IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA612/2017
[2018] NZCA 497

BETWEEN	VIVIAN JUDITH FATUPAITO AND ANDREW JOHN HAWKES Appellants
AND	KEITH VINCENT HARRIS AND IAIN ANDREW NELLIES First Respondents
	THE BANKHOUSE TRUST LIMITED Second Respondent

Hearing:	20–21 June 2018
Court:	Winkelmann, Simon France and Wylie JJ
Counsel:	M J Tingey for Appellants D M Hughes and H L Quinlan for First Respondents
Judgment:	14 November 2018 at 10 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal is allowed.

C The appellants are entitled to declarations as follows:

(a) The appointment of the first respondents as receivers was invalid.

(b) The first respondents are not entitled to recover from the assets of CIT Holdings Ltd their costs and expenses incurred in purportedly conducting the receivership pursuant to the terms of the General Security Deed or under the provisions of the Receiverships Act 1993.

D The first respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] On this appeal we address whether a creditor's appointment of receivers, made in bad faith, is invalid, and what constitutes bad faith for these purposes.

[2] The appellants, Ms Vivian Fatupaito and Mr Andrew Hawkes, are the liquidators of CIT Holdings Ltd (CIT). CIT and the second respondent, The Bankhouse Trust Ltd (Bankhouse) are party to a General Security Deed (GSD) securing repayment to Bankhouse of debt owed by CIT. Amongst other things, the GSD charged various properties owned by CIT. Mr Gregory Olliver is the sole director of both Bankhouse and CIT. Bankhouse exercised a right under that GSD to appoint the first respondents, Mr Keith Harris and Mr Iain Nellies, as receivers of CIT. It is the liquidators' case that Bankhouse did this for a purpose unrelated to obtaining repayment of the debt; that Bankhouse appointed the first respondents to ensure that the charged properties were sold, on very particular terms, to an entity owned by Mr Olliver. By controlling the sale in this way, Mr Olliver could retain control of the properties to his advantage, whilst also obtaining claims CIT had against his former wife, with whom he was in an acrimonious relationship property dispute.

[3] The liquidators say that the appointment of the first respondents was invalid because the power conferred by the GSD to appoint receivers is to be exercised for the purpose of securing repayment of the debt. The predominant purpose for the appointment in this case was collateral to that and so was in bad faith and was invalid. This follows, the liquidators say, from the application of well-established equitable principle. It follows also from s 25(1) of the Personal Property Securities Act 1999 (PPSA), which requires the good faith exercise of all rights under security agreements governed by that Act. The liquidators say the invalid appointment added cost and delay to the liquidation.

[4] These arguments failed in the High Court before Jagose J and the liquidators now appeal against that judgment.[1]

Factual background

[5] CIT's principal assets were properties in Waimarie Street in St Heliers, Auckland (the properties). These properties were mostly bare land, but one had a house on it. Mr Olliver lived in that house at the time of the appointment of the receivers. CIT held these properties as bare trustee for joint venture parties Waimarie Trust and the Glover Trust. Issues in connection with that joint venture led to CIT issuing proceedings against Waimarie Trust and Ms Sparks, Mr Olliver's estranged wife, in 2014. Waimarie Trust was associated with Ms Sparks.

[6] CIT's creditors claimed approximately $21.2 million in the liquidation. As at 2017, the Bank of New Zealand (the Bank) was the first-ranking secured creditor, owed approximately $13.5 million. Bankhouse was the second-ranking secured creditor, owed approximately $2.24 million under the GSD. There were preferential creditors with claims totalling around $400,000. A further $5.1 million was owed to unsecured creditors.

[7] The appellants were appointed liquidators of CIT on 4 March 2016, following CIT's failure to pay outstanding tax debts. The Bank initially indicated that, as first-ranking secured creditor, it would move to sell CIT's properties to realise its security interest. However, before the Bank took any steps toward sale, Mr Olliver, Bankhouse and another creditor, The Kohimarama Trust Ltd (Kohimarama), approached the liquidators with an indicative offer from Kohimarama to purchase the properties. Kohimarama is an entity associated with Mr Olliver. Mr Olliver said he believed it to be in the best interests of the creditors to avoid a mortgagee sale.

[8] The liquidators discussed with the Bank the possibility that the liquidators could manage the sale of the properties. They believed they were best placed to do so. Ms Fatupaito gave the Bank a copy of the indicative offer the liquidators had received from Kohimarama but told the Bank she could not accept the offer without testing the

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1 *Harris v Bank of New Zealand* [2017] NZHC 2374.

market. For that she needed funding to obtain a valuation, and to support the marketing of the properties.

[9] Whilst awaiting the Bank's response, the liquidators sought indicative market valuations of the properties from various real estate agents. The average of the indicative market values provided through that process was $20,393,767 including GST. In late May, the Bank advised it would not consent to the liquidators selling the properties and that arrangements for a mortgagee sale process would be finalised once notices under the Property Law Act 2007 had expired.

[10] In July 2016, the liquidators received a formal offer from another entity associated with Mr Olliver, GMO Trust Ltd (GMO), to acquire the properties at a price structured to pay out the Bank and Bankhouse in full. This represented an offer of approximately $18 million against the total creditor pool of $21.2 million. The offer was rejected by the liquidators through their solicitors because a higher price was likely to be achievable through a public sale process.

[11] The liquidators were however becoming concerned the Bank was taking little if any action to sell the property. The liquidators wrote to the Bank on 3 August 2016 advising that it was extremely important the properties be sold, given the rate at which penalty interest was accruing. On 10 August 2016 Ms Fatupaito issued a notice to the Bank requiring it to value its security and elect which power it wanted to exercise in relation to the property in terms of s 305 of the Companies Act 1993.

[12] The Bank responded to the s 305 notice on 15 August 2016, advising that it elected to realise the security it had, that its sale of the mortgaged properties had been delayed by litigation, and that it was awaiting the High Court's confirmation that the sale process could proceed. On 24 August 2016, its solicitors advised further steps could not be taken until the Bank had obtained an order requiring the removal of a caveat. A court order to this effect was ultimately obtained on 27 September 2016 but was subject to a condition that any sale of the properties over which that caveat was lodged to people or entities associated with Mr Olliver or Ms Sparks was conditional upon the Court's approval.

[13] In early November 2016 offers were received from GMO and a further entity associated with Mr Olliver, Old Schnapper Rock Ltd, to purchase between them CIT's business and assets for a total of $20.1 million including GST. GMO's offer was to purchase four of the properties and the balance of CIT's assets. This would include the claims CIT was pursuing against Ms Sparks and the Waimarie Trust.

[14] At this point in the chronology, Inland Revenue agreed to fund an independent valuation of CIT's properties. The valuations received indicated a range of between $15.5 million and $17.9 million on a forced sale, and $20.95 million for the total market value of the properties. Ms Fatupaito took the view that the combined offer from GMO and Old Schnapper Rock was consistent with the market value, after accounting for any marketing and commission costs that would be incurred on a market sale. She was concerned that the sale be progressed as soon as possible because further delays might result in deterioration of the market value of the properties. Moreover, interest continued to accrue on the Bank debt, which had the effect of reducing the net proceeds available to repay unsecured creditors. Following discussions with Ms Fatupaito, the Bank decided to put the marketing of the properties on hold while the liquidators negotiated with the prospective purchasers.

[15] There were however various sticking points in the negotiations with GMO and Old Schnapper Rock. One was a clause in the agreements to the effect that the purchase price would reduce by the amount of debts owed by CIT to interests associated with Mr Olliver, namely Bankhouse and another Olliver company, BBG Holdings Ltd (BBG), should those two companies agree to allow other creditors to be paid in preference to them. The liquidators said that reduction was too great, proposing a lesser reduction. It was too great because BBG was unsecured and so would not receive full repayment, even if it did not agree to the proposed subordination of its claim. Nor would Bankhouse if a challenge the liquidators had signalled to the extent of Bankhouse's security, succeeded. The liquidators also sought to limit the sale to a sale of the properties, excluding from the sale any debtors or claims. Ms Fatupaito made clear throughout that she would not agree to include in the sale claims against Ms Sparks and the Waimarie Trust. The liquidators also sought payment of the costs associated with obtaining the court approval of the transaction, required because the sale was to parties associated with Mr Olliver.

[16] Mr Olliver pressured the liquidators to accept the offer. He warned that if it was not agreed to, Bankhouse would appoint receivers and carry out a forced sale. Ms Fatupaito's evidence was that in a meeting with Mr Olliver on 27 March 2017, he withdrew "his" offer on the basis that the liquidators had not consented to a sale of the claims against Ms Sparks and Waimarie Trust. At the same time he claimed to have acquired the Bank's debt and said he would be appointing receivers. On 31 March 2017, Bankhouse appointed Mr Harris and Mr Nellies of Insolvency Management Ltd as receivers of CIT.

[17] On 6 April 2017, Ms Fatupaito and her legal representative met with Mr Harris to discuss the events leading to the first respondents' appointment, and how he proposed to sell the properties. Mr Harris said he intended to conduct a marketing campaign for the properties, was likely to proceed to utilise a registrar sale and would keep the liquidators appraised of any further developments.

[18] On 11 May 2017, the receivers caused CIT to enter into a sale and purchase agreement with GMO for $17.5 million plus GST. Mr Olliver explained to the liquidators that this was the same value as GMO had offered in the previous agreement because of the impact of GST. As it happens, Mr Olliver was mistaken as to the value. The offers to the liquidators had been for a total price of $20.1 million inclusive of GST. Because 22 Waimarie Street (one of the properties) was exempt from GST, no GST was required to be remitted on any proceeds from its sale. The receivers later acknowledged the purchase price under the 11 May 2017 agreement did not accurately reflect the property's valuation, and amended the agreement to $20.1 million including GST. That sum would allow the Bank and Bankhouse debts to be paid in full.

[19] The agreement had multiple conditions attached to it, of a very open-ended nature. The purchaser, GMO or nominee, had 60 working days to fulfil conditions including:

(a) the receivers obtaining approval from the High Court to act as agent of the vendor and to enter into the agreement;

(b) the vendor obtaining a valuation of the properties acceptable to it;

(c) the purchaser completing the purchase of the Bank's mortgage on terms acceptable to it; and

(d) the parties agreeing to the sale and purchase of "such of the other assets of the Vendor (including debtors) as the Vendor wishes to sell and the Purchaser wishes to purchase at a price and on terms acceptable to them".

[20] The agreement could be cancelled by either party if any these conditions were not fulfilled. But if they were fulfilled there was then a further conditional period of 60 working days within which time the vendor must procure removal of caveats affecting the properties. The effect of this clause together with the conditions created the potential for the agreement to remain conditional for approximately 24 weeks. In addition, the holding pattern created by this agreement was at no cost to the purchaser. Although the agreement provided for the payment of a deposit of 10 per cent of the purchase price, it was not payable until the agreement became unconditional.

[21] GMO made a contemporaneous offer to the receivers to purchase the other assets of CIT, including debtors, for $100,000. Mr Harris' evidence under cross-examination was that the sale of those assets was never concluded.

[22] The receivers applied to the Court for the approval contemplated in the agreement for them to act as CIT's agent for the purpose of the sale to GMO. They also sought orders removing caveats registered against the properties to enable the sale to proceed.

[23] Ms Fatupaito explained that the liquidators were concerned that the agreement was nothing more than an option to purchase, conditional in its terms and favouring GMO's position. They took the view that the receivers' appointment came with a significant increase in cost, but without value to creditors, and that it had led to an uncommercial sale and purchase agreement. They opposed the receivers' application. They brought their own application for orders setting aside the GSD in whole or in part, declaring the receivers invalidly appointed and not entitled to remuneration,

setting aside the agreement for sale to GMO, directing the receivers cease to act, ordering that no other receiver be appointed by Bankhouse over CIT's assets, and prohibiting the receivers from acting as receivers for a period not exceeding five years.

[24] Ultimately the liquidators and receivers were able to agree to consent orders to enable the agreement for sale and purchase between CIT and GMO to proceed. The terms of the consent order included a requirement that conditions in the agreement either be unconditionally waived or completely satisfied on or before 16 August 2017 and that the full purchase price under the agreement be paid in full on or before 31 August 2017. Neither requirement was met, with the result that the receivers discontinued their application and retired from their appointment as receivers with effect from 1 September 2017.

Hearing before Jagose J

[25] Jagose J made orders which are not the subject of the appeal but provide necessary background. He set aside the whole of the GSD as against the liquidators under s 299 of the Companies Act.[2] He was satisfied it was just and equitable for the GSD, so far as it conferred any security on Bankhouse, to be set aside as against the liquidators because it was created at a time when Mr Olliver knew of the financial difficulties of CIT, and because it was created to enable Bankhouse to receive more than it otherwise would have in the liquidation, at the expense of CIT's creditors as a whole. The Judge was satisfied that the GSD conferred an "inappropriate advantage" on Bankhouse.[3] He therefore made an order prohibiting the appointment of any other receiver under the GSD.

[26] The Judge declined the liquidators' application for declarations that the receivers were invalidly appointed and not entitled to any remuneration. He observed that the liquidators relied upon s 25(1) of the PPSA, which provides:

> (1) All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.

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2 *Harris v Bank of New Zealand*, above n 1, at [86].
3 At [61].

[27] The Judge accepted that the GSD was a "security agreement" for the purposes of the PPSA. Security agreement is defined in the PPSA as meaning "an agreement that creates or provides for a security interest".[4]

[28] The Judge recorded the liquidators' argument as being that the purpose of the receivers' appointment was to effect the properties' sale to interests associated with Mr Olliver, which was not a good faith exercise of the power to appoint and was improper.

[29] The Judge said that Bankhouse's purpose could not invalidate the appointment, "at least not on application against the receivers alone".[5] Even if the power to appoint was exercised in bad faith that was a challenge to the secured party's decision and not the validity of the receivers' appointment.

[30] As to the position of the receivers, the Judge said that it was long accepted that receivers are responsible to satisfy themselves as to the validity of their appointment. But it was implausible the receivers should be responsible also to satisfy themselves that their appointments were not tainted by ulterior motive on the part of their appointor. The Judge continued:

> [74] Section 33(1) enables the Court to relieve a receiver of any liability incurred solely by reason of a defect in his or her appointment, if the receiver nonetheless "acted honestly and reasonably and ought, in the circumstances, to be excused". The person in whose interests the receiver was appointed is then liable to the extent the receiver is relieved.
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> [75] Section 33(1) points to determination of validity of appointment being a mechanical rather than moral exercise. That is reinforced in a liquidation setting by "the need to differentiate between the validity or otherwise of the appointment of a liquidator (on the one hand) and the liquidation process (on the other)".[6] Any ulterior motive of Bankhouse is better measured in consideration of the receivers' conduct as against their general statutory duties in the process of receivership.
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> [76] It is also unclear why, under s 33, a receiver's relief from liability if incurred solely by reason of his or her appointment being invalidated by the appointor's lack of good faith, should turn on the receiver's honesty and reasonableness. That suggests an appointer's lack of good faith is not a defect in the receiver's appointment susceptible to determination under s 34 only as against the receiver (the section being about "Court supervision of receivers").

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4 Personal Property Securities Act 1999 [PPSA], s 16.
5 At [71].
6 *Zhang v Kamal* [2017] NZHC 1943 at [52].

[31] The Judge therefore declined to make the declarations sought. In any case, he doubted he had express power to declare the receivers should receive no remuneration; the Receiverships Act 1993 only allowed him to fix or review the remuneration, not to determine that there was no entitlement to remuneration.

Was the application made against the receivers alone?

[32] The Judge proceeded on the basis that the liquidators' application was against the receivers alone. He appears to have overlooked that the liquidators' application did join Bankhouse as the appointing creditor and included an allegation that Bankhouse appointed the receivers for an improper purpose. Bankhouse was served with the proceedings, was heard during the interlocutory phase of the proceeding and had the opportunity to be represented and to be heard at the hearing. We understand Bankhouse was not represented because leave was declined to have Mr Olliver represent Bankhouse at the hearing. There is a general rule that a company must be represented by counsel.[7]

[33] An application by the receivers for Mr Olliver's affidavit to be adduced as evidence on their application was also declined by Jagose J. The liquidators had opposed this application unless they were given the opportunity to cross-examine Mr Olliver, which Mr Tingey for the liquidators had indicated could not be achieved in the time allowed for the fixture.

[34] The first respondents now argue on appeal that in the absence of this evidence and any cross-examination of Bankhouse's director, namely Mr Olliver, it would be an unprecedented step to find that the appointment was made in bad faith. We do not accept that argument. Both Bankhouse and the receivers had the opportunity to file evidence in accordance with timetable orders. A late application to adduce the evidence of Mr Olliver was declined because of the prejudice that would accrue. The Judge was aware, when he made that ruling, that the liquidators argued that the

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7 *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 310–311; aff'd *New Zealand Cards Ltd v Ramsay* [2012] NZCA 285 at [21]; and *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [25]–[27].

appointment of receivers had been made in bad faith.[8] The Judge was therefore required to rule on the applications on the basis of the evidence before him. We also note that the receivers have not identified the evidence Mr Olliver was to give that was material to the purpose of the appointment.

Can the purpose for which a mortgagee exercises its power of appointment invalidate that appointment?

[35] We start with the GSD. The GSD is expressed to be security for payment of the debt owed to Bankhouse by CIT. Clause 9.2(c)(vi) of the GSD provides that if an event of default occurs Bankhouse may appoint a receiver of all or any of the secured properties. It is not at issue that by the time of the appointment of receivers, there were various events of default as defined by the GSD.[9]

[36] Counsel for the receivers argues that since there are no restrictions in the GSD as to the purpose for which Bankhouse could appoint a receiver, and the power to appoint had accrued, the appointment cannot therefore be invalidated due to improper purpose.

[37] It is true that a security holder has considerable autonomy as to how it exercises its powers under a general security agreement. There is a general principle of law, reflected in s 19 of the Receiverships Act and in s 176 of the Property Law Act, that a mortgagee's powers of sale must be exercised to obtain the best price reasonably obtainable at the time of sale. But beyond that there is little constraint as to the exercise of a mortgagee's contractual powers.

[38] In *Re Potters Oils Ltd* Hoffmann J rejected a liquidator's argument that a security holder should not have appointed a receiver because the liquidator was doing

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8 We note that in the amended originating application the allegation is that Mr Olliver appointed receivers to retain control of the properties. While there is no allegation that he did so to obtain the debts to pursue his dispute with his former wife, the central allegation is broad enough to encompass that allegation, and the factual foundation for it is contained in the affidavit of Ms Fatupaito. Bankhouse had an opportunity to respond to that allegation.

9 Clause 9.1.

all that could be done to protect the security holder and the appointment of a receiver would only add cost.[10] The Judge said:[11]

> The debenture-holder is under no duty to refrain from exercising his rights merely because to exercise them may cause loss to the company or its unsecured creditors.

[39] In that same judgment however, Hoffmann J commented that the mortgagee's power to fix the receiver's remuneration "like other powers of the mortgagee, has no doubt to be exercised in good faith".[12]

[40] *Shamji v Johnson Matthey Bankers Ltd* is another decision of Hoffmann J which makes clear the extent of contractual autonomy a security holder has in the exercise of the power of sale or appointment of receivers.[13] In *Shamji* it was argued that the security holder owed a duty of care to the company to consider all relevant matters before appointing receivers when negotiations to obtain financing were being conducted with a third party. Rejecting that argument, Hoffmann J said:[14]

> The appointment of a receiver seems to me to involve an inherent conflict of interest. The purpose of the power is to enable the mortgagee to take the management of the company's property out of the hands of directors and entrust it to a person of the mortgagee's choice. That power is granted to the mortgagee by the security documents in completely unqualified terms. It seems to me that a decision by the mortgagee to exercise the power cannot be challenged except perhaps on grounds of bad faith. There is no room for the implication of the term that the mortgagee shall be under a duty to the mortgagor to "consider all relevant matters" before exercising the power.

[41] There is now ample authority to confirm the further limitation, identified by Hoffmann J in both *Potters* and *Shamji*, that the power to appoint a receiver may not be exercised in bad faith. *Downsview Nominees Ltd v First City Corp Ltd* is a decision of the Privy Council on appeal from this Court, and is the leading authority as to the nature of the equitable duties owed by the charge holder under a general security agreement when exercising its powers under that agreement.[15] The issues in

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10 *Re Potters Oils Ltd* [1986] 1 WLR 201 (Ch) at 205.
11 At 206.
12 At 206.
13 *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278 (Ch).
14 At 284.
15 *Downsview Nominees Ltd v First City Corp Ltd* [1993] 1 NZLR 513 (PC).

Downsview arose out of the appointment of a receiver under a debenture.[16] The hearing before the Privy Council proceeded on factual findings made by the first instance Judge that in appointing a receiver, the first-ranking debenture holder had not acted for the proper purpose of realising its security but for the improper purpose of allowing the mortgagor to continue in trade. It achieved this by the receiver obstructing the efforts of a subsequent mortgagee to enforce its own security. There was no plan to sell the property.

[42] Their Lordships explained that equity has overlaid on contracts of security certain duties as follows:[17]

> Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that power conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower.

[43] To similar effect, later in the judgment the Court said:[18]

> A mortgagee owes a general duty to subsequent encumbrancers and to the mortgagor to use his powers for the sole purpose of securing repayment of the moneys owing under his mortgage and a duty to act in good faith.

[44] Mr Hughes, on behalf of the first respondents, argues that *Downsview* is not authority for the proposition that an appointor's improper purpose or bad faith can invalidate the receiver's appointment because the Court was not asked to address the validity of that appointment.

[45] It is true the Court did not address the validity of the appointment. The receiver, Mr Russell, had ceased to act before the issues between the parties came to trial, and so the parties pursued recovery of the losses the receiver's actions caused by way of damages claims. Nevertheless, we are satisfied the principles identified in

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16 In many of the cases discussed in this judgment, charges granted over the assets of a company are referred to as debentures. After the enactment of the PPSA, securities issued by companies are no longer called debentures.

17 *Downsview Nominees Ltd v First City Corp Ltd*, above n 15, at 522.

18 At 526.

Downsview as to the nature of the mortgagee's duties are relevant to the extent and nature of the contractual power to appoint. This is because *Downsview* is authority for the proposition that a mortgagee must exercise its contractual power to appoint receivers under the general security agreement for obtaining repayment, and that to exercise it for another purpose is a bad faith exercise of the power.[19] If a security holder may not exercise a power to appoint in bad faith, that is a limitation upon that power. To put it another way, if a power to appoint receivers is exercised for a purpose unrelated to recovery of the debt, then that is a bad faith exercise of the power and is invalid.

[46] This equitable principle is expressed in statutory form in s 25 of the PPSA which provides that all rights, duties or obligations under security agreements subject to that Act must be exercised in good faith. Section 25 applies in this case since the GSD created an interest in personal property.[20] The PPSA provides that a breach results in a right to recover damages for any loss or damage that was reasonably foreseeable as likely to result from the breach.[21] For our purposes, this adds nothing to the equitable principle we have identified above.

[47] A more difficult issue is that raised by the first respondents' challenge as to what constitutes bad faith for these purposes. The first respondents argue that even if it is accepted that the appointment of a receiver for an improper purpose can render an appointment invalid, it is necessary to show that the improper purpose is the only purpose.

[48] Mr Hughes relies upon *Meretz Investments NV v ACP Ltd*, a first instance decision for that proposition.[22] In that case Lewison J accepted that *Downsview* supports the proposition that a power of sale is improperly exercised if it is no part of the mortgagee's purpose to recover the debt secured by the mortgage. But the Judge declined to extend that principle to a situation where there were mixed motives.

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19 In some cases included within that legitimate purpose is the protection of the value of the security, but this is not an issue for us in this case.

20 PPSA, above n 4, ss 16, definition of "security agreement" and 17.

21 Section 176.

22 *Meretz Investments NV v ACP Ltd* [2006] EWHC 74, [2007] Ch 197.

He rejected an argument that a mortgagee who acts to exercise a power of sale must have "purity of purpose":[23]

> A dissection of a mortgagee's motives is likely to be difficult in practice. Moreover, unlike statutory powers conferred for the public benefit, or trustees' powers conferred for the benefit of beneficiaries … a mortgagee's powers are conferred upon him for his own benefit. In such circumstances "purity of purpose" may be difficult to achieve. The cases do support the proposition that a power of sale is improperly exercised if it is no part of the mortgagee's purpose to recover the debt secured by the mortgage. Where, however, a mortgagee has mixed motives (or purposes) one of which is a genuine purpose of recovering, in whole or in part, the amount secured by the mortgage, then in my judgment his exercise of the power of sale will not be invalidated on that ground. In addition I consider that it is legitimate for a mortgagee to exercise his powers for the purpose of protecting his security.

[49] It is true that in *Downsview* no part of the mortgagee's or receiver's purpose was to use the mortgagee's power of sale to sell the secured assets and obtain repayment of outstanding debts. Rather the intention was to allow the mortgagor to continue to trade. We accept it follows that the Privy Council's statement that the mortgagee owed a duty to use its powers for the "sole purpose" of obtaining repayment was obiter.[24]

[50] *Downsview* and *Meretz* were considered by this Court in *Coltart v Lepionka & Co Investments Ltd.*[25] In *Lepionka,* GLW Group Ltd (GLW) obtained funding from Westpac Banking Corp for its subdivision of a large parcel of land. The funding was secured by a mortgage. It sold five undivided lots to Lepionka & Co Investments Ltd interests and granted an option to Mr Coltart to buy another undivided lot. GLW defaulted on the mortgage. The Lepionka interests then formed a company to buy Westpac's mortgage. The new company did so, and then adopted GLW's contracts with the Lepionka interests whilst cancelling its option with Mr Coltart. The new company mortgagee declined offers for the land subject to the option at market price. The Court found that the new company mortgagee acquired the Westpac mortgage for the predominant, possibly sole intention of preserving the security and exercising its power of sale to protect related parties, namely the Lepionka interests. The Court continued:[26]

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23 At 271–272.
24 Set out above at [43].
25 *Coltart v Lepionka & Co Investments Ltd* [2016] NZCA 102, [2016] 3 NZLR 36.
26 At [66] (footnotes omitted).

> While that intention does not of itself prove bad faith, we agree with the Associate Judge that the Lepionka mortgagee's subsequent actions arguably give rise to an inference that its predominant purpose was not to sell for the best price reasonably obtainable or to protect its security. Instead, the Lepionka mortgagee's actions invite the inference that its predominant purpose was to secure collateral advantages for the Lepionka purchasers, driven by factors extraneous to the relationship of mortgagee and mortgagor.

[51] The Court addressed Lewison J's suggestion that a mortgagee need not have purity of purpose and could act with a mixture of motivations, as long as one of them was selling the asset to obtain repayment of the secured debt. As to that the Court said:[27]

> In our judgment, a mortgagee may lawfully have other purposes coinciding with its core interest in discharging the debt and obtaining the best price reasonably obtainable and thereby properly anticipate the enjoyment of benefits collateral to exercising its power of sale. But an exogenous purpose — that is, a purpose flowing from interests outside the function of a mortgagee — cannot be allowed to prevail.

[52] The Court distilled the various authorities as follows:

> [65] The leading authorities confirm that a mortgagee will come under the scrutiny of equity when the effect of its actions invites the inference that it was acting in breach of its duties. The ultimate question is whether a mortgagee has acted primarily for the purpose of recovering its debt. That question is to be answered objectively, not by examining a mortgagee's subjective motives, but by examining whether its *actions* are taken in good faith, bearing in mind its entitlement to prefer its own interests wherever they conflict with other interested parties.
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> (Footnotes omitted).

[53] A mortgagee therefore need not have purity of purpose. But it does act in bad faith if, judged objectively, it acts for a predominant purpose which is collateral to, or to use the language of this Court in *Lepionka*, exogenous to, its interests as mortgagee in preserving its security and obtaining repayment of a secured debt. However a mortgagee does not act in bad faith if the effect of the exercise of its power undertaken for the predominant purpose of securing repayment is that it secures to itself some collateral advantage.

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27 At [63].

[54] Of course, it will be a rare case in which there is evidence to meet this very high standard. In most cases, where a mortgagee exercises its power to appoint receivers and moves to sell the mortgaged property, the inevitable inference will be that it is acting for the proper purpose of realising its security. The evidence of bad faith would normally consist of actions taken by the receiver appointed, in conjunction with the mortgagee, which are inconsistent with an intention to act to realise the security and repay the mortgagee, as was the case in *Downsview.* It may include, as is argued in this case, statements made prior to appointment by the mortgagee or a person acting on the mortgagee's behalf. But if there is evidence to show that an appointment is made in bad faith in this sense, there seems no good reason why that appointment should be treated as valid, and be allowed to continue.

[55] Finally, we note that Jagose J was concerned about the position of receivers who could be exposed to civil liability were they to accept appointment which was later invalidated on this ground. He thought receivers should not be required to concern themselves with the motivation of their appointors. It is certainly the case that receivers would not be expected to interrogate appointing creditors as to the purposes of the appointment absent something which puts them on notice that the mortgagee is acting in bad faith. Responsible receivers are adequately protected from civil liability by the provisions of s 33(1) of the Receiverships Act which provides:

> **33 Relief from liability**
>
> (1) The court may relieve a person who has acted as a receiver from all or any personal liability incurred in the course of the receivership if it is satisfied that—
>
> (a) the liability was incurred solely by reason of a defect in the appointment of the receiver or in the deed or agreement or order of the court by or under which the receiver was appointed; and
>
> (b) the receiver acted honestly and reasonably and ought, in the circumstances, to be excused.

[56] Receivers are also able to negotiate an indemnity with the appointing creditor for their fees to cover the eventuality that their appointment is subsequently held to be invalid.

Did Bankhouse act in bad faith in appointing receivers?

[57] In this case there is good evidence that the predominant purpose, perhaps the sole purpose for the appointment, was gaining control of the properties in order to gain access to the accounts receivable of CIT and in particular the debts owed to that company by Mr Olliver's estranged wife and a trust associated with her, Waimarie Trust. It is not disputed by the first respondents that as the sole director of Bankhouse, Mr Olliver's actions and intentions can be equated with those of Bankhouse. It is also not in issue that Mr Olliver can similarly be equated with the proposed purchasers GMO and Old Schnapper Rock for all relevant purposes.

[58] Evidence of Bankhouse's purpose in appointing receivers can be gleaned from the following. The terms of sale of the properties were agreed between the liquidators and Mr Olliver, except for the condition Mr Olliver sought to impose for the benefit of GMO that the liquidators also agree to sell the claims against Ms Sparks and Waimarie Trust. As we have noted, Mr Olliver was, at the time, in a prolonged and it seems from the correspondence, bitter dispute with his estranged wife, Ms Sparks. There is nothing to suggest that GMO had any genuine commercial interest in the purchase of the debts. The inference to be drawn is that Mr Olliver was attempting to acquire the debts owed by Ms Sparks and Waimarie Trust to enable him to better pursue those debts as part of his personal dispute with her.

[59] The sale the liquidators were negotiating with GMO and Old Schnapper Rock would have enabled Bankhouse's secured debt to be fully repaid, and would have left a surplus for unsecured creditors. The exact size of that surplus would have depended upon the extent to which the liquidators succeeded in their challenge to Bankhouse's security. It followed therefore that Bankhouse did not need the sale of debtors to proceed to obtain repayment of the secured debt. We note as an aside, even if there was a shortfall, the proceeds of sale of CIT's accounts receivable were unlikely to be available to Bankhouse. Accounts receivable are amongst the assets listed in cl 2(1)(b) of sch 7 to the Companies Act as subject to the statutory claims of preferential creditors ranking for payment ahead of the claims of the secured creditor.[28] However that is not something we take into account in the absence of detail as to the extent of creditors

[28] The preferential claims are listed in cl 1 of sch 7, and include certain tax amounts.

entitled to preference to the interests of a secured creditor in respect of the cl 2(1)(b) assets.

[60] In a meeting on 27 March 2017 Mr Olliver told Ms Fatupaito that he/GMO were withdrawing the offer because the liquidators had not consented to the sale of those claims.

[61] The evidence is that one of the receivers, Mr Harris, was aware that the attempt to negotiate an agreement for sale and purchase of the land between the liquidators and GMO had broken down over Mr Olliver's insistence upon the sale of other assets. He knew those assets included the debts owed by Ms Sparks and Waimarie Trust. We think it safe to infer that when he caused Mr Harris and Mr Nellies to be appointed, Mr Olliver did so in the belief and expectation that they would agree to sell the Waimarie Trust/Ms Sparks debts to interests he controlled. It is not necessary that we also find that the receivers acted in bad faith. It is the mortgagee's purposes that are at issue.

[62] The terms of sale then agreed with GMO by the receivers were uncommercial. The agreement could fairly be described as conferring an option upon the purchasers because of the extent and nature of the conditions. But one of the conditions to be fulfilled was agreement being reached between the parties for the sale of "such of the other assets of the Vendor (including debtors) as the Vendor wishes to sell and the Purchaser wishes to purchase at a price and on terms acceptable to them". The debtors included Ms Sparks and Waimarie Trust.

[63] We therefore conclude that the evidence establishes that Mr Olliver/Bankhouse appointed receivers for the principal purpose, perhaps even the sole purpose, of obtaining control of the properties as a means of acquiring the debts due by Ms Sparks and Waimarie Trust. Bankhouse's purpose in this regard was to enable Mr Olliver to better pursue his personal dispute with his former wife. Acquiring those assets was not for the purpose of securing repayment of the secured debt. The sale of the properties would repay Bankhouse fully.

[64] Bankhouse may or may not have intended that the receivers would also sell the property to GMO to secure repayment of the debt. But if so, the sale of the properties to obtain repayment was at most a subsidiary purpose for the appointment. Indeed the evidence suggests it may not have been a purpose at all, given the highly conditional nature of the offer Mr Olliver procured GMO to present. It is also supported by the fact the sale did not ultimately proceed because the conditions were not fulfilled, although this is not something we rely upon.

[65] It follows that the liquidators are entitled to a declaration that the receivers were not validly appointed under the terms of the GSD because the appointment was made in bad faith. The appointment was made in bad faith because the principal purpose of Bankhouse was collateral to its legitimate interest in preserving the security and obtaining repayment of the secured debt. Its principal purpose was to procure control for a third party, Mr Olliver, of assets that would enable him to better pursue his personal dispute with his estranged wife and in which Bankhouse had no interest.

Receivers' remuneration

[66] The liquidators also seek a declaration that the first respondents are not entitled to remuneration. This is sought in the context, as we understand it, that the first respondents have filed an unsecured creditor's claim form in the liquidation seeking payment of their fees.[29]

[67] It follows from the fact that their appointment as receivers was invalid that the first respondents are not entitled to be remunerated from the assets of the company, a right which would only accrue to them through the secured creditor Bankhouse, because under the terms of the GSD the remuneration forms part of the secured debt.[30] Because their appointment was invalid the secured creditor has no right to charge the costs of the receivership to the company or to recover costs, on a secured basis or otherwise. Nor do the secured creditor's receivers.

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29 We were not asked to address, and did not hear argument on whether the setting aside of the GSD had any effect upon the receivers' ability to recover payment of their fees up until the date of the order setting the security aside.

30 Clause 10.3.

[68] There is also no statutory basis for the Court to order costs. Section 33(1) of the Receiverships Act provides that a court may order that they be relieved from any personal liability incurred in the course of the receivership if satisfied that they acted honestly and reasonably and ought in the circumstances to be excused. But that is not a power to award remuneration. The first respondents may of course call upon any contractual indemnity or arrangement they have with Bankhouse for payment of fees in such an eventuality.

[69] Section 34 empowers the court to fix or review a receiver's remuneration, but that provision is concerned with receivers who are validly appointed. We agree with Jagose J that it does not confer a power to fix remuneration for those whose appointment as receiver is invalid.

[70] The learned authors of *Private Receivers of Companies in New Zealand* state that a "receiver" who is not properly appointed, and acts de facto, "may recover a reasonable fee for services which incontrovertibly benefited the company in circumstances where it would be unconscionable for the company to keep the benefit without paying a reasonable sum for it".[31] The case the authors rely upon for that proposition is *Monks v Poynice Pty Ltd.*[32] The discussion in that case reflects a simple application of restitutionary principles. The Court did no more than acknowledge the possible application of those principles, leaving it to the liquidator to allow a claim in the liquidation, to the extent it was satisfied there was an incontrovertible benefit to the company from the services provided by the receiver.

[71] We did not hear argument in relation to any restitutionary claim the receivers might have. Although the evidence we have seen suggests they would be hard-pressed to show any benefit flowed to CIT from their appointment, as in *Monks* we consider that issue best resolved through the claims process. As mentioned, we understand a claim has been filed in the liquidation by the receivers, but that it was after the commencement of these proceedings. The liquidators are entitled to a declaration that the first respondents are not entitled to recover from the assets of CIT their fees and

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31 Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (3rd ed, LexisNexis, Wellington, 2008) at [6.02].

32 *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662 (SC).

expenses incurred in the course of their conduct in purportedly conducting the receivership pursuant to the terms of the GSD or under the provisions of the Receiverships Act.

Application to adduce evidence

[72] The liquidators seek leave to adduce additional evidence on appeal in the form of an affidavit from one of the liquidators, Ms Fatupaito. She annexes the unsecured creditor's claim form filed by the first respondents, the deed of appointment and other material the liquidators argue is relevant to the first respondents' knowledge of the circumstances of their appointment. We do not consider that material is relevant to the issues we have to determine on this appeal. We therefore decline the application to adduce the additional evidence.

Result

[73] The application to adduce further evidence is declined.

[74] The appeal is allowed.

[75] The appellants are entitled to declarations as follows:

(a) The appointment of the first respondents as receivers was invalid.

(b) The first respondents are not entitled to recover from the assets of CIT Holdings Ltd their costs and expenses incurred in purportedly conducting the receivership pursuant to the terms of the General Security Deed or under the provisions of the Receiverships Act.

[76] The first respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

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