ORDER THAT THERE IS TO BE NO PUBLICATION OR FURTHER DISTRIBUTION OF THE CONTENTS OF THIS JUDGMENT UNTIL 5PM FRIDAY 15 APRIL 2016 OR FURTHER ORDER OF THE COURT. SEE PARAGRAPH 62.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1833
[2016] NZHC 692

BETWEEN	FINANCIAL MARKETS AUTHORITY Applicant
AND	PTT LIMITED (IN RECEIVERSHIP) First Respondent
	MAXWELL FOSTER LIMITED (IN RECEIVERSHIP) Second Respondent
	GIBSON MCLEOD LIMITED (IN RECEIVERSHIP) Third Respondent
	ALBA INTERNATIONAL LIMITED (IN RECEIVERSHIP) Fourth Respondent

Continued over

Hearing:	4 March 2016
Counsel:	D R La Hood and S Burnett Lanauze for applicant B A Vautier for respondents J W Upson for receivers
Judgment:	14 April 2016

JUDGMENT OF PALMER J

This judgment was delivered by me on 14 April 2016 at 5 pm],
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:	Luke Cunningham & Clere, Auckland (RT Manttan) Glaister Ennor, Auckland Chapman Tripp, Wellington (DR Kalderimis, JW Upson)

STEVEN ROBERTSON
Fifth Respondent

LISA JANE ROBERTSON
Sixth Respondent

STEVEN ROBERTSON and XAVIER TRUSTEES LIMITED as trustees of the Steven Robertson Family Trust
Seventh Respondents

Summary

[1] The Financial Markets Authority (FMA) suspected that Mr Steven Robertson was operating a Ponzi scheme in receiving funds for investment which were not invested. The FMA obtained orders under the Financial Markets Conduct Act 2013 (FMCA) preserving assets and appointing receivers. It seeks that the costs of the receivers be met from the assets. Mr Robertson and the other respondents oppose that and oppose it being decided now. I hold that the court has jurisdiction to order the reasonable fees, costs and indemnities of the receiver to be met from the assets received as long as doing so is for a purpose within the Act's contemplation. The court will usually do so, after hearing from all relevant parties, if and when it is satisfied that:

(a) the receivership is clearly justified in the interests of the potentially aggrieved persons; and

(b) the effect of doing so will not impact on the returns to potentially aggrieved persons of their funds disproportionately to their benefits.

[2] I do not consider that point has yet been reached here.

Facts

[3] The FMA was concerned that Mr Steven Robertson, with involvement of the other respondents, was running a fraudulent scheme involving obtaining money from the public for investment but spending it on other purposes. The FMA sought from the High Court urgent interim asset preservation orders, and an order appointing receivers and managers, under ss 522 and 523 of the FMCA on a without notice basis. The concerns and orders are outlined in a later judgment of Hinton J.[1]

[4] On 13 August 2015 Andrews J granted the orders, largely as sought. One of the differences was that the orders made by Andrews J did not confer on the receivers all the powers of a receiver under the Receiverships Act 2003.

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1 *Financial Markets Authority v PTT Ltd & Ors* [2015] NZHC 2204 ["*FMA v PTT*"].

[5] One of the orders was, under s 523(1)(h), that Mr John Fisk and Mr David Bridgman be appointed "to act jointly and severally as receivers and managers" of all the property of the first four respondents (the companies) and similarly as receivers of all the property of the fifth to seventh respondents (the individuals and trustees).[2] These orders were expressed to be "with immediate effect and until further order of the Court".[3] The receivers were given powers to take possession of the respondents' property and, in respect of the corporate respondents, were given the powers of interim liquidators.[4]

[6] The 13 August 2015 orders included order 3.10:[5]

> 3.10 that pursuant to the appointments in 3.7 and 3.8 above, John Fisk and David Bridgman, as receivers and managers of the first, second, third and fourth respondents and as receivers of the fifth, sixth and seventh respondents, may:
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> (a) at all times act jointly and severally under one administration of the assets of all of the respondents, in such manner as in their discretion shall best and most economically perform their respective responsibilities as receivers and managers;
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> (b) in exercising their powers as receivers and managers of the respondents' property, *be reimbursed for their reasonable fees and costs* relating to the performance of their respective responsibilities as receivers and managers *out of the respondents' property*; and
>
> (c) be fully indemnified *by and out of the respondents' assets* in respect of all losses or liabilities which may be sustained or incurred by reason of exercising the powers conferred under these orders provided that such losses or liabilities are not attributable to their dishonesty, negligence or deliberate breach of duty.

[7] On 20 August 2015 the respondents sought and obtained an order from Andrews J that, relevantly, the receivers not take any costs out of the estate until that question was revisited at a hearing on 4 September 2015. The FMA did not oppose this. So the 13 August order at 3.10(b) was still extant but its operation was suspended.

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2 Interim order preserving assets, at [3.7].
3 At [3.7].
4 At [3.9(a)]. [3.9(c)].
5 Emphasis added.

[8] On 4 September 2015 Hinton J heard applications from the individuals and trustees including one that the receivers' and managers' fees be met by the FMA and not be reimbursed out of, or indemnified by, the respondents' property.[6] The basis for that application was that the requirement to pay the costs of the receiver was oppressive and the costs were disproportionate to, and in excess of, the value of the available property. The fees at that point were approximately $115,000. Hinton J stated:[7]

> It seems to me to be premature for the receivers fees to be ordered as payable or to be paid out of the asset pool at this relatively early stage of the investigation. The matter can be reviewed at a later date. The FMA and receivers accepted that was appropriate. The respondents pressed for me to reverse the order of Andrews J which I decline to do for the same reason.

[9] Subsequently, on 10 December 2015, Hinton J released the sixth respondent, Mrs Lisa Robertson, from personal receivership.

[10] The FMA has provided affidavits updating the Court about its investigations:

(a) Initial estimates are that approximately $9.8 million of purported investor deposits were placed in bank accounts of the respondents from December 2009 to October 2015. There is evidence of substantial funds being spent on personal expenditure.

(b) The FMA is aware of a range of alleged conduct including:

(i) seeking funds for investment which were not invested;

(ii) taking funds for share purchase without it being clear whether shares were transferred or at what value;

(iii) taking funds for a term deposit and apparently using it for personal expenditure; and

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6 *FMA v PTT,* above n 1, at [15(c)], [16(d)] and [41] to [43].
7 At [43].

(iv) acquiring credit card details from investors for investment purposes and making unauthorised deductions.

(c) The FMA considers, based on the evidence to date, that there may have been breaches of the Crimes Act 1961, the FMCA and the Financial Advisers Act 2008.

[11] The receivers advise that:

(a) To 2 March 2016 they have received 57 claims from former clients with a combined face value of $1,496,010.11 plus AUD460,706.08.

(b) The combined assets of the companies are approximately $50,000. Any meaningful recovery by the companies' creditors will depend on whether claims lie against the residence held in trust by the seventh respondent.

(c) The receivers' total fees and expenses, including legal expenses, as at 29 February 2016 are $172,603.10 (excluding GST and disbursements) comprising $115,610 from commencement until the 4 September 2015 hearing and $56,993.10 thereafter.

(d) The reduced total in the second phase reflects the Court's appointment of the receivers as liquidators of the respondent companies on 11 December 2015. The FMA has met the costs of preparing the receivers' liquidation applications and of monitoring the individual respondents' weekly living allowance.

(e) The ongoing costs of the receiverships are likely to be at a similar or lower rate to those of the second phase.

Law

The Text

[12] Section 522 of the FMCA is entitled "When court may make order to protect interests of aggrieved person". Subsection (1) defines the statutory pre-conditions by which the section applies which are, in summary, where:

(a) there is an investigation under the FMCA into contravention or possible contravention of a specified Act (s 522(1)(a)(i), (ii));

(b) there is an investigation under the FMCA which may result in a prosecution or civil proceedings (s 522(1)(a)(ii));

(c) a prosecution has begun for an offence in a specified Act (s 522(1)(b));

(d) civil proceedings have begun under or in respect of a specified Act (s 522(1)(c)); or

(e) civil proceedings have begun in connection with financial products or services for a contravention, fraud, negligence, breach of duty or other misconduct (s 522(1)(d)).

[13] It is clear that s 522(1)(a) was satisfied here.

[14] Subsection (2) provides:

> The court may, on application by the FMA or by an aggrieved person, make 1 or more of the orders listed in section 523 if the court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person.

[15] Section 522(4) defines "aggrieved person" to mean "any person to whom a relevant person is liable" and "relevant person" to mean "a person referred to in subsection (1)".

[16] Section 523, delightfully entitled "What orders may be made", sets out exactly that. The orders are potentially highly coercive in preventing or requiring dealing with assets, money or financial products or making payments as well as requiring passports to be handed over or prohibiting leaving New Zealand. Relevantly, the potential orders include:

> (h) an order appointing,—
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> (i) if the relevant person is an individual, a receiver or trustee, having any powers that the court orders, of the property or of part of the property of that person; or
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> (ii) if the relevant person is a body corporate, a receiver or receiver and manager, having any powers that the court orders, of the property or of part of the property of that person; …

Purpose

[17] On its face, this is a breathtakingly broad coercive power. It allows the court to confer upon a receiver, trustee or manager of other peoples' assets "any powers that the court orders". It might only be slight comfort to the owners of such assets that the power:

(a) may only be exercised by the High Court;

(b) may only be exercised where the Court considers it "necessary or desirable for the purpose of protecting the interests of an aggrieved person" (which the High Court has said should be interpreted widely and approached as an evaluative exercise);[8] and

(c) in accordance with the usual principle of administrative law, may only be exercised "to promote the policy and objects of the Act"[9] or, put another way, for a purpose within the contemplation of the Act.[10]

[18] The FMCA helpfully specifies its "main" purposes in s 3 which are to:

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8 *Financial Markets Authority v Hotchin* [2011] NZHC 458, [2011] 3 NZLR 469 at [52]-[53]. The Court of Appeal accepted that proposition in *Hotchin v Financial Markets Authority* [2012] NZCA 155 at [45].

9 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

10 *Astrazeneca Ltd v Commerce Commission* [2009] NZSC 92, [2010] 1 NZLR 297 at [29].

(a) promote the confident and informed participation of business, investors, and consumers in the financial markets; and

(b) promote and facilitate the development of fair, efficient, and transparent financial markets.

[19] Section 4 provides that the FMCA also has the following "additional" purposes:

(a) to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services:

(b) to ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks:

(c) to avoid unnecessary compliance costs:

(d) to promote innovation and flexibility in the financial markets.

[20] Sections 522 and 523 are in part 8 of the FMCA, entitled "Enforcement, liability, and appeals", and in subpart 7 entitled "Orders to protect interests of aggrieved persons in case of financial markets investigations or proceedings". There is a clear link between the main purposes of the FMCA and the regime constituted by these sections. As Winkelmann J stated, in relation to the predecessor sections 60G-60I of the Securities Act 1978, their purpose "is to ensure that the rights of aggrieved persons to damages, compensation or restitution are not frustrated through the assets of a liable person being dealt with in a way that renders them unavailable to meet those claims".[11] So for example, where the FMA can demonstrate it has good reason to suspect fraud is being committed on the investing public, the residual power of the Court under s 523(1)(h) to appoint receivers and managers of assets that may otherwise be dissipated can be valuable in promoting the confident participation of investors in financial markets and in facilitating the fairness, efficiency and transparency of those markets.

[21] There is no New Zealand case law on the question of whether and when the costs, fees or indemnities of receivers appointed under this power can be met out of

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[11] *Financial Markets Authority v Hotchin,* above n 8, at [48].

the assets received. Such an order has been made by the High Court at least twice, other than in this case, but without opposition or by consent.[12]

Legislative history and Australian law

[22] Sections 522 and 523 of the FMCA essentially derive from ss 60G and 60H of the Securities Act 1978 and ss 43P and 43Q of the Securities Markets Act 1988. They were inserted into those Acts by the Securities Legislation Bill which was introduced in 2004 and passed in 2006 as (relevantly) the Securities Amendment Act 2006 and the Securities Markets Amendment Act 2006. These two provisions were inserted unanimously by the Commerce Committee of the House of Representatives.

[23] The only clue to Parliament's purpose in inserting these sections is the Parliamentary Counsel's note to compare them with ss 1323(1), (2A) and (6) of the Corporations Act 2001 (the Australian Act). Those sections are substantially the same as the New Zealand provisions with respect to the appointment of receivers.[13] Section 1323(1)(h) of the Australian Act empowers the Court, "if it considers it necessary or desirable to do so for the purpose of protecting the interests of a person (in this section called an *aggrieved person*)" to make:

> (h) an order appointing:
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> (i) if the relevant person is a natural person--a receiver or trustee, having such powers as the Court orders, of the property or of part of the property of that person; or
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> (ii) if the relevant person is a body corporate--a receiver or receiver and manager, having such powers as the Court orders, of the property or of part of the property of that person;

[24] So it seems that Parliament's intention in 2006 was to import this aspect of Australian law into New Zealand's securities law. The very minor changes made to the provisions in the FMCA in 2013 further aligned the wording with that of the Australian Act.

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12 *Financial Markets Authority v Ross* [2012] NZHC 2925 at [8] and [9] and *Financial Markets Authority v Arena Capital Ltd* [2015] NZHC 1156 at [4].

13 French J, speaking extra-judicially in 2007, noted that the provision has its origins in s 147 of the Securities Industry Act 1980 and was reproduced in s 573 of the 1981 Companies Code: see Robert S French "Stopping the Train after the Wreck: Corporate Group Collapse and Protective Orders under Section 1323" [2007] BalJlNTLawSoc 39 at [12].

[25] The New Zealand Parliament's intention means that the interpretations of the Australian Act's provisions by the Australian courts are relevant to interpretation of the equivalent New Zealand provisions by New Zealand courts. The FMA submits that the Australian cases are neither consistent nor conclusive. The respondents invoke them to submit that s 523 does not provide power to order receivers' costs be paid at all. I have found the Australian case law helpful though I would reach the same conclusion about the interpretation of the New Zealand law without it.

[26] In 1984 Waddell J in the Supreme Court of New South Wales made obiter comments about the issue, at the end of a judgment on other aspects of equivalent powers there, in *Corporate Affairs Commission v Smithson*.[14] He noted that appointment of a receiver when no liability ultimately results may cause the relevant person unjustifiable damage with no right of compensation and that:[15]

> If a receiver is appointed on terms which permit him to take his remuneration out of the assets received by him, the unjustified damage caused to the relevant person would be so much greater. It should not be thought that in every case the property of a relevant person may be taken over by a receiver and his financial affairs investigated in order to provide security for claims against him, which may or may not succeed, on the basis that in any event the relevant person will have to pay the receiver's remuneration. It may well be that in a particular case, in order to avoid such a consequence, no order should be made permitting the receiver to take his remuneration out of the assets received, thus leaving it to the Commissioner to be responsible for such remuneration pending a determination of the liability of the relevant person.

[27] In 1992 Gummow J in the Federal Court of Australia cited part of that passage as "expressive of cogent considerations in dealing with s 1323 of the [Commonwealth] Corporations Law".[16]

[28] In 1993 in *Australian Securities Commission v Aust-Home Investments Ltd & Ors* Hill J in the Federal Court of Australia went further.[17] He considered that it was there reasonable for the Commission to commence the proceedings and for the respondents to defend them.[18] Ultimately the Commission did not pursue

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14 *Corporate Affairs Commission v Smithson* [1984] 3 NSWLR 547.
15 At 556.
16 *Australian Securities Commission v MacLeod* [1992] FCA 370 at [22].
17 *Australian Securities Commission v Aust-Home Investments Ltd & Ors* [1993] FCA 401, (1993) 44 CR 194 ["*Aust-Home Investments"*].
18 At [38].

proceedings and the receivership was discharged. Hill J decided to make no order as to the costs of the proceedings but considered the receiver's costs more difficult.[19] He made the distinction between an order that the costs be paid out of the assets received and an order as to how the costs be borne between the parties. In quoting Waddell J and ordering the Commission to bear the costs of the receiver, he stated:[20]

> It seems clear to me, with respect to Northrop J, that the order that the costs of the receivers be borne out of the assets of the respondents Mr and Mrs Best, made as it was virtually ex parte, should not have been made. It would seldom, if ever, in my view, be appropriate when an ex parte order is made appointing an interim receiver under s 1323(3) to provide that the costs of the receivership be paid out of the assets of the person whose property has been seized but who has had no chance to put his case. At least on an interim basis the costs of the receivers should be reserved, the court requiring perhaps an undertaking from the Commission that, at least initially, the Commission will bear those costs.

[29] Hill J also observed:[21]

> For the future the Commission should, in my view, where the application is ex parte, draw the attention of the judge hearing the application for appointment of an interim receiver to the question of how the costs of the receiver are both to be paid initially and to be thereafter borne as between the parties. In my view, the ordinary order should require the Commission to be responsible for payment at the outset, leaving the ultimate responsibility as between the Commission and the person whose assets are to be seized, to be dealt with at a later time. If the occasion be appropriate to order at first instance the receiver's costs should be paid out of the assets (and the receiver would, in any event have a lien over those assets for his proper costs) the court should specifically reserve the question of how the costs are to be borne as between the parties for determination at a later time. In so saying, I leave open the question whether there could ever be an appropriate case for the costs to be paid out of the assets seized where the order is made ex parte.

[30] In 2006 the Federal Court of Australia expanded on this in *Australian Securities and Investment Commission; Re Richstar Enterprises Pty Ltd v Carey (No 5).*[22] French J (as he then was) noted the purpose of orders both positively and negatively. He said the orders that can be made "are directed, inter alia, to the preservation of assets against which recovery may be sought in the event that

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19 At [39].
20 At [45].
21 At [49].
22 *Australian Securities and Investment Commission, Re Richstar Enterprises Pty Ltd v Carey (No 5) & Ors* [2006] FCA 684, (2006) 58 ACSR 6 [*Richstar Enterprises No 5*].

liability to 'an aggrieved person' is established on the part of a "relevant person",[23] and:[24]

> It is not the object of the orders made under s 1323 to punish the defendants. Their object is to preserve their assets and thereby protect the interests of persons to whom they may have a liability. A secondary object is to ascertain the extent of the assets.

[31] Then:

> [19] The Corporations Act does not expressly authorise the court to make an order that the persons or companies who are the subject of the orders appointing receivers to their property pay the costs of those receivers in discharging their function. The court may confer upon the receivers "such powers as the court orders". Such powers necessarily relate to the ways in which the receivers can deal with a relevant person's property. The imposition of a costs liability by the court is not readily accommodated by words authorising it to confer powers on the receivers. Absent any express power in the Corporations Act the relevant provision can be found in s 23 of the Federal Court of Australia Act or in the implied incidental power – *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; 71 ALR 457.
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> [20] Although, in my opinion, the existence of a power to impose a liability to pay receivers' remuneration out of the defendants' assets can be found in s 23 as an incident of the powers conferred on the court by s 1323 of the Corporations Act, it is not lightly to be exercised.

[32] After quoting case law noted above French J distinguished the position of a receiver appointed in the exercise of an equitable jurisdiction from one appointed under s 1323, saying the latter appointment "aids the public regulatory and protective functions conferred upon ASIC by the Corporations Act".[25] Absent agreement, he did not consider at that stage that he should order that the receivers recover costs and remuneration out of the assets received.

[33] The following year, in a follow-up judgment, French J repeated the point more assertively:[26]

> The question of the costs of the receivership is still open. It is not an obvious proposition that the fees of receivers appointed to carry out a public statutory function of identifying and protecting the assets of individuals and corporations for creditor and other claims should be taken out of the assets to

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23 At [15]

24 At [18].

25 *Richstar Enterprises No 5,* above n 22, at [22].

26 *Australian Securities and Investment Commission; Re Richstar Enterprises Pty Ltd v Carey (No 12) & Ors* [2007] FCA 35, (2007) 60 ACSR 597 [*Richstar Enterprises No 12*] at [121].

> be protected. The appointment of the receivers is inextricably linked to the discharge by ASIC of its statutory and regulatory functions in the public interest.

Application of law to facts

The Issues

[34] In her minute of 6 January 2016 Hinton J directed that a hearing be allocated "for consideration of any outstanding issues, including the question of further payment of the respondents' legal expenses and of the Receivers' fees". That hearing was 4 March 2016.

[35] Submissions on the outstanding issues, including arguments about the receivers fees, were filed by the respondents on Tuesday 1 March 2016 and by the FMA on Wednesday 2 March 2016. The receivers' submissions were also filed on 2 March 2016. The receivers indicated they would abide the decision of the Court on who is to pay their fees and expenses, but they do want to be paid.

[36] At the hearing on Friday 4 March 2016 lead counsel for the respondents, Mr Gedye QC, was not present. Mr Vautier said that they simply sought a timetable for a hearing, of half a day or a full day, about the receivers' costs. Mr La Hood, for the FMA, expressed surprise at that since the argument was the primary reason for the hearing – other matters being dealt with largely by consent (and being the subject of my minute on 8 March 2016). Based on Hinton J's minute, I agreed that the purpose of the 4 March hearing was to hear argument in order to decide who should pay the receivers' costs. Written submissions had been filed on the issue and all parties made oral submissions.

Arguments

[37] In relation to the substantive issues, the respondents submit that, for two reasons I examine below, there is no jurisdiction for the court to order that the receivers' costs be met from the assets received. If there is, they submit the court should not exercise the power now.

[38] Mr La Hood for the FMA submits that the Australian cases are neither consistent nor conclusive. He points out that the doubt expressed in those cases about whether costs can be met out of the assets received is because the merits there were highly uncertain. He submits that that is not the case here.

Analysis

[39] I consider the High Court does have jurisdiction to order that the receivers' fees, costs and indemnities be met from the assets received. Despite the doubts mooted about the equivalent provision in Australia, that is the direct, and incidental, effect of the plain meaning of s 522(2) and 523(h)(ii) of the FMCA. As noted above, such an order can and must accord with the purposes of the FMCA. And such an order is a common incident of private and court appointment of receivers otherwise. Consistent with the common law it is provided for explicitly in s 30D(2)(a) of the Receiverships Act 1993 and is usually provided for in securities empowering private appointment of receivers.[27] The House of Lords has gone as far as saying that it is "a basic principle of receivership".[28]

[40] The purposes of the FMCA also limit the range of the Court's discretion. The section 3 purposes boil down to confident participation in financial markets and development of fair, efficient and transparent financial markets. These purposes are promoted by FMA actions, including application for appointment of receivers, that identify and stop unlawful activities such as running Ponzi schemes and minimise investors' losses. However, appointment of receivers of assets of legitimate business activities would interfere with the management, and increase the costs, of those businesses. That would be antithetical to confident participation in financial markets, and the development of fair, efficient and transparent financial markets.

[41] The problem is that investigation, and even litigation, may be required before it can be established whether business activities have been legitimate or not. The title of an extra-judicial address by French J in 2007 on this subject was titled

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27 *Rea v Omana Ranch Ltd* [2012] NZHC 2639, [2013] 1 NZLR 587 at [16]-[18].

28 *Capewell v Revenue and Customs Commissioners & Another* [2007] UKHL 2, [2007] 2 All ER 370 at [21].

"Stopping the Train after the Wreck".[29] But sometimes the train might need be stopped before we know whether there has been a wreck, in order to find out exactly that. Receivership under the FMCA may be an important tool in doing that but will not always be a necessary tool. As the respondents submit here, sometimes freezing orders are all that will be required. The Australian courts have said that, even if a case has been made out for the appointment of a receiver, the court must consider "whether a less drastic remedy will suffice".[30]

[42] So where should the costs of receivers fall?

[43] I agree with French J in *Richstar Enterprises No 5* and *Richstar Enterprises No 12* that the public and regulatory function of receiverships ordered under the FMCA on the application of the FMA distinguishes them from ordinary commercial receiverships.[31] Privately appointed receivers act in the interests of the creditors on whose behalf they are appointed.[32] Receivers appointed under the FMCA are more akin to the ancient institution of receivers appointed by the Court under its inherent jurisdiction; who, as officers of the court, act to protect the interests of all stakeholders.[33] Ultimately, receivers appointed under the FMCA have a public function; they act in the interests of potentially aggrieved persons in order to fulfil the wider public functions expressed in the FMCA.

[44] When aggrieved persons themselves apply for orders under the FMCA appointing receivers they can be expected to have weighed (or, in the language of economics, internalised) the costs and benefits to themselves of doing so.

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29 Robert S French "Stopping the Train after the Wreck: Corporate Group Collapse and Protective Orders under Section 1323" [2007] BalJlNTLawSoc 39.

30 *Australian Securities and Investment Commission v Burnard* [2007] NSWSC 1217, (2007) 64 ACSR 360 at [22], quoted by Winkelmann J in *Financial Markets Authority v Hotchin,* above n 8, at [19]. This approach was taken in *Australian Securities and Investment Commission v Krecichwost & Ors* [2007] NSWSC 948, (2007) 64 ACSR 411 at [75].

31 *Richstar Enterprises No 5*, above n 22, and *Richstar Enterprises No 12*, above n 26.

32 Paul Heath and Michael Whale, *Heath and Whale Insolvency Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) at [12.8] and s 18 Receiverships Act 1993. Regarding remuneration of privately appointed receivers see Peter Blanchard and Michael Gedye *Blanchard and Gedye's The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) ch 6.

33 At [12.9] and *Rea v Omana Ranch Ltd,* above n 28, at [7]-[11].

[45] When the FMA applies for such orders it is bringing its public resources to bear in fulfilling its public functions in the public interest as expressed in the FMCA. Its decision-making should promote the purposes of the FMCA and the fees, costs and indemnities of receivership ordered under the FMCA should be allocated so as to promote its purposes.

[46] There is nothing in the FMCA that inhibits the court from ordering that the fees, costs and indemnities of receivers appointed on the FMA's application should be met by the FMA. Rule 7.62(2) of the High Court Rules empowers the Court, in appointing a receiver, to "name the party or parties who must pay the remuneration and, if more than 1 party is named, the proportion to be paid by each party". Naming the FMA as the party who must pay the fees, costs and indemnities of a receiver appointed under the FMCA on the FMA's application may well be in accordance with the purposes of the FMCA.[34]

[47] It could reasonably be expected that, if the FMA were to face no potential costs in applying for orders appointing receivers, there would be a greater number of such applications than is either optimal for efficient enforcement or than is consistent with the purposes of the FMCA. As the respondents submit, there is a certain tension between a power that may only be exercised "if the court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person" where exercise of that power causes direct loss to an aggrieved person when it turns out not to be clearly justified.

[48] However, if an application does turn out to be clearly justified and its costs to be proportionate to the private benefit received by the potentially aggrieved, then it would be both efficient and consistent with the purposes of the FMCA for the aggrieved persons to bear the costs. The question is when that will be known.

[49] I consider an FMA application, for the fees, costs or indemnities of receivers appointed under the FMCA to be met out of the assets received, should not be made

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[34] The House of Lords, in *Capewell v Revenue and Customs Commissioners & Another,* above n 28, found that a rule of civil procedure did not change the general law of receivership, or of statutory provisions relating to receivership of proceeds of crime, and so overruled a Court of Appeal decision that a receiver's costs be met by Customs. That is a different statutory context from the one here.

or heard on a without notice basis. I agree with the observations of Hill J in this regard.[35] The issue should at least be traversed in argument by both parties, rather than just one. That could occur soon after an appointment of a receiver on a without notice basis if there is sufficient information available. The FMA seems now to have sympathy for this position, given Mr La Hood's agreement in oral argument that in future the FMA would say such an order might be better left to an on notice hearing.

[50] In addition, where the application for orders appointing receivers under the FMCA is by the FMA I consider an order that the fees, costs and indemnities of the receivers be met out of the assets received should only be made if and when the Court is satisfied, after hearing from all relevant parties, that:

(a) the receivership is clearly justified in the interests of the potentially aggrieved persons; and

(b) the effect of doing so will not impact the returns to potentially aggrieved persons of their funds disproportionately to their benefits.

[51] Before those conditions are satisfied, or if the conditions are never satisfied, the presumption consistent with the purposes of the FMCA is that the FMA should bear the cost of the receivership as an incident of the performance of its functions. It may be desirable to record that allocation of cost in orders appointing a receiver. That prospect will place appropriate incentives on the FMA to apply for receivership orders when it considers that is likely to be justified, and to ensure its costs will be proportionate to the benefits to the aggrieved persons, and to manage the ongoing costs of receivership accordingly. That is consistent with the purposes of the FMCA. The FMA may object that their enforcement activities might be subject to a chilling effect via their budget. But if it is only receiverships they do not expect would be clearly justified, or receiverships they do not expect would yield benefits to the aggrieved proportionate to the costs, that will be chilled, then that would be exactly the point. Otherwise, the FMA is made of sterner stuff in acting in the public interest than to be deterred unnecessarily.

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[35] *Aust-Home Investments Ltd,* above n 17, at [45].

[52] If a receivership instigated by the FMA is not clearly justified in the interests of the potentially aggrieved persons it would be neither efficient nor consistent with the purposes of the FMCA for them to bear its costs. Mr La Hood, for the FMA, agreed that it makes sense to look at whether a receivership is justified. I agree with Mr La Hood's submission that a receivership being "justified" does not necessarily require that it must yield successful criminal or civil proceedings, though that would certainly indicate justification. A receivership may also be clearly justified in the interests of potentially aggrieved persons in other circumstances, such as if it led to identification and prevention of unlawful diminution of investors' assets.

[53] If receivership is clearly justified but the effect is disproportionate, then the court may face a difficult decision as to how to allocate the costs. The FMA may need to bear the portion of the costs that are not proportionate to the benefits. The Court will need to use its discretion in assessing this, in light of the relevant context. But it will need to know what that context is.

[54] Promotion of the purposes of the FMCA must always require that the fees and costs of a receivership ordered under the FMCA be reasonable and be within the reasonable scope of the receivership. The legislative policy behind s 34(2)(a) and (b) of the Receiverships Act 1993 that entitles application to the court to determine what remuneration is reasonable is relevant here. And, as Mr Upson for the receivers noted in oral argument, it is not unusual for the reasonableness of a receiver's fees to be left to the end of a receivership.

[55] I have outlined above what I expect would "usually" occur. There may, of course, be exceptional circumstances justifying a different approach by a Court.

Application

[56] I do not consider the requirements above have yet been fully met here.

[57] It seems likely that the receivership ordered here is clearly justified in the interests of the potentially aggrieved persons. On the evidence, as outlined above, I certainly do not accept the respondents' submission that the order appointing

receivers was not necessary or desirable for the purpose of protecting the interests of aggrieved persons.

[58] However, there is not yet enough information to assess whether ordering $172,603.10 plus GST and disbursements be met from the assets received would impact on the returns to potentially aggrieved persons of their funds disproportionately to their benefits. That seems likely to depend on the relationship between the total pool of claims and the total available assets. In particular, as the respondents submit, it seems likely to depend on whether the proceeds of sale of the residence is available for return or not and what the total amount of claims is. That has not yet been determined.

[59] Accordingly, I do not make the orders sought by the FMA. Once there is greater clarity about the costs and claims the FMA may apply again. At that time the Court would examine any remaining submissions by the respondents about the reasonableness of the costs. In the meantime, it is not appropriate that the order made, ex parte, on 13 August 2016 remain extant and I rescind it.

Orders

[60] I make the following orders:

(a) I rescind the Court's orders 3.10(b) and (c) of 13 August 2015 that the receivers be reimbursed and indemnified out of the respondents' property.

(b) I grant leave for the FMA to apply again for such orders when it considers the conditions set out in this judgment are met.

[61] The respondents have succeeded in their argument on this point and costs are allocated to them on a category 2 basis. If costs cannot be agreed between the parties I reserve leave for memoranda to be filed within 15 working days.

[62] Counsel raised with me issues of potential confidentiality during the hearing and confidentiality orders have been made over the court file. This judgment is

released initially to the parties only. Any concerns about the content of the judgment in terms of confidentiality are to be raised by way of memorandum filed by 4pm Friday 15 April 2016. Otherwise the judgment will be made publicly available after that.

Palmer J