IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA68/2018
[2019] NZCA 275

BETWEEN	MICHAEL DAVID KIDD Appellant
AND	ALEXANDER PIETER VAN HEEREN First Respondent
AND	WORLDWIDE LEISURE LIMITED Second Respondent
AND	SARACENO HOLDING BV Third Respondent
AND	STICHTING ADMINISTRATIEKANTOOR SARACENO HOLDING Fourth Respondent
AND	BANK OF NEW ZEALAND Fifth Respondent

Hearing:	27–28 November 2018
Further submissions:	5, 6, 7 and 11 December 2018
Further memoranda:	13 and 21 February, 9 April, 8, 14, 15 and 31 May 2019
Court:	French, Brown and Gilbert JJ
Counsel:	S J Mills QC and B O'Callahan for Appellant M D O'Brien QC and S D Williams for First Respondent I M Gault and B J Ward for Second Respondent No appearance for Third to Fifth Respondents
Judgment:	2 July 2019 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The cross-appeal is allowed.

C The orders made in the High Court are set aside.

D We make an order appointing Kare Johnstone and Andrew John Grenfell, chartered accountants of Auckland, as receivers of the shares in Worldwide Leisure Ltd for the purpose of realising as soon as reasonably practicable sufficient of the company's assets found to be partnership assets, being Huka Lodge and (if necessary) Dolphin Island, to enable USD 25 million to be paid into the High Court.

E The net proceeds of sale (after repayment of the secured indebtedness to the fifth respondent and deduction of all costs reasonably incurred in the receivership including costs of the sale) are to be paid into the High Court on account of Mr van Heeren's obligations under the Interim Payment Order made by Fogarty J on 14 June 2015 ([2015] NZHC 517) and held pending further order of that Court.

F The orders in D and E above are to lie in Court and not become operative for a period of 30 days from the date of delivery of this judgment or until further order of this Court.

G The parties are to confer and file memoranda on the precise terms of the orders needed to give effect to this judgment or such other orders as they may agree. A joint memorandum setting out the proposed terms (or separate memoranda if no agreement is reached) is to be filed within 21 days of the date of delivery of this judgment.

H This judgment is released to the parties, the receivers and counsel only in the first instance and is not to be published for a period of 30 days from the date of delivery of this judgment or until further order of this Court.

I The first and second respondents are jointly and severally liable to pay one set of costs to the appellant for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Gilbert J)

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Introduction

[1] On 14 April 2015, Fogarty J ordered Mr van Heeren to pay USD 25 million into Court within one month in respect of his liability to account to Mr Kidd for his share of their partnership assets (Interim Payment Order).[1] This interlocutory order was made pursuant to r 7.71 of the High Court Rules 2016 in proceedings commenced by Mr Kidd against Mr van Heeren in 2014 seeking an accounting for his share of their partnership assets (2014 Proceeding). Rule 7.71 empowers a Judge to order a defendant to pay an amount the Judge thinks just if satisfied the plaintiff is likely to obtain judgment against the defendant at trial for a substantial sum of money apart from damages or costs. Fogarty J was satisfied Mr Kidd is likely to obtain judgment in the 2014 Proceeding for at least USD 25 million. The Judge contemplated this sum would be paid to Mr Kidd subject to the Court's approval of a "plan of investment and/or use of the interim payment pending completion of the final accounts".[2]

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1 *Kidd v van Heeren* [2015] NZHC 517 [Interim Payment Order].
2 At [172(g)].

[2] Mr van Heeren has not complied with the Interim Payment Order; he has paid nothing. Three years after the date for compliance had passed, Mr Kidd filed an originating application (2017 Proceeding) seeking the appointment of receivers to sell the assets of Worldwide Leisure Ltd, including Huka Lodge, a luxury resort situated near Taupō. Mr Kidd alleges these assets held by Worldwide Leisure are partnership assets to which he and Mr van Heeren each has a 50 per cent beneficial entitlement. Whereas Mr van Heeren is the sole defendant in the 2014 Proceeding, additional parties had to be joined as respondents in the 2017 Proceeding. These include Worldwide Leisure (the second respondent) and its shareholder Saraceno Holding BV (Saraceno), a Netherlands company (the third respondent). Saraceno is a wholly owned subsidiary of a private Dutch foundation, Stichting Administratiekantoor Saraceno Holding (the fourth respondent). Mr van Heeren transferred his shares in Worldwide Leisure to Saraceno in 2006. Mr Kidd contends Saraceno holds these shares on a bare trust for Mr van Heeren. The only other share in Worldwide Leisure is held by Mr van Heeren's solicitor, David McGregor, who is a director of the company.

[3] Mr Kidd sought an order that half of the net proceeds of sale of the assets of Worldwide Leisure be paid to him, representing his share of these partnership assets, and the balance, being Mr van Heeren's half-share, be paid into Court on account of Mr van Heeren's obligations in the 2014 Proceeding under the Interim Payment Order. Although these were the formal orders sought in the application, we were advised that the matter was argued in the High Court on the basis that the realisation of the assets was to be applied first in discharge of the Interim Payment Order with any surplus being "preserved".

[4] Mr Kidd relied on two jurisdictional grounds in seeking these orders. First, he relied on r 7.48 of the High Court Rules. This rule confers wide powers on a judge to make such order as may be just, including the appointment of a receiver of any property in dispute, if a party (the party in default) does not comply with an interlocutory order, here the Interim Payment Order. Secondly, he relied on the Court's equitable jurisdiction to aid enforcement and assist in calling in partnership assets in a winding up of the partnership.

[5] In a judgment delivered on 18 December 2017, Jagose J declined to make these orders.[3] The Judge considered he had no jurisdiction to make the orders under r 7.48 because he was not satisfied Mr van Heeren was a "party in default" in terms of that rule.[4] The Judge considered that absent a party in default, enforcement was also not available in equity.[5] Mr Kidd appeals against the Judge's refusal to make these orders.

[6] Although the Judge rejected the application for appointment of receivers with power of sale, he found that Mr Kidd was entitled to a lien in terms of s 42 of the Partnerships Act 1908 securing payment of outstanding partnership liabilities from partnership assets prior to completion of the accounting between them.[6] The Judge accordingly made an order appointing receivers to Huka Lodge "to preserve and manage that partnership asset to meet outstanding partnership liabilities".[7]

[7] No party sought this order and no one desired it. It is common ground there are no outstanding partnership liabilities and there is no concern about the management of Huka Lodge. Mr Kidd appeals against that order and this aspect of his appeal is supported by Mr van Heeren and Worldwide Leisure in their cross-appeals. The order has been stayed by the Judge by consent in the interim.[8] The appeal and cross-appeals against the order may be allowed by consent.

[8] Before addressing the submissions on the appeal, it is helpful to begin by briefly summarising some more of the relevant background.

Background

[9] For some 15 years from 1975, Messrs Kidd and van Heeren conducted in partnership a highly profitable international steel trading business. The profits were invested through various entities including Worldwide Leisure in assets located in different parts of the world. Mr Kidd has been seeking an account for his share of these assets since the parties went their separate ways 28 years ago, in January 1991.

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3 *Kidd v van Heeren* [2017] NZHC 3199 [High Court judgment].
4 At [67].
5 At [73].
6 At [88]–[95].
7 At [96].
8 *Kidd v van Heeren* HC Auckland CIV-2017-404-1074, 7 May 2018 (Minute of Jagose J).

[10] In February 1996, Mr Kidd commenced proceedings against Mr van Heeren in the High Court at Auckland seeking an accounting for his share of the partnership assets. Mr van Heeren resisted Mr Kidd's claim relying on a deed of indemnity dated 18 January 1991 in terms of which Mr Kidd purportedly indemnified Mr van Heeren against all claims by Mr Kidd and settled all disputes between the parties anywhere in the world. On Mr van Heeren's application, Smellie J stayed the proceedings in October 1997 because the indemnity provided that any dispute concerning it was to be determined according to South African law in the Republic of South Africa.[9]

[11] Mr Kidd then brought proceedings in the South Gauteng High Court, Johannesburg in 1998 challenging the validity of the indemnity. These proceedings were determined in Mr Kidd's favour 15 years later, in May 2013.[10] Satchwell J found the partnership had made acquisitions throughout the world including, but not limited to, Genan Trading Company NV, Prime International Ltd, Galaxy Properties (Pty) Ltd (Tisco), shares in Jocrow Steel Ltd, Huka Lodge, Dolphin Island, Cromwell/Wellesley shares (which the Judge noted "ultimately became a substantial stash of monies"), Optech International Ltd, gold bars, bearer certificates and cash in bank accounts.[11] Satchwell J found that Mr van Heeren took advantage of Mr Kidd's trust and procured the indemnity by fraudulent misrepresentations intending to "snatch" a "tremendous bargain"[12] having been "cheating" Mr Kidd out of partnership profits for years.[13] The Judge accordingly made an order declaring the indemnity to be null and void. Mr van Heeren's application for leave to appeal to the Supreme Court of Appeal of South Africa was declined, first by Satchwell J[14] and then by that Court.[15]

[12] Mr Kidd then commenced the 2014 Proceeding seeking an account between the parties to determine his entitlement to partnership assets. He applied for an interim payment of USD 25 million. Fogarty J made these orders in his judgment delivered on 14 April 2015. The Judge directed an account be taken to determine the amount due to Mr Kidd and ordered Mr van Heeren to pay USD 25 million into Court within

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9 *Kidd v van Heeren* [1998] 1 NZLR 324 (HC).
10 *Kidd v van Heeren* SGHC Johannesburg 27973/1998, 20 May 2013 [South African judgment].
11 At [132].
12 At [165].
13 At [169].
14 *Kidd v van Heeren* SGHC Johannesburg 27973/1998, 13 August 2013.
15 *van Heeren v Kidd* SCA 717/13, 21 October 2013.

one month of the date of the judgment (with leave to apply for an extension of time). The Judge also ordered Mr van Heeren to file and serve within one month a complete list of all assets of the partnership, not confined to those listed in the South African judgment, including a description of the assets, their current value and the entities holding them. The Judge further ordered Mr van Heeren to detail any assets disposed of or no longer in his control and state his knowledge as to who controls those assets and their estimated value.

[13] In making these orders, Fogarty J found that Satchwell J's finding that the assets referred to at [11] above, including Huka Lodge, were partnership assets gave rise to an issue estoppel.[16] The Judge was satisfied in terms of r 7.71 that Mr Kidd was likely to recover at least USD 25 million following the account he had ordered having regard to the value of these assets alone.[17] The Judge went further and said he was satisfied that Mr Kidd "would" recover at least that amount.

[14] Mr van Heeren did not comply with the Interim Payment Order. Instead, he applied in May 2015 to vary the orders on the grounds he had appealed to the Court of Appeal and was unable to pay the amount ordered. This application was dismissed by Fogarty J in a judgment delivered on 31 August 2015.[18] The Judge summarised the burden of Mr van Heeren's supporting affidavits as follows:

> [18] Essentially, both affidavits taken together, but particularly the first, contend that all of his assets are now held by either the Timbavati Foundation or, more likely, the Gerda Foundation [both registered in Liechtenstein] and are out of his control. He does not say that the total assets would not be able to meet the interim payment. He does not say that he does not know the scale of assets. For example, he says, "I am therefore unable to confirm what assets are now vested in the Gerda Foundation".
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> (Emphasis in original).

[15] The Judge noted Mr van Heeren's evidence that Huka Lodge was owned by Worldwide Leisure, the current shareholders of which were Saraceno (holding all but one of the shares).[19] In 2005, when Mr van Heeren was the sole shareholder of Worldwide Leisure (apart from one share), an application was made to the Overseas

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16 Interim Payment Order, above n 1, at [117].
17 At [155]–[156].
18 *Kidd v van Heeren* [2015] NZHC 2082.
19 At [10].

Investment Office (OIO) for approval to transfer Mr van Heeren's shares to Saraceno. The application was granted on the basis that Saraceno would hold the shares as a bare trustee for Mr van Heeren.[20] Mr van Heeren then transferred 19,555 shares in Worldwide Leisure to Saraceno, on 3 April 2006.[21] Mr van Heeren remains one of the directors of Worldwide Leisure.

[16] The Judge concluded that Mr van Heeren's affidavits were unsatisfactory and did not show he was unable to pay the amount ordered:

> [35] Therefore this Court, being informed that a wealthy person has transferred assets to a trust or a foundation does not draw the inference that the wealthy person is giving his property away but, rather, draws the opposite: that he is seeking protection from any attachment of it. So the information in the affidavits from Mr van Heeren that he and his wife transferred progressively all of their assets to the Timbavati Foundation is an indication of seeking to make those assets more secure, rather than giving them away. These are real world presumptions which I have applied when scrutinising the evidence from Mr van Heeren that [he] has lost control of his assets.
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> [42] It is possible that when swearing his two affidavits, Mr van Heeren considered that he was able to depose that assets were no longer in his [direct] power or control consistent with him having ultimate and effective control by one of these mechanisms. On this basis he possibly drew the distinction … between requesting that the trustees of the [Timbavati] Foundation settle the assets previously vested in it upon the Gerda Foundation and controlling this process. He therefore considered he could distinguish these Foundation managed assets, and assert that he had not accumulated assets in his personal name.
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> [43] It was not and could not be suggested that para [172] of the judgment containing the orders intended them to be confined to accumulated assets held in the personal name of Mr van Heeren. Submissions of abuse of the Court's processes are very serious. If accepted they can result in the Court accessing other powers. In the course of the argument I was left unsure as to whether Mr van Heeren was deliberately obstructing disclosure of assets under his control or, rather, knowing and disclosing of the function of the Timbavati Foundation and the Gerda Foundation, and the Worldwide Leisure Limited's shareholding etc, felt able to swear that the partnership assets listed, and carefully listed by Satchwell J in her para [132] were not under his control so that he was unable to make a payment of USD25m.
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20 At [29].
21 At [10].

> [46] The defendant has not made out the merit of an application for variation of the orders. On the contrary, his two affidavits are quite unsatisfactory and not significantly persuasive.

[17] The Judge stopped short of finding that Mr van Heeren was deliberately refusing to comply with the orders, allowing for the possibility he had "taken a narrow, very narrow, reading of the orders … and, in particular, has read the term 'control' to be confined to meaning direct control or immediate control and as not including the ability to control indirectly or remotely the assets and proceeds of the assets found by Satchwell J to be assets of the partnership".[22]

[18] Following release of this judgment, Mr van Heeren applied in September 2015 for a stay of the April 2015 judgment including the Interim Payment Order. Fogarty J declined that application on 7 October 2015[23] for reasons he gave in a judgment delivered two days later.[24]

[19] On 27 November 2015 this Court declined Mr van Heeren's further application for a stay of execution pending appeal.[25] This Court concluded that Mr Kidd was entitled to the immediate benefit of the fruits of the interim judgment.[26]

[20] The respondents rely heavily on the next judgment of Fogarty J which proved to be influential in persuading Jagose J to decline the present application. Mr Kidd applied under r 7.48 of the High Court Rules to enforce the orders made in the April 2015 judgment by requiring Mr van Heeren to attend Court for examination. In a judgment delivered on 16 December 2015, Fogarty J declined to make this order in view of significant further information provided by Mr van Heeren in a recent affidavit and his pending application to the Court of Justice in Liechtenstein for information from the Gerda Foundation.[27] Importantly, the Judge was not satisfied at that stage that Mr van Heeren was personally responsible for the failure to make a payment of USD 25 million into Court and was therefore a "party in default" in terms

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22 At [69].
23 *Kidd v van Heeren* [2015] NZHC 2455.
24 *Kidd v van Heeren* [2015] NZHC 2475.
25 *van Heeren v Kidd* [2015] NZCA 574.
26 At [19].
27 *Kidd v van Heeren* [2015] NZHC 3250.

of r 7.48. Nor was the Judge persuaded that an order for examination would be an effective remedy at that time.[28]

[21] This Court dismissed Mr van Heeren's appeal from the Interim Payment Order in a judgment delivered on 19 August 2016.[29] The Court found Satchwell J's findings as to partnership assets could not be reopened because of the doctrine of issue estoppel.[30] This Court saw no reason to depart from Fogarty J's finding that Mr Kidd is likely to obtain judgment against Mr van Heeren for at least USD 25 million.[31] The Supreme Court declined Mr van Heeren's application for leave to appeal on 9 December 2016.[32]

[22] Mr Kidd then commenced the 2017 Proceeding seeking the appointment of receivers of the property of Worldwide Leisure with power to sell its assets and pay 50 per cent of the net proceeds to Mr Kidd and any remaining sum into Court on account of Mr van Heeren's obligation in the 2014 Proceeding to pay USD 25 million. Various ancillary orders were also sought including an order preventing Worldwide Leisure from declaring any dividend, charging or otherwise disposing of its assets and disclosure orders against Mr van Heeren, Worldwide Leisure, Saraceno and others.

[23] Fogarty J gave permission for the proceeding to commence by way of originating application and granted the restraining and disclosure orders in his judgment delivered on 14 June 2017.[33] The Judge recorded that the purpose of the orders was "to give efficacy to the goal of obtaining useful permanent appointments [of receivers]" following a hearing *inter partes*.[34] The Judge was satisfied that the assets covered by the application were part of the partnership assets identified by Satchwell J in her judgment and that these assets, including Huka Lodge and Dolphin Island, were under the control of Worldwide Leisure and associated

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28 At [54].
29 *van Heeren v Kidd* [2016] NZCA 401, [2017] 3 NZLR 141.
30 At [147].
31 At [183].
32 *van Heeren v Kidd* [2016] NZSC 163.
33 *Kidd v van Heeren* [2017] NZHC 1304.
34 At [11].

entities.[35] The restraining order was to prevent Worldwide Leisure from dealing in any way with the assets, but not so as to interfere with normal trading operations.[36] The disclosure order was to assist the proposed receivers in conducting the receivership.[37]

[24] It is clear from his judgment that Fogarty J anticipated the early appointment of receivers to the assets covered by the orders. However, this turned out to be the last of the 13 judgments Fogarty J gave during the time he was assigned to the matter prior to his retirement.

[25] The *ex parte* interim orders were varied by Venning J on 26 June 2017 to enable Worldwide Leisure to carry on the normal operations of the business as Fogarty J had intended.[38]

High Court judgment

[26] The substantive application for appointment of receivers was dealt with by Jagose J in a judgment delivered on 18 December 2017.[39] The Judge considered he was in no better position than Fogarty J was (at the time of his 16 December 2015 judgment referred to at [20] above) to be satisfied Mr van Heeren was personally capable of making the payment ordered.[40] For that reason, Jagose J was not satisfied Mr van Heeren was a "party in default" for the purposes of r 7.48. On that basis, the Judge considered there was no jurisdiction to appoint receivers under that rule:

> [67] Returning to HCR 7.48, absent a 'party in default', there is no jurisdiction to enforce Fogarty J's interlocutory order. I am also of the view, by 'enforce', the rule's title means to coerce performance of the primary obligation, rather than to achieve it by other means. Until it is established Mr van Heeren is personally responsible for the failure to make the payment in, the Court should not lend itself to futile coercive attempts to obtain his performance of that obligation. But that does not mean other means of achieving Fogarty J's desired efficiency are beyond consideration.

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35 At [23]–[24].
36 At [26]–[27].
37 At [28].
38 *Kidd v van Heeren* [2017] NZHC 1431.
39 High Court judgment, above n 3.
40 At [59].

[27] Jagose J considered that because Mr van Heeren was not a party in default, the equitable jurisdiction of the Court could not be called in aid of enforcement.[41] The Judge recognised that the Court has jurisdiction in equity to assist in calling in partnership assets on dissolution. However, he observed that a partner does not have an absolute right to insist on the sale of partnership property even on dissolution of the partnership and alternatives to the appointment of receivers and sale of assets prior to completion of account-taking are generally preferable.[42] Having rejected that option, the Judge considered Mr Kidd had a partner's lien under s 42 of the Partnerships Act justifying the appointment of receivers to preserve and manage Huka Lodge and meet outstanding partnership liabilities.[43]

Cross-appeal

[28] As noted, no party sought the appointment of receivers to manage Huka Lodge to pay outstanding partnership liabilities. It is common ground: there are no outstanding partnership liabilities; there are no concerns about the management of Huka Lodge; there was no discussion at the hearing about a partner's lien; the existing restraining and disclosure orders made by Fogarty J are sufficient to preserve and protect the assets of Worldwide Leisure; and the orders would only serve to damage the reputation of Huka Lodge and its consequent value. All parties accept the order appointing receivers to manage the business was inappropriate and must be set aside. We agree and will make an order accordingly.

[29] Mr van Heeren also cross-appeals against Jagose J's findings in the judgment that the partnership has not been dissolved and there was no dissolution agreement. He contends the parties did not raise these issues in the High Court and they were not heard on them. He says the findings are contrary to Mr Kidd's pleaded case and the evidence he gave in the South African proceedings and his affidavits in the 2014 Proceeding. Mr Kidd disagrees.

[30] We do not consider it is necessary for us to address this issue. Whether or not the partnership was dissolved in January 1991, it is common ground that the winding

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41 At [73].
42 At [84]–[85].
43 At [88]–[96].

up of the partnership remains to be completed. In any case, the orders made in the High Court will be set aside by consent. In those circumstances, the reasoning in the judgment leading to those orders will not have any ongoing significance and does not require correction.

[31] Mr van Heeren also complains that the Judge did not consider a proposal advanced jointly by him and Worldwide Leisure on 10 November 2017, the last day of the hearing, to resolve the matter by: continuing the existing restraining orders; allowing the appointment of an additional director nominated by Mr Kidd to Worldwide Leisure; and for Worldwide Leisure to borrow USD 2.646 million and pay this sum into Court on the basis that it would then be paid to Mr Kidd on provision of suitable undertakings. We will deal with this issue when we come to consider what relief, if any, ought to be granted.

Appeal

[32] The issues raised by Mr Kidd's appeal can be summarised as follows:

Rule 7.48 — enforcement against Mr van Heeren's assets

(a) Was there jurisdiction under r 7.48 in the 2017 Proceeding to enforce the Interim Payment Order made in the 2014 Proceeding?

(b) If so, are the shares in Worldwide Leisure held on bare trust for Mr van Heeren so the Interim Payment Order can be enforced against them?

Equitable jurisdiction — sale of partnership assets

(c) Did the Court have equitable jurisdiction to appoint receivers to partnership assets held by Worldwide Leisure?

Relief

(d) Should relief be given?

(e) If so, what orders should be made?

Was there jurisdiction under r 7.48 to enforce the Interim Payment Order?

[33] Rule 7.48 of the High Court Rules relevantly provides:

> **7.48 Enforcement of interlocutory order**
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> (1) If a party (the **party in default**) fails to comply with an interlocutory order or any requirement imposed by or under subpart 1 of Part 7 (case management), a Judge may, subject to any express provision of these rules, make any order that the Judge thinks just.
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> (2) The Judge may, for example, order—
> (a) that any pleading of the party in default be struck out in whole or in part:
> (b) that judgment be sealed:
> (c) that the proceeding be stayed in whole or in part:
> (d) that the party in default be committed:
> (e) if any property in dispute is in the possession or control of the party in default, that the property be sequestered:
> (f) that any fund in dispute be paid into court:
> (g) the appointment of a receiver of any property or of any fund in dispute.
> …

Party in default

[34] The expression "party in default" appears in bold and in parentheses clearly signalling that it is purely definitional. It does not add a further jurisdictional requirement to engage the rule. The sole jurisdictional issue is whether there was a failure to comply with an interlocutory order as specified. We reject the respondents' submissions that jurisdiction to make an order under the rule is limited to circumstances where there has been deliberate, blameworthy or contumelious conduct. This will usually be highly relevant to whether an order should be made but it is not a jurisdictional requirement.

[35] Fogarty J ordered Mr van Heeren to pay USD 25 million into Court by 14 May 2015. Mr van Heeren's applications to vary or stay that order were declined. His appeal to this Court against the order was dismissed. The Supreme Court declined leave for a further appeal. Despite this, not one dollar has been paid, over three years later. In our view, there cannot be any doubt Mr van Heeren has failed to comply with the order and therefore, for the purposes of the rule, is a party in default.

[36] In reaching the contrary conclusion, we consider Jagose J placed undue emphasis on the observation made by Fogarty J in his December 2015 judgment referred at [20] above that he was not satisfied at that stage Mr van Heeren was a party in default. This overlooks Fogarty J's judgment delivered 18 months' later, in June 2017 and referred to at [22]–[23] above, where the Judge made orders for the purposes of enforcing the Interim Payment Order.[44] These orders were sought partly in reliance on r 7.48.

Separate proceeding

[37] The respondents contend the Court cannot make an order under r 7.48 in one proceeding to enforce an interlocutory order made in another proceeding. We accept that will almost always be the case.[45] However, we agree with Jagose J that it need not necessarily be so.[46] Here, the 2017 Proceeding sought the appointment of receivers to realise assets "by way of enforcing the interim payment order" in the 2014 Proceeding. In granting permission to commence the 2017 Proceeding as an originating application and in making the restraining, disclosure and other interim orders, Fogarty J made the following pertinent observations:[47]

> [33] Examining the long history of this dispute reveals a difficulty in obtaining compliance with not only the orders made by this Court, but also confirmation of those orders by the Court of Appeal and the Supreme Court of New Zealand. In my view, it is more probable than not that obtaining compliance depends on the appointment of receivers of the assets and restraint on WWL, the Huka Trust and associated entities in control of those assets.
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> [34] This is a meritorious application for ex parte interim relief. I consider the restraining orders, disclosure orders and artwork inspection orders are necessary to ensure the receivers of the assets are able to undertake their tasks.

[38] Having granted permission to commence the 2017 Proceeding for the very purpose of enforcing the Interim Payment Order in the 2014 Proceeding, it might be thought odd that the Court subsequently determined there was no jurisdiction to make any such order. We do not consider the Court's jurisdiction to enforce compliance with its orders should be frustrated by such technicalities. While the 2017 Proceeding

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44 *Kidd v van Heeren*, above n 33, at [33].
45 See for example *Elvidge v ASB Bank Ltd* [2015] NZHC 44 at [194]; and *Walker v Forbes* [2017] NZHC 1090 at [15].
46 High Court judgment, above n 3, at [61].
47 *Kidd v van Heeren*, above n 33.

is technically distinct from the 2014 Proceeding, this is a matter of form rather than substance. The two proceedings are closely interrelated. The additional parties could have been joined as defendants in the 2014 Proceeding and the current orders sought in that proceeding. The Court gave permission to pursue the same end using the originating application procedure in the 2017 Proceeding. We reject the respondents' suggestion that the Court's sanction of this process raised a jurisdictional block to the orders now sought. Such a formalistic reading of the rules is not consistent with their stated objective of securing "the just, speedy and inexpensive determination of any proceeding or interlocutory application".[48]

[39] Mr Gault for Worldwide Leisure makes the additional submission that r 7.48 cannot be used to enforce against his client an interlocutory order made in a separate proceeding against Mr van Heeren. However, Mr Mills QC for Mr Kidd made clear that the application under r 7.48 is predicated on the Court accepting his submission that Mr van Heeren is the beneficial owner of the shares in Worldwide Leisure. Further, following the hearing of the appeal Mr Kidd advised that his preference is for receivers to be appointed over the shares in Worldwide Leisure rather than its assets. In these circumstances, Mr Gault's objection falls away.

Power limited to coercing performance?

[40] Jagose J considered the powers under r 7.48 were intended "to coerce performance of the primary obligation [by the party in default], rather than to achieve it by other means".[49] The Judge took the view that until it is established Mr van Heeren is personally responsible for the failure to make the payment, "the Court should not lend itself to futile coercive attempts to obtain his performance of that obligation".

[41] We respectfully disagree with this analysis. The Court has broad powers to make such orders as may be required in the interests of justice where its orders are not complied with. Were it otherwise, respect for the rule of law would be seriously undermined. As Lord Neuberger observed in *Global Torch Ltd v Apex Global Management Ltd (No 2)*:[50]

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48 High Court Rules 2016, r 1.2.

49 High Court judgment, above n 3, at [67].

50 *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, [2014] 1 WLR 4495

> The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have.

[42] Rule 7.48 is wide in scope — the judge may make *any* order the judge thinks just. The examples listed are just that, they do not limit the type of order that can be made. The rule empowers a judge to strike out a pleading or enter judgment if, for example, a party persistently fails to comply with a discovery order. An order striking out the proceeding or entering judgment in such a case does not serve to coerce compliance with the primary obligation to give discovery. On the contrary, the entry of judgment would serve to dispense with the discovery obligation.

Appointment of receiver limited to preserving property or fund in dispute?

[43] The respondents argue that receivers cannot be appointed under r 7.48 except in respect of property or a fund in dispute to preserve that property pending final resolution of the issues between the parties. They submit this requirement is not capable of being satisfied in this case. First, the findings made by Satchwell J as to partnership assets, relied on by Mr Kidd, are beyond dispute and are now subject to issue estoppel. There is therefore no property in dispute. Secondly, the assets are sufficiently protected by the comprehensive restraining orders made by Fogarty J. There is therefore no need for any further order to preserve the property.

[44] We are not persuaded by this submission. It is premised on the incorrect assumption that the example provided under r 7.48(2)(g) (an order appointing a receiver over any property or any fund in dispute) limits the circumstances in which a receiver can be appointed under the rule. While the rule gives the example of the case where such an order will typically be justified, there is no justification for reading down the broad scope of the words "any order that the Judge thinks just" and confining the orders that can be made to those listed merely by way of example. Ultimately, the Court's power must be exercised in such a way as to best meet the requirements of justice in the particular case.

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at [23],

Other limits on enforcement

[45] Mr van Heeren submits it is important to recognise the distinction in r 17.2 of the High Court Rules between enforcement of judgments and final orders on the one hand and an order made on an interlocutory application on the other. We accept the importance of this distinction, but it has no relevance here. The modes of enforcing a final judgment, for example by way of an attachment order, a charging order or a sale order, are not available as of right in respect of an order made on an interlocutory application. These enforcement processes cannot be accessed for the purpose of enforcing an order made on an interlocutory application without applying to the Court. However, this does not fetter the Court's powers to make any order the judge thinks just on proper application being made under r 7.48 to enforce an interlocutory order that has not been complied with. As McGechan J observed in *Taylor Bros Ltd v Taylors Textile Service (Auckland) Ltd* (with reference to r 277 of the former High Court Rules, the equivalent of r 7.48), this rule merely reflects the High Court's inherent jurisdiction to make such an order.[51]

Conclusion

[46] We conclude there was jurisdiction under r 7.48 to make the orders sought despite the technical objections advanced by the respondents. As noted, r 7.48 provides the judge with very broad powers to make such orders as may be necessary in the interests of justice to ensure that interlocutory orders of the Court are complied with. Here, Mr van Heeren has persistently failed to comply with the Court's order. His efforts to overcome the order by applying to vary it, stay it and appealing it to our highest court have all failed. Public confidence in the administration of justice would be damaged if the Court was now to accept his submissions that there is no effective remedy available to enforce the Court's order with the result he can ignore it with impunity. The Court's powers to require compliance with its orders are not so constrained and are not to be defeated by the narrow reading of the High Court Rules urged upon us.

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[51] *Taylor Bros Ltd v Taylors Textile Service (Auckland) Ltd* (1987) 1 PRNZ 483 (HC) at 484–485.

Are the shares in Worldwide Leisure held on bare trust for Mr van Heeren?

[47] Mr Kidd contends that Saraceno holds the shares in Worldwide Leisure as a bare trustee for Mr van Heeren. Accordingly, he argues that personal enforcement against Mr van Heeren is available under r 7.48 in respect of these shares. This is a critical factual issue which Jagose J did not address, no doubt because he considered there were jurisdictional impediments that could not be overcome.

[48] The primary evidence Mr Kidd relies on is the public record of a decision of the OIO approving the transfer of Mr van Heeren's shares in Worldwide Leisure to Saraceno. This decision is dated 30 September 2005 and records the consent sought as follows:

> To acquire up to 100 percent of the specified securities of and/or having the right to exercise or control the exercise of the voting power of and/or appoint or control the appointment of the board of directors of Worldwide Leisure Limited.

[49] The offeree/seller is recorded as Mr van Heeren. The offeror/applicant is Saraceno. The affected land is described as 11.6347 hectares of freehold situated at Huka Falls Road, Taupō being CT SA1424/13 and SA1424/14 (South Auckland Registry). This is the land on which Huka Lodge is situated. The "Rationale" for the decision includes the following statement:

> Worldwide Leisure Limited (WWL) owns the subject property (known as Huka Lodge). The shares in WWL are currently owned by Mr van Heeren. The transfer of the shares in WWL by Mr van Heeren to the Applicant is part of Mr van Heeren's asset protection procedures … whereby Mr van Heeren is transferring his international private assets into trust entities. The Applicant will hold the shares as bare trustee for Mr van Heeren.
>
> The transaction is essentially a transfer of assets for family and asset protection measures. The transaction is not likely to result in any change to the operations of Huka Lodge or the subject property.

[50] The contact person is shown as Mr McGregor, an experienced commercial lawyer who was then a partner at Bell Gully. He was Mr van Heeren's solicitor at the time and had been involved in the original acquisition of Huka Lodge by Worldwide Leisure. Mr McGregor has been a director of Worldwide Leisure since 1994 and has held one share in Worldwide Leisure since 2010.

[51] We agree with Mr Mills that the Court can be confident the information contained in the OIO decision, a contemporaneous public record, is accurate and can be relied upon. This was a significant transaction, the consideration being $16.875 million. Approval was needed because the transaction involved sensitive land. The information given to OIO was provided by Mr van Heeren's solicitors who would have understood the need for candour and accuracy. The solicitors would have well-understood the significance for the purposes of the application of the transferee being described as a bare trustee. The approval was expressly given on this basis.

[52] The transfer of the Worldwide Leisure shares to Saraceno as bare trustee for Mr van Heeren can be contrasted with the contemporaneous OIO decision approving the transfer of the associated owner's cottage from Mr van Heeren to the trustees of the Huka Trust. It is inconceivable that the experienced commercial lawyers involved in the transaction and the OIO would have failed to appreciate the critical difference between the nature and status of the transferee in these two transactions.

[53] Mr van Heeren does however take issue with accuracy of the information recorded in the OIO's decision. He says:

> Worldwide Leisure Limited (through Stichting) has been part of the trust structure since 2006. The intention was and had always been to transfer Worldwide Leisure Limited to the Timbavati Foundation along with the other assets. The reason it was done later was due to legal and tax planning issues. I personally always held the shares in Worldwide Leisure Limited on behalf of the Timbavati Foundation. We were also not able to transfer the shares earlier because there was a series of restrictions and it was a very lengthy process to obtain the OIO approval, but it eventually came. I always held the shares as nominee on behalf of the Timbavati Foundation. The reference in the OIO documents to "bare trustee" is a reference to me as beneficiary of the trust, not me personally. This is reflected by the fact that the OIO Decision Sheet also records that "*Mr van Heeren is transferring his international private assets into trust entities*" and that "*The transaction is essentially a transfer of assets for family and asset protection measures*" … That position has not changed. I believe that the situation and the details of the trust structure were discussed by my lawyers with the OIO at the time (and subsequently) and that the OIO was provided with all the relevant information and was advised of the transfer.

[54] Mr van Heeren's claim that he has always held the shares on behalf of Timbavati is nothing more than an unsubstantiated assertion. He has not produced any document showing when or how this occurred.

[55] Mr van Heeren cannot "always" have held the shares in Worldwide Leisure as nominee on behalf of the Timbavati Foundation as he contends. Worldwide Leisure was incorporated in November 1984 shortly after the agreement to purchase Huka Lodge was signed in October 1984. Timbavati was not established until five years later, in 1989.

[56] If Mr van Heeren held the shares in Worldwide Leisure as a nominee on behalf of Timbavati at the time consent was sought, this important fact was clearly not mentioned to the OIO. Mr van Heeren is shown as the offeree/seller and the decision records that the shares "are currently owned by Mr van Heeren". If Mr van Heeren held the shares merely as nominee for Timbavati, he would not have been able to transfer "the right to exercise or control the exercise of the voting power of and/or appoint or control the appointment of the board of directors of Worldwide Leisure", unless of course he controlled Timbavati. But in that case, voting power and control rested with Timbavati before and after the transaction and was not being transferred.

[57] Mr van Heeren's claim is also inconsistent with his further claim that the transaction was part of his "asset protection procedures" whereby he was transferring his private assets into a trust entity. If Mr van Heeren was only ever a nominee for Timbavati, these shares were not his private assets to transfer.

[58] The statement that following the transfer, Saraceno would hold the shares as a bare trustee for Mr van Heeren as a beneficiary also does not make sense. If the shares were always held on behalf of Timbavati, the transfer would be from one nominee or bare trustee to another without any change being made to the beneficial interest. Saraceno would not be holding the shares as a bare trustee for Mr van Heeren as beneficiary, rather for Timbavati, the true owner. And, if Mr van Heeren's explanation was correct, one would expect Saraceno to be resisting Mr Kidd's application, not him.

[59] There is considerable force in Mr Mills' submission that, given the significance of this issue, one would have expected it to have been addressed by Mr McGregor in an affidavit if he was able to assist Mr van Heeren on the point. Mr McGregor has filed two affidavits in this proceeding but he does not suggest there is any error in

the OIO's decision or that the reference to Saraceno holding the shares for Mr van Heeren as a bare trustee was incorrect. Mr van Heeren's failure to provide evidence from Mr McGregor or from any other solicitor with knowledge of the transaction invites an adverse inference.[52] Saraceno, in whose name the shares are held, has taken no steps in this proceeding or filed any evidence to support Mr van Heeren's claim that he is not the beneficial owner of the shares in Worldwide Leisure.

[60] Satchwell J recorded in her judgment that in response to pre-trial questions Mr van Heeren claimed that Huka Lodge, Dolphin Island and other assets (which she found to be partnership assets) were Mr van Heeren's "exclusive assets".[53] This also strongly supports Mr Kidd's claim that Mr van Heeren is the owner of the shares in Worldwide Leisure.

[61] We conclude that Mr van Heeren's assertions:

(a) he "always" held the shares in Worldwide Leisure "as nominee on behalf of Timbavati"; and

(b) the reference in the OIO decision to Saraceno holding the shares as "bare trustee" for him "is a reference to [him] as beneficiary of the trust, not [him] personally"

are irreconcilable with the contemporaneous public record, inherently implausible and wholly unsubstantiated. There is no mention in the OIO decision of Timbavati, a foundation registered in Liechtenstein.

[62] In any event, it appears that Mr van Heeren is the ultimate beneficiary of Timbavati and he retains power and control over that foundation. An annexure to the seventh affidavit filed by Mr van Heeren in the 2014 Proceeding shows he was the economic founder of Timbavati and is, and always has been, the sole member of its advisory board. The "statutes" or constitution of the foundation provide that while

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52 *Dairy Containers Ltd v NZI Bank Ltd* (1994) 7 PRNZ 465 (HC) at 468; and *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [150]–[154].

53 South African judgment, above n 10, at [107].

the foundation board appoints the beneficiaries, this appointment must be made in accordance with instructions from the advisory board, being Mr van Heeren. Mr van Heeren was initially a first beneficiary but is now said to be a second beneficiary having been replaced by Gerda Foundation as the first beneficiary. This must have been done on Mr van Heeren's instructions. Mr van Heeren and his former wife are said to be the beneficiaries of Gerda Foundation.

[63] The "bylaws" of the Gerda Foundation show it too was established on behalf of Mr van Heeren. Mr van Heeren confirms in his fifth affidavit that, contrary to his earlier understanding and evidence, he is the founder of the Gerda Foundation and he acknowledges he has "a degree of control" over it. This is an understatement. An annexure to Mr van Heeren's sixth affidavit shows that Mr van Heeren has the right to revoke, amend or dissolve it at any time. As the founder, he is also the ultimate beneficiary. He is also the sole member of the advisory board. The foundation board now comprises Dr Lamprecht and Petunia Services Ltd, a company controlled by Dr Lamprecht. Pursuant to a mandate agreement signed in June 2009, Dr Lamprecht is bound to act in accordance with Mr van Heeren's instructions.

[64] All of this reinforces the correctness of Fogarty J's reasoning when declining Mr van Heeren's application to vary the Interim Payment Order:[54]

> Therefore this Court, being informed that a wealthy person has transferred assets to a trust or a foundation does not draw the inference that the wealthy person is giving his property away but, rather, draws the opposite: that he is seeking protection from any attachment of it.

[65] Mr O'Brien QC, for Mr van Heeren, submits this Court cannot resolve the question of beneficial ownership of the shares because Mr van Heeren's evidence has not yet been tested in cross-examination. For that reason, he submits the only option would be to refer the matter back to the High Court to enable this to occur if this Court was otherwise persuaded to allow the appeal.

[66] We disagree. Satchwell J found that Worldwide Leisure acquired Huka Lodge as a partnership asset. That finding gives rise to issue estoppel and cannot now be

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[54] *Kidd v van Heeren*, above n 18, at [35].

challenged. The shares in Worldwide Leisure were initially held by Mr van Heeren personally. The evidence does not indicate he has since disposed of these shares, only that he has attempted to make them more secure, as Fogarty J observed. For the purposes of the present interlocutory application, we are satisfied on the balance of probabilities that Saraceno holds the shares in Worldwide Leisure as a bare trustee for Mr van Heeran, just as the OIO was told.

Did the Court have equitable jurisdiction to appoint receivers to partnership assets held by Worldwide Leisure?

[67] As noted, Jagose J considered there was no jurisdiction in equity to enforce the Interim Payment Order by appointing receivers because he was not satisfied Mr van Heeren was a party in default. For the reasons given above at [35], we consider Mr van Heeren is a party in default and there is no such jurisdictional impediment to the making of the order sought by Mr Kidd.

[68] Mr O'Brien confirmed it is common ground the Court has equitable jurisdiction to appoint receivers in the context of partnership disputes or to facilitate the winding up of a partnership. There is also no dispute that the Court has a discretion to make orders for the sale of partnership property in appropriate cases. However, Mr O'Brien emphasises the appointment of a receiver is normally regarded as a remedy of last resort and interim orders for the sale of any asset are unusual. He relies on the following passage in *Lindley & Banks on Partnership* to support his submission that it would not be appropriate to appoint a receiver to sell partnership assets in this case:[55]

> It goes without saying that a sale will not normally be ordered where that would be inconsistent with the terms or spirit of the agreement between the partners. Thus, where a partner agrees to retire from the partnership and thereby recognises the continuing partners' right to continue the business, he will normally be taken to have forgone his right to insist on a sale.

[69] Mr O'Brien contends Mr Kidd's pleaded case and evidence in the 2014 Proceeding (and his evidence in the proceedings in South Africa) was to the effect the partnership was dissolved in 1991. He says the consequences of that

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[55] Roderick I'Anson Banks *Lindley & Banks on Partnership* (20th ed, Sweet & Maxwell, London, 2017) at [23-189].

dissolution will fall to be determined according to the law of South Africa and it would be premature to appoint receivers now.

[70] Mr Gault similarly accepts the Court has equitable jurisdiction to appoint receivers to aid in the winding up of a partnership. He supports Mr O'Brien's submissions that no such order is appropriate in this case. The issue is not one of jurisdiction but whether the jurisdiction should be exercised in this case.

[71] Having found there was power to make appropriate orders under r 7.48 or in exercise of the Court's equitable jurisdiction, we now turn to consider whether relief ought to be given.

Should relief be given?

[72] Mr van Heeren submits the appropriate course is to remit the proceeding to the High Court to progress the account to a final resolution and to enable his further application to vary the Interim Payment Order to be heard. The context for this submission is that in September 2017, shortly prior to the hearing in the High Court, Mr van Heeren applied for an order to progress the account in the 2014 Proceeding. Then, on 8 November 2017, which was the third day of the hearing, Mr van Heeren made a further application to vary the Interim Payment Order. In support of that application he asserted that Mr Kidd is confined to a claim in debt. He contended that the maximum total debt as at January 1991, the date of dissolution of the partnership, was USD 1,323,905. He says total interest cannot exceed the principal because of the *in duplum* rule which applies to all debt claims under the law of South Africa. On that basis Mr van Heeren claims his liability to Mr Kidd cannot exceed USD 2.646 million. He asked the Court to vary the Interim Payment Order accordingly and he advanced a proposal for this sum to be borrowed by Worldwide Leisure and paid into Court. Mr van Heeren repeated his earlier claim that he cannot pay USD 25 million and maintained the Court was in error in setting the payment at that level. In resisting the appeal, Mr van Heeren argues that Mr Kidd is adequately protected by the existing restraining orders and any further relief is "premature". Worldwide Leisure supports this submission.

[73] We disagree entirely. We can see no justification for setting the clock back and revisiting the correctness of the Interim Payment Order. There has been no change of circumstances that could justify that course. The interests of justice in this case overwhelmingly demand that meaningful relief be granted to enforce that order. The context is highly relevant. Satchwell J found that Mr van Heeren had been "cheating" Mr Kidd out of partnership profits for years at the time he fraudulently sought to procure a binding indemnity precluding all claims in January 1991. Mr Kidd has been pursuing his entitlement to his share of the partnership assets ever since. Notwithstanding the final judgment given in his favour in South Africa giving rise to an issue estoppel as to the extensive partnership assets held by Mr van Heeren or his associated entities, Mr Kidd has still not received anything towards his entitlement. Fogarty J was satisfied Mr Kidd will receive at least USD 25 million following the account. This Court was not persuaded to interfere with that assessment and the Supreme Court declined leave for a further appeal against the order. Mr Kidd has been kept out of his entitlement to his share of the partnership assets for over 28 years and he is now in his mid-seventies.

[74] The Interim Payment Order made by Fogarty J was intended to provide immediate partial relief to redress the serious injustice Mr Kidd has suffered for well over two decades. Mr van Heeren's various attempts to overcome the effect of that order have all failed. For the Court now to deny Mr Kidd a remedy would deliver the result Mr van Heeren has sought all along and perpetuate the injustice the Interim Payment Order was designed to redress. This Court said in November 2015, when denying Mr van Heeren's application for a stay of the Interim Payment Order, that Mr Kidd is entitled to the fruits of his judgment "now" and he should not have to wait indefinitely "as if the High Court judgment does not exist".[56] That observation applies with even greater force now, over three years later. As Lord Neuberger said, if court orders are disobeyed, a sanction is almost inevitable to ensure they continue to be respected. We have no hesitation in concluding that relief is justified. In our view, the Court would be failing in its duty to deny it. The only real issue is as to the appropriate form of relief.

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[56] *van Heeren v Kidd*, above n 25, at [19].

What orders should be made?

[75] This is the issue that has caused us the greatest difficulty. All parties recognise that the appointment of receivers is generally a remedy of last resort and risks significant damage to the value of the asset. For this reason, all parties, including Mr Kidd, now favour the appointment of a receiver over the shares in Worldwide Leisure, rather than over its assets. We accept there are significant advantages in adopting this course for the reasons the parties identified in their post-hearing submissions.

[76] Following the hearing of the appeal, counsel for the respondents advised that Saraceno and Worldwide Leisure have embarked on a sale process for Huka Lodge and other associated assets not yet been found to be partnership assets, namely the owner's cottage and adjoining land. The respondents expect the sale will generate sufficient funds to enable USD 25 million to be paid into Court. This is an encouraging development.

[77] Mr Gault submits that rather than appointing receivers, the Court could make a sale order as a "less destructive mode of enforcement". This would give Mr Kidd comfort that the sale will be finalised within a reasonable period and Worldwide Leisure could be directed to file regular memoranda updating the Court and Mr Kidd on progress in the meantime. He contends these orders, combined with the existing restraining and disclosure orders, should be sufficient to protect Mr Kidd.

[78] Mr Kidd's response, which is understandable given the background, is that Mr van Heeren is in control of the negotiations to sell Huka Lodge, a partnership asset, and Mr Kidd has been given little information about the process. Nevertheless, he says through his counsel:

> However, in light of the advice from the respondents of the advanced state of negotiations, the appellant would support a variation to the orders sought to the effect that any judgment in favour of the appellant would not be made public, and no receivers would be appointed, for a period of 30 days following the judgment. This would give the respondents the opportunity to persuade the appellant that any conditional agreement that had been negotiated is one that he should accept, but in circumstances where there is the finality of a Court judgment.

[79] We consider there is considerable merit in Mr Kidd's position. It is not practical for this Court to attempt to exercise ongoing supervision over the sale process as Mr Gault suggests. If that turns out to be necessary, we consider receivers should be appointed to undertake this task. Having concluded that Mr van Heeren beneficially owns all the shares in Worldwide Leisure, we consider the appropriate course is for receivers to be appointed over those shares for the purpose of realising as soon as reasonably practicable sufficient of the company's assets found to be partnership assets, namely Huka Lodge and (if necessary) Dolphin Island, to enable USD 25 million to be paid into the High Court in accordance with the Interim Payment Order.

[80] All parties request that any such order lie in Court for a period following receipt of the judgment to allow further consideration of the precise terms of the orders. We accept this is appropriate and that a period of 30 days should be sufficient. In accordance with all parties' request, and to facilitate the prospect of resolution without the need for receivers to be appointed, this judgment will be delivered in the first instance only to the parties, the proposed receivers and counsel. The judgment is not to be published until further order of this Court.

Result

[81] The appeal is allowed.

[82] The cross-appeal is allowed.

[83] The orders made in the High Court are set aside.

[84] We make an order appointing Kare Johnstone and Andrew John Grenfell, chartered accountants of Auckland, as receivers of the shares in Worldwide Leisure Ltd for the purpose of realising as soon as reasonably practicable sufficient of the company's assets found to be partnership assets, being Huka Lodge and (if necessary) Dolphin Island, to enable USD 25 million to be paid into the High Court.

[85] The net proceeds of sale (after repayment of the secured indebtedness to the fifth respondent and deduction of all costs reasonably incurred in the receivership including costs of the sale) are to be paid into the High Court on account of Mr van Heeren's obligations under the Interim Payment Order made by Fogarty J on 14 June 2015 ([2015] NZHC 517) and held pending further order of that Court.

[86] The orders in [84] and [85] above are to lie in Court and not become operative for a period of 30 days from the date of delivery of this judgment or until further order of this Court.

[87] The parties are to confer and file memoranda on the precise terms of the orders needed to give effect to this judgment or such other orders as they may agree. A joint memorandum setting out the proposed terms (or separate memoranda if no agreement is reached) is to be filed within 21 days of the date of delivery of this judgment.

[88] For the reasons given in [78]–[80] this judgment is released to the parties, the receivers and counsel only in the first instance and is not to be published for a period of 30 days from the date of this judgment or until further order of this Court.

[89] The first and second respondents are jointly and severally liable to pay one set of costs to the appellant for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

Solicitors:
K3 Legal Ltd, Auckland for Appellant
Fee Langstone, Auckland for First Respondent
Bell Gully, Auckland for Second Respondent