaining specialised advice, and setting a suitable reserve.

Hiving-down is however be distinguishable in that the mortgagor's equity of redemption is retained after transfer: on payment of the debt it will re-assume beneficial interest through its shareholding in the subsidiary. It is suggested accordingly that the duty should be applied to the total transaction, recognising hive-down as essentially a device to facilitate later 'packaged' realisation. The obvious "mischief" addressed by section 345B is to ensure that any transfer of assets whereby the borrower loses its equity of redemption is not at an under-value: the certification process does not detract from that purpose. There seems no good policy reason to the contrary: the consolidation regime has similar effect for tax purposes. Before assets leave the receiver's control, any unrealised "values" are illusory. If later called on to set values, a court would look beyond any prices set by a receiver in any event. Interpretation of "sale" and "sells" in section 345B might accordingly exclude corporate assets retained in group control for later sale, with appropriate anti-avoidance measures such as continuity and commonality of shareholding.

On final sale, full and appropriate advertising and consideration of the method of sale must be undertaken. Management buy-outs will necessitate particular care in that the purchasers have clear conflict of interest.

4.3 Other Duties

The fundamental duty is good faith, including proper purpose and avoiding conflict of interest. In Downsview Nominees[90] the receiver controlled the debenture holder. The dominant purpose of a proposed hive-down, which had been prepared but delayed for more than 6 months, was held to be to defeat creditors if necessary and to benefit the receiver personally. It is apparent from the tenor of Gault J's remarks that any hive-down would been set aside or negated had it been implemented.

5.0 RIGHTS OF INTERESTED PARTIES

This section examines the rights and interests of selected groups affected by hive-down.

5.1 Beneficial Owners And Trust Property

Fundamentally, property which is not owned by the company beneficially cannot be secured by the charge nor defeated by the receiver nor creditors. Identification and establishment of trusts may however be problematic. In Re Registered Securities Limited[91] for example, funds were pooled by RSL purportedly for investment on a contributory basis in mortgages over land. The Court of Appeal was unable to clearly identify individual trusts notwithstanding the apparent intention of the scheme and its investors, and ordered pooling of all investments followed by proportional distribution to contributories. In Dakin v Goldcorp Exchange Limited[92] (In Rec) Goldcorp had possession of bullion on a "non allocated" basis, being bullion either supplied or purchased by customers to be held by Goldcorp until request for delivery was made. On appointment of receivers, claims by customers exceeded the

stock of bullion. While an application to Court to determine ownership was pending, the receivers gave notice of commencement of sale. An application for injunction by persons claiming to represent one fourth of potential claimants was declined. On the balance of convenience the Court preferred sale on the basis that the receivers would hold proceeds until ownership was determined.

Uncertainties while trust property is identified may prevent or delay or require staged hive-down. Clearly the receiver can apply to a Court for directions. In Re National Pacific Securities Limited (In Rec and In Liq)[93] the High Court accepted inherent jurisdiction in equity under the doctrine of Emergency to allow a receiver to interfere with the property of others and to remunerate work in respect of trust property carried out during the emergency[94]. Establishing the trust necessarily will involve interference with the trust property by the receiver while a determination of ownership is made. During that period the receiver acting in good faith will ordinarily have lawful justification to retain the chattel and will not be liable in conversion[95].

Is the receiver entitled to hive-down assets held by the company as legal owner while claims of trust are unresolved? Such course would usually be unwise particularly if a second-stage hive-down can be completed once trust issues are resolved. Hive-down might be considered however if claims are not seen as genuine and/or an "emergency" is in prospect: a prudent receiver would apply for directions. It is suggested in the absence of authority that the position of the beneficiary is unaltered by hive-down provided that the subsidiary assumes the role of putative trustee, protects the asset, and minimises dealing with it until beneficial ownership is resolved, effectively the position with trust moneys in Dakin v

Goldcorp. Whether the receiver can recover part of the costs of hive-down from such trust property will depend on the circumstances.

5.2 Unsecured Creditors

Unsecured creditors in particular will view hiving-down with suspicion, in that viable assets are moved out of a liquidator's reach leaving a skeleton debtor company whose only valuable asset is a book debt substantially committed to repayment of its own secured debt. On a practical level, the creditor may see the subsidiary trading under a new lease of life, probably in the same premises with substantially the same personnel under a similar name but with continuing trading profits and ultimate sale proceeds not available for general distribution. The creditor may later learn that the new business is beneficially owned by the proprietors of the company in receivership which s/he is pursuing at some cost for breach of contract. In reality, however the unsecured creditor is likely to be no worse off than if assets were sold by the receiver under 'fire sale' conditions.

What remedies does the unsecured creditor have?

(1) Liquidation

Application for a winding up order will take time, is unlikely to prevent a hive-down nor speed up realisation of assets and distribution, nor, in itself, persuade the receiver to pay out as an informal preference. An Order might however be valuable in appointing the liquidator to independently monitor a receiver who is suspected of bad faith. The closeness of relationships between the main parties to the hive-down may also be a factor as in Re Hibiscus Coast Centre Ltd[96]. On appointment the liquidator

may apply to the Court for orders limiting or terminating the receivership (section 346A) and fixing the receivers remuneration (section 347), both expanded in the Receiverships Bill[97]. The hiving-down process may need to be unwound if a section 346A order is to have any real impact[98].

If hiving-down of any assets within 3 years of commencement of winding up is at an under-value, the liquidator may recover the amount of the under-value from the subsidiary pursuant to section 311c(2). Although there is no exemption in the section for any bona fide subsequent purchaser of the related company, the Courts "should be slow to condemn a bona fide commercial bargain negotiated at arms length and with no intention of defeating creditors" Re Burgess Homes Ltd[99].

(2) Equitable Remedies

One of the main advantages of hive-down is the ability to shed bad debt. While a receiver cannot disclaim pre-receivership contracts, s/he cannot be obliged to cause the company to perform its obligations under them but may choose to enforce them. Specific performance is available against the receiver only to protect a third party's "unique" pre-receivership property interests, for example under an existing agreement for sale and purchase of land[100]. Injunctive relief might be available to a party to a trading agreement with the company, particularly where the receiver intends to breach a negative covenant in the agreement and damages would not be an adequate remedy. In either case, the Court must enquire whether the remedy would have been available were the company not in receivership, and whether the receivership has introduced any new element which might affect the exercise of its equitable jurisdiction. The receiver will not be ordered to

pay away any funds of the company so as to deprive the debentureholder of its priority nor ordered to incur personal liability which it is reasonable for the receiver to avoid[101].

In Airlines Airspaces Limited v Handley Page Limited[102] the receiver of Handley Page proposed hiving-down the company's aircraft manufacturing business leaving the plaintiffs entitlement to ongoing commission on sales as an unsecured damages claim. The plaintiffs application for an interim injunction to prevent hive-down failed. Graham J held that provided "repudiation of the contract will not adversely affect the realisation of the assets or seriously affect the trading prospects" then the receiver was entitled not to perform the contract notwithstanding potential liability for the company. The decision is brief and substantially ignores arguments of counsel. While Graham J's reasoning that the receiver is in a better position to disclaim onerous contracts than the company has been criticised as "plainly wrong"[103] , the case is a high-water mark for hive-down. It has also been explained "as an attempt to enforce a contract that could not be specifically enforced" in equity against the company[104] and as a formulation more appropriate to court appointed receivers[105].

The later decision in Schering Pty Limited v Forrest Pharmaceutical Co Pty Limited[106] leaves some conflict unresolved. Schering had an exclusive distribution agreement to sell goods manufactured by Forrest. The receiver of Forrest determined that by-passing Schering and marketing Forrest's product direct to end-users was the only realistic rescue option. Helsham J granted an injunction to Schering on the basis that damages was an inadequate remedy, notwithstanding acceptance that the last real hope of saving the company was gone such that Schering and other unsecured creditors might be no better off in

consequence. Applying the above criteria, it can be said that the remedy was available against the company irrespective of receivership, and the judgment did not oblige the receiver to trade or incur personal liability or expend the debentureholder's funds.

Receivers faced with similar contracts may elect to hive-down in any event on the basis that the other party might not be aware of its particular rights or might not be prepared to incur costs of pursuing an uncertainty. The receiver will be mindful however that interim injunction might stop the process or mandatory injunction might cause it to be undone. Traders might recognise as a result of Schering that they have leverage for discussions with the receiver. This is particularly so where (as in Schering) the "special creditor" may fundamentally jeopardise the receivership. Payment to a creditor in Schering's position would not be a voidable preference under section 309(1): the receiver's intent is to preserve assets and protect the company not prefer the creditor. Further, Courts have recognised that "commercial reality" may justify payment to a creditor "having a sufficient lever"[107].

(3) Breach Of Statutory Duty

Inclusion in the Receiverships Bill of a duty to general creditors is a new development. Milmo J in Latchford v Beirne[108] rejected recovery for creditors as presenting "problems of very considerable, if not insoluble, complexity", Farrar[109] considers that this is "the wrong conclusion for the wrong reasons", separating secured and preferential creditors and guarantors (who have remedies) from general creditors (who have no direct remedy in equity against the company). Latchford was overruled in Standard Chartered Bank v Walker[110] where duty to an unsecured creditor (in that case a guarantor) was established: Lord

Denning MR applied the 'neighbour' principle and, "while [saying] nothing about creditors" also commented that "the duty of care is owed to [the mortgagor and guarantor] if not to the general body of creditors of the mortgagor". A low-level duty can be reconciled with a receiver's "virtual impunity"[111] to repudiate contracts and thereby create unsecured debts: in pursuing the primary duty to the debentureholder the receiver may not recklessly disregard other interests. The Bill does not affect ability to ignore contracts on hive-down: those liabilities are addressed elsewhere[112]. It is suggested that recovery under this provision might be limited to funds paid or lost through negligence or fraudulently preferred or for special or proprietary interests, such as Schering.

(4) Other Remedies

To prevent particular assets from being hived-down, an execution creditor might consider obtaining Garnishee Orders, Charging Orders, a Mareva receivership[113], or declarations of trust where appropriate.

(5) Information

A major grievance of creditors is the paucity of information provided to them. The Receiverships Bill[114] considerably expands the receiver's statutory reporting requirements but stops short of the English system whereby an administrative receiver must send notice to unsecured creditors within 28 days and call a meeting within three months of appointment and must furnish reports and reasonably required information. Notably however ,consultation is not required before any hive-down.

5.3 Employees

Davies and Friedland[115] write of two deeply divided lands of labour law and company law with a volcanic island between where hiving-down occurs. Some fine balancing is required between the two cultures: in New Zealand at least the balance may be too favourable to the debentureholder in that employees have limited preference for pre-receivership wages, salary and holiday pay[116] but are unsecured creditors for post-appointment entitlements. Appointment of a receiver does not automatically terminate contracts unless an additional factor inconsistent with existing contracts is present, for example, sale of the business[117], entry into new contracts with the receiver[118], or where a managing director's wide powers are inconsistent with the receiver's managing agency[119].

Where hiving-down causes the parent to cease trade, it may operate to determine all contracts of employment[120]. The subsidiary might re-employ with the employee's consent. The re-employment might be construed from the circumstances: "in practice it is often idle to look for individual offer and acceptance"[121]. Passing liability to the subsidiary for redundancy compensation however might deter purchasers and will result in a reduced sale price, in effect indirectly obtaining a super-priority for those employees over the debentureholder. To avoid this, the parent company might subcontract employees (subject to their contracts or with consent) to the subsidiary, perhaps for a short period[122]. Arguably the parent does not cease trade but commences a new trade as subcontractor of labour without break in employment. The receiver will be cautious not to 'adopt' the contracts in the process. After the subsidiary is sold, some positions may be superfluous to allow dismissal through redundancy: such dismissal does not breach the employment contract whereby the receiver risks criminal liability for aiding and abetting breach by the company. Failure to give notice or pay in lieu may however be a

breach: a commercial decision by the receiver to pay will again creates a super-priority. Redundancy compensation is not pre-receivership "wages"[123] and has no preferential status. The Courts will not "second-guess" the receiver's decisions provided that s/he acts fairly[124] and is genuine in claiming the position to be redundant, irrespective of the reasons for that situation.

The law is case-driven and the area is a minefield for receivers: not only is there potential criminal liability for which there is no right to indemnity but also potential breach of duty if, in making an employee redundant, the company's unsecured debts increase. If hive-down is beneficial in saving jobs then the receiver's personal risk must be balanced against socially acceptable standards of practice or, in economic terms, the contractarian view is balanced against the view that employment runs with the undertaking rather than the structure it resides in. The former appears current policy: realistic levels of redundancy compensation could still be available by worker insurance or a Redundancy Fund or through social welfare. Regulations similar to Great Britain[125] might be productive whereby employment contracts remain with the parent after hive-down, The purchaser may require dismissal of unwanted employees before settlement of the purchase, such that liability remains with the parent. On settlement remaining contracts are deemed to be automatically transferred. On a contractarian view, redundancy, superannuation and pension entitlement should not be transferred since a reduced sale price will result. The employee should be entitled to terminate without notice if working conditions substantially change: change of employer alone should be insufficient. Where transfer is to an insolvent shell company or where hive-down or subsequent transfer is later voided, contracts should revert to the parent with liability falling on directors or receiver where

appropriate. However balanced, hiving-down should not be made more risky for the receiver than direct sale of assets nor (if that is the corollary) should the employee gain the high ground: even an uncertain prospect of saving jobs is to be preferred to effective liquidation.

Under the Receiverships Bill[126] the receiver will be deemed to have adopted and be personally liable for employment contracts unless the employee is given notice within 14 days. The receiver will probably terminate all contracts, inform employees that the company is in breach, and negotiate new short-term "rollover" contracts which exclude the receiver's personal liability and allow for subcontracting and/or transfer.

5.4 Subsequent Debentureholders

A receiver for a subsequent debentureholder considering hive-down must either pay out the prior debt,(ordinarily impractical) or obtain the consent of the prior chargeholder to transfer subject to the prior security. The prior chargeholder would be likely to appoint its own receiver unless persuaded that its security was not prejudiced and ongoing interest installments under the prior charge will be paid. The Harmer Report proposed that a receiver be specifically able to obtain an Order permitting sale of an asset which is subject to a charge having priority to the floating charge, The intention is to attach the prior charge to proceeds of sale. The Receiverships Bill[127] substantially follows the recommendation with provisos that the receiver has made reasonable efforts to obtain co-operation and that the sale does not substantially prejudice the interests of prior mortgagees. The provision might be invoked where there is urgency or unfair prejudice to the subsequent creditor (such as likely loss of an interested purchaser in a

declining market), if the prior mortgagee cannot be found, has been wound up or otherwise has ceased to exist, or will not co-operate. In Downsview[128]: the receiver appointed by the first debentureholder declined offers by the second debentureholder to buy out the first debenture debt without apparent regard to his primary duty to obtain satisfaction of that debt. The Court ordered the receiver to accept the offer of redemption and to assign the first debenture. An order under this provision might require full disclosure of the receiver's proposals, directions for sale, compensation for the prior mortgagee to be determined on ultimate sale, and directions to release the prior security on payment.

5.5 Preferential Creditors

If hive-down of stock and work-in-progress results in a profit on realisation compared to their value on a break-up basis, is that profit caught under the fixed or floating charge? Preferential creditors bear no risks for losses through ongoing trade but are entitled to damages if such trade dissipates asset values; arguably the risks of trading and funding of it by the debentureholder justify a super-priority. The receiver's function however is to realise assets, and the price obtained is simply a consequence of a more beneficial sale method. The assets accordingly trace back to the floating charge: the receiver must account accordingly. Where the receiver creates such profit through new (as distinct from adopted) post-receivership contracts, the result appears no different provided future acquired assets fall within floating charge definitions.

5.6 Landlords

The landlord cannot require the receiver to adopt the lease but will usually be entitled to re-enter. Relief against

forfeiture is likely to be available to the receiver on payment of arrears of rental. Relief might be available if the landlord does not agree to assign the lease to the hive-down company (refer Warnocks(1992) below). The Receiverships Bill[129] will provide the receiver 7 days grace after appointment from which date s/he becomes personally liable for rent until ceasing occupation or receivership. This provision applies equally to chattels hire purchase or lease debts. The equitable assignment in favour of the debentureholder now precludes a landlord from distraint against plant which is subject to a fixed charge[130].

5.7 Receiverships Bill

All of the foregoing will have standing to apply to the Court for orders to enforce the receiver's duties[131] and supervisory orders[132] including setting remuneration and protecting property.

6.0 CASE STUDY - WARNOCKS LIMITED

6.1 Background

Warnocks Ltd, a national chain of 47 retail shops, was put into receivership on 16 April 1992 by ANZ as first debentureholder after directors informed ANZ of trading difficulties and resigned. A hive-down of viable assets to a dormant wholly-owned subsidiary renamed Warnocks(1992) Ltd was approved in principle by ANZ and the second debentureholder, subject to taking of full inventories. Three shops were closed immediately and seven subsequently, shedding operating costs of $1m per annum. Thirty-seven shops essential to the core business were identified: rental payments and wages were continued without adoption of contract by the receivers on understandings that the

receivers would pay funds to the company and would cause it to pay funds out. ANZ funded purchase of stock required for the continued operation of the core business; pre-receivership suppliers were paid out or had goods returned to them. A winding-up order was made on 20 July 1992. Hive-down was publicised on 5 June 1992 and completed on 1 August 1992 when core assets were transferred to the subsidiary in consideration of a debenture granted to secure debt of $8m. Warnocks(1992) then repaid $5m to Warnocks Ltd and called up the unpaid capital. Warnocks Ltd then paid $5m to Warnocks(1992) Ltd. Capitalising was expressly intended to provide an impression of substance and credibility to the market to encourage ongoing suppliers and landlords. ANZ intend to assist trade by Warnocks(1992) Ltd for 18 months to 2 years before sale and will no doubt monitor progress carefully.

6.2 Litigation

The landlords of Queensgate Mall located a new tenant and purported to terminate the lease on 5 August 1992. Warnocks (1992) obtained relief against forfeiture on conditions. Heron J considered that relief in cases involving reconstruction would be the exception but that the balance tipped slightly to the assignee notwithstanding that an alleged breach of section 62 (if established) would leave a shell company as lessee. Interestingly, His Honour commented that "essentially the same tenant ... remains for the balance of the term of years"[133].

6.3 Commentary

Hive-down appears a calculated gamble by a debentureholder who, having made full investigation, prefers the uncertainty of delayed sale at (say) 90% of stock and goodwill valuation to immediate break-up sale in a flat

market at (say) 30%. Provided the undertaking can trade profitably ANZ can choose the most beneficial time of sale. Orderly break-up sale of individual shops and the capacity to franchise as the market may dictate are preserved. The undertaking is fundamentally reconstructed with relatively low fall-out: the principled dealings with suppliers have avoided chain reaction. Unpaid creditors and landlords are no worse off given the fact of liquidation; Warnocks Ltd retain beneficial interest in valuable assets suggesting a surplus may be available (subject to the amounts of preferential claims) for eventual distribution. Continuing suppliers and 37 landlords are better off.

The receiver has completed a type of rescue which the company itself could not have performed without cost, uncertainty and delay in setting up a scheme of arrangement. Full control of the process by ANZ has been efficient and reasonable: Administration might have achieved this result but effectively by using ANZ's money during any moratorium. Speculatively, the cost to ANZ of unprofitable trade over a short term might not greatly increase the alternative write-off of debt. Existence of a core viable business (with relatively uncomplicated undertaking and a one-off debt-equity problem) together with the low prospect of short-term sale and ANZ's ability to finance cash flow appear key elements. Fresh management is now installed and Warnocks(1992) is operating freely without (it is assumed) risk to the directors of insolvent trading. The receiver has avoided personal liability, ultimately to ANZ's benefit as indemnifier. ANZ made the key decision but in standing aside from administration avoids ongoing liability, Suppliers have had an opportunity to negotiate terms of trade, Social and commercial fallout, particularly in smaller communities, is significantly avoided: not only has ANZ reserved itself an opportunity to maximise eventual recovery in a more buoyant market (in

which goodwill may be significant) but it is likely to have enhanced its own commercial standing.

Had the Receivership Bill applied:

(1) Notice to employees would have been required within 14 days
(2) Essential supplies could be required
(3) Rental liabilities commenced after 7 days
(4) A full report would have been filed by 16 June 1992 including proposals to carry on an associated business and any breaches by directors

7.0 REFORM

The flexible nature of the technique precludes definition in statute. While the Receiverships Bill implies powers of management, to legitimise the hive-down process it should also specify an implied power to transfer the undertaking. The Warnocks transaction was well funded: some development of balances for employees in labour law may be desirable.

8.0 CONCLUSION

"The lemon may, so to speak, be squeezed dry"[134]

The device of hiving-down is no more than one of several techniques available to a secured creditor entitled to exercise rights to convert a debtor's property to cash. It provides a valuable option when there is a clearly identifiable viable core business which is capable of trade if unburdened of debt, and where it is further unlikely that the business will be sold in the immediate future. Separating and controlling use of the core of the undertaking is consistent with the fundamental ability of a secured creditor to stand outside insolvency. The device is not corporate rescue although its use may improve survival

prospects and incidentally confer benefit on other parties having interest in the undertaking. The decision to use it remains the entire prerogative of the debentureholder. It involves two further incidental processes, being likely liquidation of the parent and some continuation of the trade pending sale.

Two tensions in company law are also sensed: first, the truism that the company structure exists because of the undertaking and secondly, the concept of separate legal entity which is at the essence of the technique. The separate entity argument on one side enables business debts to be unilaterally repudiated and provides a defence to allegations that the hive-down property is available to the parent's creditors. The contrary argument that the group is one economic unit allows grouping of the same entities for tax purposes, assignments of contracts, and possible equitable relief from the strict s345B duty. The purer approach must be to maintain the separation concept, notwithstanding Lord Denning's views,[135] unless equity demands otherwise.

The duties hover in the background. The receiver is exposed to complaint from indeterminate members of each class, to a higher degree than the proprietors of the company, for decisions made urgently on limited information and in stress conditions.

The hive-down receiver is not a corporate doctor: more an undertaker doubling as a heart transplant surgeon in a war zone.

"Hive" vt;to collect into a hive, to lay up in store
(Chambers Twentieth Century Dictionary)

[1] Brady v Brady [1987] 3 BCC 535 per Nourse J.; cited by Ross Grantham "The Judicial Extension of Directors Duties to Creditors" [1991] JBL9
[2] Gosling v Gaskell [1987] AC 575:
Halsburys Laws of England (4th ed) Vol 16 para 1280
[3] Receivership is now the "dominant procedure for the conduct of insolvent companies" (Scottish Law Commission Memo72,para 1.3 (1986).
[4] Accountants Journal (Feb 1990) p7 per Bruce McCallum
[5] Minister of Justice (8 December 1988) (1990 CCH 60-416);
Australian law nonetheless appears out of line with New Zealand/Great Britain in the area of duties of care eg compare. Expo International v Chant [1979] NSWLR 679 & Australian Company Law(24May1990)para324/6 with N.Z. cases cited in Downsview Nominees (No.2) (cit.below n.33)
[6] Insolvency Law Review Committee Report Cmnd No 8558 (1982)
[7] Australian Law Reform Commission Paper No 32 "General Insolvency Inquiry" (1987)
[8] NZ Law Commission Report No 9 Company Law Reform and Restatement (June 1989) Part 6
[9] Refer clause 133 Companies (Ancilliary Provisions) Bill 1991
[10] Alternately granted to principals or vendors; 2500 appointments in the 3 years to August 1990 (Source - Spicer & Oppenheim);
see general commentary in eg. Samwell "Corporate Receiverships" at pp5&6 ;
Lightman & Moss "The Law of Receivers of Companies"(Preface)
[11] Street J in Duffy v SuperCentre Dev Corp Ltd [1967] 1 NSWLR 382
[12] (Feb 1990) Accountants Journal p7 per Bruce MacCallum
[13] From National Business Review (3.4.92) "Receivers near end of requiem for Judge Corpse", an example of chain fall-out through cross-shareholding ;
For reports of Bank/small business discontent see "New Zealand Business"(Oct.1990)at page 14; "Enter the Receiver" National Business Review Magazine(26 April 1991) & National Business Review(21 February 1992) at p58 "Agency rises from ashes as creditors complain".
[14] Joint Working Party to Law Reform Committee (UK) cited in Davies & Friedland [1980] ILJ 95 "The Effects of Receiverships upon Employees of Companies"; for liabilities to preferential creditors see Westminster City v Haste (below n42)
[15] eg Davy v Nathan Securities Ltd [1989] 4 NZCLC 65,321 ;
Lightman & Moss (supra n10) para 8-07;
[16] Statutory powers to manage and transfer assets to a subsidiary: (Insolvency Act 1986; schedule 1; Nos 15 & 16(Eng.);Schedule 2 Nos 18 & 19 (Scot.); Gore-Browne on Companies paras 31.44 & 19.16
[17] supra (n6); para 495
[18] GL Gretton (1986) S.L.T.(News) 325 "Should Receiverships and Floating Charges be abolished"
[19] Re Emmardart Ltd [1979] Ch 540 ;
Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd [1965] NSWR 1652

[20] eg.see Sykes EJ "The Law of Securities" (4th ed) at pp 538-9 ;Gough W.J."Company Charges" (Butterworths U.K.)1978 at p17 ; Blanchard "The Law of Company Receiverships" paras 101/108

[21] Consolidated Traders Ltd v Downs [1981] 1NZCLC 95-001

[22] Salomon v Salomon & Co Ltd [1897] AC 22,52

[23] Cork Report;(supra n6) para 1481

[24] Tolleys Insolvency Journal "Boom Time for Company Deaths" (UK) (1990)Vol6 No1 p2 (Cuthbertson/Hudson)

[25] GL Gretton: (supra n18) at p328

[26] Salomon (supra n22) at p53

[27] In particular the priority of the holder of a floating charge ahead of claims of unpaid trade suppliers ; for a useful discussion refer to Chesterman M "Small Businesses" Chaps 4 & 5:

[28] Submissions of Society of Accountants to NZ Law Commission (1989) at p2 ;Lingard"Corporate Rescues & Insolvencies"Chapter4; Totty & Crystal (below (n58)Chaps1&2;"..the present Insolvency Act..fails to save companies..and charges them heavily for the privilige; it simply parcels them up and tucks them out of sight..where a commercial return is not in immediate prospect.." Tolleys Insolvency Journal(1990)Vol6 No.5 p217 "Great Britain(1991)Ltd" (Grenville)

[29] Report No9 (Pt6) para748 (supra n8); Chilvers & Shewell "Receivership Manual" (Preface at p.iii); O'Donovan "Company Receivers & Managers" at pp4-5;
Bond Brewing Holdings v National Australia Bank [1990]ACLC330(SCofVic),336(HCA)"..there is no substitute for good old-fashioned security"; Consider also the secured creditors powers to veto Administration in the U.K cf.U.S.A.Chapter 11 "cram-downs";eg.comparison in Tolleys Insolvency Journal Vol6 No3 p86(Westbrook)

[30] Anns v Merton Borough Council [1978] AC 728

[31] National Westminster v United Finance [1988] 1NZLR 226, 234

[32] South Pacific Manufacturing Co Ltd (CA 14 and 172/90) (29.11.91): quote from Capital Letter Vol 14 No 46(654) ; duties lie concurrently in tort equity and contract ; see cases cited at (1991)6BCB29 & (1992)6BCB110

[33] [1989] 4 NZCLC 65,192 at 65,222 (High Court) per Gault J

[34] Rogers v Bullen (1992) 6 NZCLC 67,636 per Holland J; the receiver was not liable for trading loss in carrying on a contract "reasonably anticipated to be highly profitable [which] turned out to be financially disasterous" (p67,644)

[35] Downsview Nominees: (supra n33)

[36] [1990] 3NZLR 265 (CA)

[37] supra:(n34) at pp67,641/2

[38] (1843) 2 Hare 461 ;a receiver is not an "officer" Downsview Nominees(n36)

[39] discussed in Farrar JH (1982) BBL 132 "A receivers duties on sale" ; creditor protection involves reversal of precedent such as Salomon (n22) and a change in the meaning of "the company" according to Grantham (supra n1) at p18

[40] Re B Johnson & Co Ltd [1955]2AllER 755 and Re Board of Trade exp St Martins [1965] 1QB603,614 compared with Lawson v Hosemaster Co Ltd [1966] 1WLR 1301 and Airlines Airspaces Ltd v Handley Page Ltd [1969] 1Ch.10 ;Lightman & Moss (supra n10) at p95 ;refer para 5.2(3)herein

[41] Downsview Nominees Ltd v First City Corporation (CA) (1990) 5NZCLC 66304,66315 per Richardson J ; see Chilvers(n29) para6.25- a receiver may wish to enhance his/her reputation, to earn increased fees,or respond to social pressures but the penalties of failure are high ; Samwell (n10) p66 ;trading on is "a calculated risk" a/c to Totty & Crystal (below n58) at p111; also Lange & Hartwig (below n100) para3.66

[42] (1989) 4 NZCLC 64,961 clause 144 at 64,969 per Bisson J; Re B.Johnson(Builders)Ltd (supra n40) -no duty to trade to preserve goodwill; Westminster City v Haste [1950]Ch442- (liability where payment could have been made to preferential creditors had the receiver not traded on) applied in CIR v Goldblatt [1972]Ch498 ; this rule was considered "quite fair" by Scottish Law Commission Memorandum No72 (Oct1986) para3.37

[43] Clause 144: no equivalent in Companies Act 1955 ;In the USA strict liability for environmental damage may be imposed on insolvency practitioners who trade on eg.Fleet Factors 901F.2d 1550 (11thCir);[1991]56 MissLR 330

[44] eg Cuckmere Brick Limited v Mutual Finance Ltd [1971] Ch 949 Davy v Nathan (1989) 4 NZCLC 65,321 ;China & South Seas Bank Ltd v Tan [1989] 3AllER 839 ;Henry Roach Petroleum Pty Ltd [1976]VR309; Tse Kwong Lam v Wong Chit Sen [1983] 3 AllER 54 ;Lingard(supra n27)para6.45; Standard Chartered Bank v Walker [1982] 3 AllER 938 ;Blanchard (n20) paras 1110/1111; NZLS Seminar(June1991)"Mortgagee Sales"& cases cited therein

[45] Davy v Nathan (supra n44); duties to be judged "in a realistic way" Alexandre v NZBreweriesLtd [1974] 1NZLR 497,501 per Richmond J.; The receiver must be "plainly on the wrong side of the line"; Salmon J.in Cuckmere (supra n44)at p646

[46] (Inadvertantly?) wider in scope in PLA Amendment Bill in first draft ;redrafting emphasises shut-out of shareholders (infra para 2.2) -in practical terms a liquidator may enforce the duty for the benefit of general creditors and failure to obtain the best price will impact on recovery from other parties eg.Walker(supra n44); Edmonds v Westland Bank Ltd [1991] 2NZLR 655; Davis v BNZ [1991] 1NZLR 745; BNZ v Ginivan [1991] 1NZLR 178 ;Stevenson (1988) 4NZCLC 64,485

[47] Supra n33 at 65,225

[48] Supra n33 at 65,225

[49] Maynard v West Midland RHA [1984] 1WLR at 638

[50] Supra n33 at 65,229

[51] Clause 149 and (to emphasise the primary duty) clause 148(2)

[52] Pambakian v Brentford Nylons Ltd [1978] ICR 665

[53] as distinct from any offer of shares ;ss3,37A Securities Act 1978

[54] clause 140 follows s346(2)

[55] clause 168: no equivalent in Companies Act 1955 ;avoids extensive problems eg.Clutha Leathers(1988)4NZCLC 96-205; NZOpticalLtd(1990)NZCLC 94-389; Walter Peak Resort Ltd (1989)NZCLC 96-314

[56] expanded in clause 160

[57] expanded in clause 153

[58] Totty & Crystal "Corporate Insolvency" (McGraw-Hill)(1982) p119

[59] eg Re Your Size Fashions Ltd High Ct(Unrept) Christchurch M416/88 - (20.9.90)

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[60] Lawson: Supra n40
[61] Clause 144: no equivalent in Companies Act 1955
[62] Some problems noted in Law Commission Preliminary Paper No 6 (1988) "Reform of Personal Property Security Law"
[63] (1986) 3NZCLC 99-853; note liquidators power to pool assets of related companies in ss315A-C CosAct1955 (cl.226 Companies(Ancilliary Provisions)Bill)
[64] (1988) 4NZCLC 64,661
[65] (1988) 4NZCLC 64,710
[66] [1976] AC 167 per Lord Diplock(H.L)
[67] [1897] AC 575 per Rigby LJ: Thomas v Todd [1926] 2 KB 511; Goughs Garages Ltd v Pugsley [1930] 1KB 615,626 per Romer L.J.
[68] [1968] 1 NSWR 705 & Re Leslie Homes(Aust)Pty Ltd [1984] NSWLR 1020 ; not "convincing " according to Blanchard (below n101) at p240
[69] [1946] Ch 188 ;to comply with s271 the trading should be with a view to realisation rather than trading profit (refer Blanchard(n101) at p241); the secured creditors right to realise charged property outside liquidation is recognised in cl.259(3)(a) Companies(Ancilliary Provisions) Bill
[70] [1980] 2AllER 655
[71] [1941] Ch 112
[72] supra n44 at p942
[73] [1985] 3AllER 564,568
[74] [1978] 1WLR at p30
[75] Sowman (supra n73) at p30; for entitlement to assets held by a liquidator see Re Potters Oils Ltd [1986] 1WLR 201 ; McAlister v Lewis (1989) 4NZCLC 65,055 ; Lightman & Moss (supra n10) para 11-01
[76] Clause 159: no equivalent in Companies Act 1955; the better interpretation of "is being wound up"is that the receiver retains agency until the final order is made; Refer s346; Re Christonette [1982] 3AllER 225 : Power to hive-down in s278
[77] Bompas v King (1886) 33ChD 279; new notice provisions in clauses.104BB-MM Property Law Act Amendment Bill affecting mortgagees in possession
[78] Ex p Punnett [1880] 16 ChD 226
[79] BNZ Finance Ltd v Smith [1991] 3NZLR 659; DFC v Samuel (1990) 5NZCLC 66,545 ; Commodore Pty Ltd v Perpetual Trustees [1984] 1 NZLR 324

[80] Re Borax [1901] 1Ch 326: Old Bushmills [1897] 1IR 488,507; Julius Harper Ltd [1991] NZLR 530
[81] Pambakian (supra n52) at p669B; Sufficient certainty for A-G v Barker Bros[1976] 2NZLR 495, Hinterleitner v Heenan (1990)1NZConvCases
[82] Lightman & Moss (supra n10) para 9.02 ; Ability of the subsidiary to provide security to assist financing purchase of its shares will assist such buy-outs (clause 61,Companies Bill)
[83] All references to Income Tax Act 1976; Continuity requirement to be increased from 49% to 66% from 1 April 1993;
For UK position (at 1990) refer Kerr on Receivers Chapter 26.;
For GST eg. NZTaxPlanningReport(August1991)p17 "Receivers & GST"(Mark Jeffries)
[84] Alternatively Common market value as defined
[85] supra n65; Samwell (supra n10) at p182

[86] Lightman & Moss (supra n10) p95; accepted in Downsview(No2)(supra n33)at 65,228 per Gault J.; but cf. Exp.St.Martins [1965] 1QB 603,614
[87] [1943] 66CLR 314,327
[88] [1972] AC 680,695; wide divergence betwen valuations is likely even if a valuation basis such as "willing buyer/seller" can be agreed, more so in a flat market where the business has unique qualities or depends on employee skills
[89] supra n44
[90] supra n33 ;also Quennell[1979] 1WLR 318;Speed Seal[1986] 1AllER 92;Jones v Lipman [1962]1WLR832,836 ; Other duties include keeping within powers,not abusing powers, not taking secret commissions, keeping moneys separate & rendering accounts as a fiduciary; refer eg.Insolvency Law & Practice (Jan1985)p22; McKendrick Glass [1965]NZLR 717,721 (fraud on a power); Official Assignee of Houston Enterprises Ltd(inLiq) v Downsview Nominees Ltd (Unrpt) High Court Auckland M846/89(27Feb1990) for a separate case of bad faith by Downsview
[91] [1991] 1NZLR 545
[92] (1988) 4NZCLC 64,675; also Re Secureland Mortgage Investment Ltd (1988)4NZCLC 64,266; Re Francis James Nominees Ltd (1988)4NZCLC 64,279; Re Landbase Nominees Ltd (1989) 4NZCLC 65,093; Re Advisorcorp Ltd (Unrept)High Ct Wellington 20/2/91 per McGechan J.; Re Tricorp Investments Ltd (Unrept)High Ct Auckland 14/11/90 per Wyllie J.; Re Ararimu Holdings Ltd (1989) 4NZCLC 65,104;
London Wine Co[1976] 126NLJ 977 cited by Lightman & Moss (n10) at para 17-09 involving a Goldcorp-type scheme for storage of vintage wine; For closely-held companies see eg McAlister v Blackler (1989) 4NZCLC 96,340

[93] (Unrept) High Court (Wellington) 7/8/91, Eichelbaum J
[94] Defined as "a state of affairs that has to be presently dealt with"
[95] Conversion: "Any act of wilful interference with a chattel done without lawful justication whereby any person entitled thereto is deprived of the use and possession of it"; Todd " The Law of Torts" (LBC 1991) ;
In England s234 Insolvency Act 1986 exempts the receiver from liability for conversion & grants a lien provide s/he believed on reasonable grounds that entitled to the asset & was not negligent
[96] (Unrept) High Court, Auckland (Vautier J) CP 1169/1980; Re John Wiper Ltd [1972]22FLR 206,216 per Bright J.; the liquidators duties as "watchdog" over the receiver'to investigate conduct of officers, & to protect minority share-holders
[97] Clauses 163 and 162
[98] section 346A ;notable lack of reported cases; Re Manson (1984) 2NZCLC 99,092
[99] [1989] 1 NZLR 691,696 (Cooke P)
[100] Jones v Lipman [1962] 1WLR 832; cited by Lange & Hartwig on Administrative Receiverships (para3.92) as authority for proposing that the subsidiary must undertake the parents contracts if it was formed "for the purpose of prejudicing creditors"; the purpose of hive-down will ordinarily be ultimate sale of assets ; Also Freevale Ltd v Metrostore (Holdings)Ltd [1983] 1Ch 199.
[101] Blanchard, P (1989) 13 NZULR 237 "The Contracts of a Company in Receivership at pp245,251,252 & supra (n20)at paras 1007-9; Lightman

& Moss(supra n10 at p101) conclude that the tort of interference with contractual relations does not apply - implicitly supported by Airlines Airspaces (below n102); also Lange & Hartwig (supra n100)at para 3.57.

102 [1970] 1Ch 195

103 Helsham J in Schering [1982] 1 NSWLR 287,289C

104 Helsham J in Schering:(supra n103)

105 Lightman & Moss:(supra n10) at p86; Gore-Browne (n16) at para 31.44

106 [1982] 1NSWLR 286

107 Walter Peak Resort(In rec) v Otago Central Electric Power Bd (1989) 4NZCLC 96-314 per Tipping J;"..there may be occasions when perfect equity between unsecured creditors cannot be achieved.."; Blanchard(supra n10) at para 1107

108 [1981] 3ALLER 705

109 Farrar (supra n39) at pp134-5

110 supra n44; followed in Clark v UDC Finance [1985] 2NZLR 636,638 per Casey J.

111 re Diesels & Components Pty Ltd (In Rec) (1985)ACLR 825,828 per MacPherson J

112 clause 160

113 Seabrook [1949] 2AllER 94, Cairney v Back [1906] 2KB 746(garnishee orders); Cretanor Maritime Co [1978] 1NLR 966(CA) used in Derby v Weldon [1989] 2WLR 412 (Mareva injunction); Hinde Sim & McMorland "Introduction to Land Law"(2nd Ed.)(Butterworths 1986) paras 8.166etseq (charging orders)

114 clause 153; Smith Ltd v Middleton [1979] 3AllER 942 as to keeping accounts sufficient to disclose the companies position "with reasonable accuracy"

115 (1980) 9ILJ 95 "The Effect of Receiverships on Employees of Companies" p95

116 Sew Hoy & Sons Ltd (In Rec) HC Dunedin (15/2/91) CP21/90: legislative intervention suggested by Tipping J; also Nicoll v Cutts [1985]BCLC322

117 Re Foster Clark Ltd Indenture Trusts [1966] 1 AllER 43; International Harvester Export Co [1983] 1VR 539

118 Re Macks Trucks (Britain) Ltd [1967] 1 AllER 977

119 Griffiths v Secretary of State [1974] 1 QB 468

120 Re Foster Clark Ltd (supra n117) cf Pambakian (supra n52):useful discussion in Lange & Hartwig (supra n101) paras 3.93-95

121 Pambakian (supra n52)at p762B per Phillips J

122 as in Migwain Ltd (In Liq)[1979] ICR 596 and Pambakian (supra n52)

123 GN Hale & Sons Ltd [1991] NZLR

124 ditto

125 Transfer of Undertakings (Protection of Employment) Regulations 1981; (see outline in Picarda H, "Law Relating to Receivers and Managers" p154);
In the U.K. the Redundancy Fund pays the employee & proves as an unsecured creditor; Lange & Hartwig consider the burden on the taxpayer is justified by public interest in survival of the undertaking & employment; Timing of dismissals is a major factor; Samwell (supra n10) at p159 proposes contracting by irrevocable option to reduce the risk of purchasers default after employees are dismissed

126 clause 160: no equivalent in the Companies Act 1955

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[127] clause 147: no equivalent. The subsequent debentureholder might claim marshalling rights ; see "Accountants Journal"(August1989) "Marshalling"at p34 and National Westminster Finance (supra n31)

[128] supra n33

[129] clause 160 expands on s345(2)

[130] Essere Print Ltd(In Rec) [1990] BCL 1574 affirmed on later appeal - noted [1991] NZLJ 182.-the position against the holder of the floating charge is less clear; Powers limited on the parents liquidation (ss226,308(6),314)

[131] Clause 165

[132] Clause 162 ; under clause 163 only the grantor/liquidator can apply to terminate or limit the receivership (under s346A only the liquidator can apply)

[133] (Unrept) High Court, Wellington - 22 September 1992 M479/92 Heron J

[134] re Diesels & Components Pty Ltd (supra n111) at p828 per MacPherson J

[135] Wallersteiner v Moir [1974] AllER 217:
DHN Distributors Ltd v London Borough of Tower Hamlets [1976] 3AllER 462: "one can look to the economic entity of the whole group especially where the subsidiaries are wholly owned" ; Also Cork Report (supra n6)Chapter51 "Group Trading " approving ss315A-C (supra n63)
Also Smith Stone & Knight Ltd v Birmingham Corporation [1939] 3AllER 116,121 ;Rolled Steel [1982]Ch478; Bell v Lever Bros [1932] AC161,228

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