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IN THE HIGH COURT OF NEW ZEALAND **M227-SW02**
AUCKLAND REGISTRY

UNDER	**THE RECEIVERSHIP ACT 1903**
BETWEEN	**THE GREAT DESSERT CO LIMITED**
	Plaintiff
AND	**J L VAGUE and G G McDONALD, Chartered Accountants**
	First Defendants
AND	**SALAD FOODS (1992) LIMITED**
	Second Defendant
AND	**T W HAY and D L NATHAN, Company Directors**
	Third Defendants
Date of hearing :	**27 March 2002**
Date of judgment	**28 March 2002**
Counsel:	D M Carden for plaintiff P Davey for first defendants M Whale and A Kuran for second and third defendants

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JUDGMENT OF O'REGAN J

Solicitors
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[1] This is an application for an interlocutory injunction to restrain the first defendants, Mr Vague and Mr McDonald from proceeding as receivers and managers of the plaintiff (there is a requirement that they return property held by them in their capacity as receivers), and restraining the second defendant, Salad Foods (1992) Limited (SFL), from appointing any receiver or manager in relation to the plaintiff, until further order of the Court.

[2] The matter came before me at 2.15 pm yesterday, 27 March 2002. Because the Easter break is upon us, it is necessary that the issues be resolved immediately and this judgment has therefore been prepared under conditions of urgency. I was presented with a significant quantity of affidavit material, much of it containing conflicting evidence on important points, and also a large number of cases of varying relevance. I heard argument from counsel until 7 pm last night. I have considered all of the arguments made by counsel, read all the affidavits, and considered all the cases but, given the exigencies of time, I will refer only to the matters which bear directly upon my decision.

[3] The first defendants' counsel appeared before me and offered assistance to the Court, but the first defendants abided the Court's decision and did not take an active role in the proceedings.

[4] It was common ground that the standard "serious issue to be tried" and "balance of convenience" approach, considered in the light of overall interests of justice, was the appropriate framework to be applied.

The facts

[5] The plaintiff was originally wholly owned by Katherine Ray, who is still the only director. In March 2000 the third defendants, Mr Hay and Mr Nathan, agreed to purchase 50% of the shares in the plaintiff between them (25% each), because an

expansion of the company's premises and business activities meant it needed more capital.

[6] About the same time as Mr Hay and Mr Nathan became shareholders, the plaintiff obtained a term loan of $350,000 from ANZ Banking Group (New Zealand) Limited, which was secured by a debenture in the bank's standard form and was the subject of guarantees from Ms Ray, Mr Hay and Mr Nathan. The term loan was initially due to expire on 31 March 2001, but there was provision for a review of the facility and when this occurred, the loan was extended to 31 March 2002, subject again to a further review, which was undertaken. There is a dispute as to whether the loan was then extended further to 31 March 2003. I will come back to that later.

[7] Mr Hay and Mr Nathan had apparently been consulted by Ms Ray for advice before they bought their shares in the plaintiff, because they were involved with a customer of the plaintiff, Pacific Flight Catering Ltd (PFC), of which both are directors. They are also directors of the second defendant, SFL.

[8] Recently there has been tension between the shareholders of the plaintiffs. This appears to have come to a head when Ms Ray hired a new business manager and Mr Hay and Mr Nathan objected to this occurring without being consulted in their capacity as shareholders of the plaintiff. There was also evidence that Mr Hay had taken an active role in the preparation of the GST return for the plaintiff in January-March 2002. There was conflicting evidence about the significance of this. Mr Hay said he had made corrections to deal with deficiencies in the plaintiff's accounting systems. Ms Ray said he had altered the GST returns to show a lower amount than ought to have been paid. It is not possible to resolve the conflict of evidence at this stage of the proceedings.

[9] Events came to a head on 12 March 2002. On that day, an arrangement was entered into between ANZ and SFL, apparently at the instigation of Mr Hay and Mr Nathan, pursuant to which ANZ assigned to SFL all its rights in its term loan agreement with the plaintiff and the debenture granted by the plaintiff to ANZ. There was no evidence before the Court as to the terms of that assignment or the amount that has been paid by SFL. Up until the time of the assignment there was no

indication that ANZ had any concern about the operation of the account, and it was common ground there was no default in the payment of principal or interest under the term loan. Indeed, ANZ had written to the company on 8 January 2002 following its annual review, and no mention was made of any perceived difficulties on the part of ANZ.

[10] The assignment by ANZ to SFL was followed immediately by the appointment by SFL of Mr Vague and Mr McDonald as receivers of the plaintiff. The evidence before me was Mr Vague then went to the plaintiff's business premises and handed a notice of the assignment by the ANZ (fulfilling an obligation which ANZ had to give such notice but, I was informed from the bar, doing so as agent for SFL which had apparently undertaken a contractual obligation to do this on behalf of ANZ), and also handing over a copy of the agreement between SFL and Mr Vague and Mr McDonald, pursuant to which they were appointed as receivers. There was no separate notice of appointment of receiver given to the company, but the provision of a copy of the appointment document conveyed the message that the appointment had occurred.

[11] It appears therefore, that the assignment by ANZ to SFL and the appointment by SFL of receivers, was essentially contemporaneous. There was no evidence as to ANZ's knowledge that assignment was to be followed by an immediate appointment of receivers, and in this case nothing turns on it, but the fact ANZ's notice was given by the receivers would indicate that all the events of 12 March 2002 were closely linked. Any questions about ANZ's role in events are not relevant to this action and, of course, ANZ is not a party, so I say no more about that issue.

[12] The agreement appointing the receivers (which was also the notice of appointment of receivers), gives no clue as to the reason for their appointment. There is a recital which says "default has been made by the company under the terms of the debenture", but is silent as to what the default is. When Mr Vague arrived at the plaintiff's premises, Ms Ray asked what the default was and her evidence was she was told that the defaults were, in the opinion of the debenture holder, a material adverse change that had occurred in relation to the plaintiff, and that the plaintiff

was insolvent. She said she was told the material adverse change resulted from a discontinuance of supplies by the plaintiff by PFC.

[13] It was a matter of dispute as to whether the plaintiff had decided to discontinue supplies to PFC, or PFC had terminated supplies. Again, it is difficult to resolve this at this stage of the proceedings, but evidence of correspondence at the time indicates it was PFC which instigated the discontinuance, not the plaintiff. The ceasing of supplies to PFC was followed by PFC repossessing equipment it had lent to the plaintiff.

Was there an event of default?

[14] The plaintiff argued that neither of the alleged grounds for appointment of a receiver outlined to Ms Ray (apparently by Mr Vague), constituted an event of default justifying the appointment of a receiver.

[15] Counsel for the defendants, Mr Whale indicated that SFL was not relying on the loss of the PFC supplies as a material adverse change, but that there were a number of other circumstances which amounted to events of default. In view of the position taken by SFL as to the impact of the loss of the PFC supplies, I do not need to deal with one of the arguments made on behalf of the plaintiffs, to the effect that the cessation of the PFC business was something caused by SFL's associates, Mr Hay and Mr Nathan, and they could not "profit from their own default". In essence the argument was that since SFL's associates had caused the event which led to the alleged material adverse change, SFL could not use that event as the foundation for the appointment of the receivers. As I have said, SFL now indicates that that is not the basis of the appointment and so the argument does not need to be dealt with.

[16] SFL argued that even if the appointment of receivers is made on invalid grounds, that will not invalidate the appointment if there was, at the time of appointment, a further valid ground upon which it could have been made, even if the debenture holder did not know of that other ground. The authority for that proposition was said to be *Curragh Developments Ltd (in receivership) v Rodewald* (2001) 9 NZCLC 262,639. I accept that the statement of the law in paragraph [24] of

that decision is correct for the reasons given in that paragraph, and on the basis of the authorities set out. It is notable, however, that in that case, the appointment document did recite the breach on which the debenture holder was relying at the time of appointment, in contrast to the position here.

[17] In view of the position taken by SFL in this Court, I will proceed on the basis that the ground which was being relied on by SFL at the time of appointment, was the insolvency of the plaintiff, which was also the primary argument before me. I will consider the validity of that ground, then the other possible grounds for appointment presented to me in argument on the same basis as in *Curragh,* ie, that even if the ground for appointment turns out to be invalid, the appointment itself may still be valid if other grounds existed at the time of the appointment.

Insolvency

[18] The plaintiff argued that there was a serious issue to be tried as to whether in fact, the plaintiff was insolvent at the time of the appointment, and a further serious issue to be tried as to whether insolvency was an event of default under the debenture. I will deal with the second of those issues first.

[19] Perhaps surprisingly the standard form ANZ debenture does not contain an event of default for insolvency. However, counsel for SFL said that clause 10(1)(i)(ii) of ANZ's standard terms for the term loan arrangement made it an event of default under the loan agreement if the plaintiff was insolvent or unable to pay its debts. Under clause 11(2)(c) of the loan agreement, the existence of the event of default under clause 10(1)(i)(ii) meant that the lender (now SFL by virtue of the assignment), was entitled to "make some or all of the money that is or may become owing to us in respect of one or more of the facilities immediately due and payable to us". That in turn leads to an event of default under the debenture because clause 9.2(a) makes it an event of default under the debenture if "any Secured Indebtedness becomes capable of being declared due before it would otherwise become due". "Secured Indebtedness" includes amounts owing under the loan agreement.

[20] Mr Whale accepted that SFL had not made any demand for payment of the amount owing under the loan agreement, and that amount was not therefore the subject of a demand at the time of the appointment of the receiver. However he said this was not required clause 9.2(a) requires only that the loan was capable of being declared due, not that it had actually become due.

[21] Mr Carden, for the plaintiff, argued that under clause 11(4) of the loan agreement, SFL could make money due and payable under clause 11(2)(c) only by giving written notice to the plaintiff, at which point the amount referred to in the notice would become immediately payable. He said since no notice had been given by either ANZ or SFL to that effect, it could not be said that any part of the Secured Indebtedness had become capable of being declared due.

[22] I do not accept Mr Carden's submission in that regard. I consider Mr Whale was correct in saying that all that is required for there to be a default under clause 9.2(a) is that the debenture holder has become entitled to give the notice under clause 11(4) of the loan agreement. That being the case, I accept Mr Whale's general submission that the combination of clauses 10 and 11 of the loan agreement and 9.2(a) of the debenture, means that if the company was insolvent at the time of the appointment, then that would be a valid ground for appointment of receivers under the debenture.

[23] That leads me to the first issue mentioned above, namely whether the plaintiff was insolvent at the time of the appointment. There was much conflicting evidence on the point. In his affidavit, Mr Vague, one of the receivers said that there were, at the time of the receivership, overdue creditors of $194,529.53, and only $44,109.56 in cash resources to meet them. However, he noted that McDonalds had since paid the plaintiff over $175,000 under an arrangement relating to work undertaken by the plaintiff for McDonalds. There is apparently another substantial order from McDonalds in the pipeline.

[24] Mr Vague's affidavit also acknowledges that the plaintiff is in a position of a surplus of assets over liabilities, and although the extent of the surplus is a matter of dispute, SFL is not relying on an argument that the company is in a position of

having liabilities exceeding its assets, for the purposes of establishing insolvency. Rather it is relying on the inability to pay debts as they fall due.

[25] Mr Whale accepted that the McDonald's payment, made after the date of the receivership, was a current asset at the time of the appointment, and properly taken into account in considering ability to pay debts. But he argued that even when this was taken into account, there was still an insolvent position.

[26] Ms Ray filed an affidavit in which she made various adjustments to the figures quoted by Mr Vague, and concluded there was an excess of funds over overdue creditors of about $42,000.

[27] Mr Whale suggested that further adjustments needed to be made to that figure, and when these were made, a deficit position was established. In particular he argued that:

[a] there was a loan of $30,000 owing to Mr Hay and Mr Nathan ($15,000 each), which was due and payable. That was disputed by the plaintiff. Mr Whale pointed to statements in Mr Hay's affidavit that there had been a number of verbal requests for repayment but there was no documentary evidence of a demand being made, and in view of the conflict of evidence it is difficult for me to resolve the position. Mr Whale said the way the loan was referred to in the accounts indicated it was owing, but that is not an inference I can make either. I also note that the repayment of this loan would have constituted a default under the ANZ loan agreement which makes it difficult for me to accept that it was considered by the parties to be presently owing, given there was no evidence of any approach having been made to ANZ for permission to make the repayment;

[b] rent was owing for the month of March. In her affidavit, Ms Ray said she had an arrangement with the landlord that rent for January and February could be left outstanding in the meantime and there was no evidence to the contrary. However, Mr Whale said the rent was still a

liability that should be taken into account in this context, as another rental payment would become due in March and the arrangement that Ms Ray said existed related only to January and February. I accept that submission, but it was not clear to me from the evidence that the March rent was owing as at 12 March 2002.

[c] Mr Whale argued there must have been a PAYE liability which he calculated by a process of reverse engineering from the wages figures in the January accounts at about $15,000, and asked me to assume that that amount was owed. Mr Carden strongly disputed that and in the absence of evidence, I cannot make the assumption Mr Whale asks me to make.

[28] Mr Whale pointed to the schedule of creditors for the plaintiff, which showed some creditors outstanding for 90, 60 and 30 days, and said should take this as evidence the company was unable to meet those debts. In the absence of further detail I do not think I can accept there is no issue to that effect, and it will need a proper consideration of all the evidence with cross-examination to determine the position.

[29] On the basis of the evidence before me and with the limitation of an interlocutory proceeding, I conclude that there is a serious issue to be tried, to the effect that the plaintiff was not in an insolvent position at the date of the appointment of the receivers.

Ms Ray's salary

[30] Mr Whale argued there was an event of default at the date of appointment of the receivers because Ms Ray draws a salary of $80,000 per annum from the plaintiff. He said that the original letter of offer from ANZ relating to the term loan dated 29 March 2000, included a financial covenant that shareholders' salaries would be capped at $75,000 per annum, including any bonus payments. He said that the letters resulting from the reviews of the term loan facility, dated 7 February 2001 and 8 January 2002, provided that the terms of the facility were not varied by those

letters, except as expressly provided. Nothing was said about the shareholders' salary cap in either letter.

[31] Mr Carden argued that the salary cap applied in the first year of the term only, and that in any event, Mr Hay and Mr Nathan had agreed to the increased salary. I cannot accept the first submission which does not have any support from the documentation itself. Whether Mr Hay and Mr Nathan approved of the salary does not appear to me to prevent the payment of the salary, amounting to an event of default in relation to the ANZ facility.

[32] Mr Whale says the breach of the salary cap set out in the letter of offer, is an event of default under clause 10(l) of the term loan agreement, because it is specified on the letter of offer to be an event of default, and by virtue of the inter-play between clause 11(2)(c) of the term loan agreement and clause 9.2(a) of the debenture. This amounts to an event of default under the debenture.

[33] It is not clear from the evidence before me that the salary payable to Ms Ray has exceeded $75,000. The evidence on the point comes from Mr Nathan where he says she has unilaterally increased her salary to that level, but does not say whether she has, in any particular year, actually received more than $75,000. Ms Ray's evidence is simply to the effect she told Mr Hay and Mr Nathan that the salary would need to be increased, but it is not clear when or if the increase happened, and whether there has been a breach of the salary cap in practice.

[34] The use of the term "salary cap" does not make it clear whether simply setting a higher salary is a breach, or whether the shareholder has actually to receive more than $75,000 in a given year. The loan offer says that compliance with the salary cap covenant (and others) will be tested against quarterly, monthly and annual accounts of the plaintiff, which suggests the latter interpretation is correct. There was no evidence of any breach being noted by ANZ and no submission that the accounts established payments to Ms Ray in breach of the covenant.

[35] I am not in a position to conclude that a breach of this requirement has actually occurred on the basis of the evidence currently before me. I believe that a serious issue arises.

Liabilities exceeding assets

[36] The next ground argued by Mr Whale was at the date of the appointment of the receivers, the liabilities of the plaintiff exceeded its assets. This would be a breach of another of the financial covenants in the letter of offer of 29 March 2000, and through the same process referred to above in relation to the salary cap, that would be a breach of clause 9.2(a) of the debenture. The factual basis for this argument is the same as the argument relating to insolvency, and I come to the same conclusion in respect of it.

Failure to pay rental

[37] Mr Whale argued that at the date of the appointment of the receivers, the plaintiff had failed to pay rental on its premises in breach of clause 7.1(f) of the debenture (a covenant to duly and promptly pay all rent) and clause 7.1(i) (a covenant to avoid any action which would lead to any of the secured property becoming liable to forfeiture or cancellation). The argument focused on the former clause, and that appears to me to be appropriate – clearly it is the more directly relevant provision.

[38] The evidence of this ground was the statement in Mr Vague's affidavit that at the date of the receivers' appointment, rent of about $7,400 which was due on 16 February 2002 had not been paid. That affidavit says Ms Ray had advised Mr Vague that she had discussed rent arrears with the landlord and he had accepted the situation. Mr Hay's affidavit included a statement that he considered the non-payment of rent a serious breach because it put the large investment which the plaintiff had in leasehold improvements in jeopardy, and this was a material adverse event.

[39] Ms Ray's affidavit in reply stated she had made arrangements with the landlord for the late payment of the January-February rental, because of the significant money expected from McDonalds.

[40] There was no evidence from the landlord and no real contesting of Ms Ray's statement that arrangements had been made with the landlord. In view of that, there can be no certainty there was any failure to pay rental as required by the landlord, and therefore any breach of the covenant relating to rental in the debenture. Again, this is a matter on which further evidence will be required at trial. I note Ms Ray's statement about the arrangements with the landlord are not backed up by any correspondence. Her statement only related to the January and February rental, not to that owing in March, but there was no allegation that the March payment was due and payable at the time of appointment of the receivers, and the evidence was that the February payment was due on 16th, which may well indicate the March payment was due on 16 March, after the date of appointment of the receivers.

Material adverse change

[41] The next ground relied upon by Mr Whale was there was an event of default under clause 9.2(h) of the debenture, which says there is an event of default if "in the opinion of the Bank a material adverse change occurs in relation to the Company". Mr Whale said the assignment to SFL meant the requirement of that provision was such an opinion was held by SFL at the date of appointment. Mr Whale denied there was any view that the loss of supplies to PFC led to a material adverse change and I accept his submission on that point, although it seems puzzling that the receiver, who appeared to be acting as agent for SFL in delivering the notice of assignment of the ANZ's debtor, told Ms Ray that it was. I note Mr Vague's affidavit did not dispute that point.

[42] In any event, the position as outlined by Mr Whale, was SFL held such an opinion because there had been a fall off in the business which the plaintiff was undertaking for another airline catering company called Caterair, which had previously been a significant customer. Mr Whale said the fall off in this business meant the plaintiff was much more exposed to the vagaries of the suppliers to

McDonalds which was by far the biggest customer of the plaintiff, and it was this increased exposure to McDonalds which had arisen from the fall off of the Caterair business, which was the real basis for the opinion as to a material adverse change. He also referred to the downturn in air traffic after the terrorist attacks in New York on 11 September 2001, as exacerbating the situation.

[43] The difficulty with this argument is that the affidavits of Mr Nathan and Mr Hay do not indicate that they (or any other responsible officer of SFL), actually held that opinion at the date of the appointment. Mr Hay's affidavit refers to the fall off in Caterair's purchases, referring to the fact they were $75,000 per month when he and Mr Nathan invested interest the plaintiff, and they had fallen to approximately $22,000 per month. However, there is no reference to the increased exposure to McDonalds or September 11. Mr Nathan's affidavit refers to the plaintiff becoming dependent on McDonalds and refers to the fall off in Caterair business, but makes no reference to September 11.

[44] Ms Ray's affidavit in reply indicated that the drop in sales to Caterair amounted to a 33% drop in the whole year, but that the position had stabilised to the extent that the drop between January and March 2002 was only 2%. She set out a schedule indicating sales to Caterair had fluctuated during the financial year to March 2002, but at the same time total sales had increased from April 2001 ($163,000) to March 2002 ($208,000).

[45] I am not satisfied on the evidence provided to me, and in the absence of cross-examination that the directors of SFL did hold the opinion that there was a material adverse change of the kind outlined by Mr Whale in this Court at the time of the appointment of the receivers. SFL could have set out in its notice of appointment of receivers to the company the nature of the default relied on, but did not do so. Instead, the information conveyed to the plaintiff was that the loss of PFC business was seen as a material adverse change. This changed to a reference to the loss of the Caterair business in the affidavits, and changed further in this Court to being an exposure to McDonalds, consequent upon the loss of the Caterair business and September 11.

[46] In view of the apparent confusion I cannot conclude SFL actually held that opinion at the time of the appointment. It is notable that the review of the loan facility by ANZ in January did not seem to trigger any concern about any material adverse change. The fall off in the Caterair business since the ANZ review letter of 8 January 2001, appears minimal and it is therefore difficult to accept that any change during January-February in relation to Caterair could really have formed a basis of an opinion there had been a material adverse change at that time.

[47] In my view there is a serious issue to be tried as to whether such an event of default had occurred, which will need to be determined at trial. The position is complicated by the assignment. It may be that ANZ's opinion was there was no material adverse change, but SFL's opinion was that there was. In effect, that would mean ANZ's assignment of the debenture would expose the plaintiff to enforcement action. That issue does not need determination at this stage of the proceedings.

Sixty day creditors

[48] The last ground relied upon by Mr Whale was a breach of clause 9.2(k)(ii) of the debenture which says there is an event of default if any indebtedness of the plaintiff incurred with respect to the acquisition by it of assets or services in normal trade terms in the ordinary course, and for the purposes of carrying on its ordinary business, is not paid in full within 60 days of the relevant due date for payment. There was no direct evidence of a breach of this covenant, but Mr Whale asked me to infer that such a breach had existed from information contained in a list of creditors exhibited to Mr Vague's affidavit, which showed some creditors as being in a column headed "Ninety days". There was a similar schedule in Ms Ray's affidavit in reply, which also showed creditors under a heading "Ninety days".

[49] Mr Whale's argument was that if a creditor was shown as "Ninety days" that would mean the indebtedness had been incurred in December 2001. He accepted that, if the normal trade terms of payment on the 20th of the following month applied to those amounts, they would not be more than 60 days outstanding at the date of the appointment of the receivers (12 March). But he argued that I should infer that at least some of the 90 day creditors were payable before 12 January, ie that they were

not subject to the normal payment terms, either because special terms applied to them or because the creditor was pressing for payment.

[50] Mr Whale referred to Mr Hay's affidavit, which showed that during the period of December and January a net working capital deficit was increasing, and was substantial in mid-January, and asked me to infer that a company with that degree of cash flow problem would have creditors pressing for payment before the normal payment terms arose. That may be the case, but in the absence of evidence to that effect, I do not believe there are grounds for me to make the inference which Mr Whale suggests at this stage of the proceedings and I therefore conclude that there is a serious question as to whether this ground for appointment of a receiver has been established.

Conclusion: event of default

[51] I therefore conclude that there is a serious issue to be tried as to whether there was any basis for appointment of the receivers at the time of their appointment. As I said at the outset, there was a very considerable volume of material placed before me, much of it consisting of conflicting evidence. I consider the evidence before me passes the "serious question to be tried" threshold.

Balance of convenience

[52] Having decided there is a serious question to be tried, I now turn to the issue of balance of convenience. An important component in the assessment of that aspect of the case is the factual dispute as to whether the ANZ term loan facility expires on 31 March 2002 as suggested by the defendants, or 31 March 2003, as suggested by the plaintiff.

Expiry date of ANZ term loan

[53] The original letter of offer for the ANZ term loan facility, said that the termination date for the facility was 31 March 2001 and that the loan was to be

repaid on 31 March 2001 "or renegotiated". The letter of offer provides for the facilities to be subject to an annual review and sets the review date as 16 June 2000.

[54] On 7 February 2001, ANZ wrote to Mr Hay, who was apparently acting as the plaintiff's representative in dealings with ANZ. The letter is headed "Annual review and variation letter". It appears to be the product of the review, scheduled to have taken place on 16 June 2000, even though the letter is many months later than that date. It says that the termination date for the facility is extended from 31 March 2001 to 31 March 2002, in accordance with clause 9 of the ANZ's general conditions, but a copy of the conditions applying at that stage was not in evidence before me. The letter goes on to say no other variations to the conditions are proposed, and sets the next annual review date as being 16 June 2001.

[55] On 8 January 2002, ANZ wrote a letter to the plaintiff, marked for the attention of Mr Hay. Again this letter was called "Annual review and variation letter". It referred to a new facility being given (for business credit cards) and said a new version of ANZ's general conditions would now apply to the term loan instead of an earlier version which had applied up to that point. It summarised the facilities, including reference to the $350,000 term loan. It said it was not proposed to make any other variations to the conditions, and in keeping with earlier practice, it set a next annual review date of 16 June 2002. It was written by the same bank officer as had written the 7 February 2001 letter.

[56] In contrast to the 7 February 2001 letter, the 8 January 2002 letter does not mention an extension of the term. Accordingly the defendants say the letter was simply a substitution of new terms for the remaining few weeks of the loan, but was in effect a notice of termination. It is notable however that the letter refers to the next annual review occurring on 16 June 2002 which would be unnecessary if the term loan terminated on 31 March 2002. Mr Whale said the review could be of the $3000 credit card facility, but that seems unlikely.

[57] The plaintiff filed an affidavit on 26 March 2002 from Frances Ray, Katherine Ray's sister, recording a discussion with the bank officer responsible for ANZ's relationship with the plaintiff. During that discussion he confirmed that the

intent of the letter of 8 January 2002 was an extension of the term loan to 31 March 2003.

[58] After the plaintiff had closed its case, Mr Whale tendered an affidavit from the bank officer himself. I accepted this over the strong objection from Mr Carden. The affidavit confirms the discussion with Frances Ray. However, it goes on to say that he was incorrect when he told Frances Ray that there had been an extension of the facility to 31 March 2003. The affidavit says the facility had not, in fact, been extended beyond 31 March 2002. It says there is no record in ANZ's files of any discussion with the plaintiff about extending the loan, and that the "credit submission" (an internal ANZ document apparently prepared by another bank officer), did not seek such an extension.

[59] As I said earlier, the person representing the plaintiff in discussions with the bank, appears to have been Mr Hay. The correspondence placed in evidence before me relating to the dispute between Mr Hay, Mr Nathan and Ms Ray, refers to a number of concerns which Mr Hay has about the plaintiff's situation, but does not mention the imminent termination of the ANZ term loan. Similarly, the evidence given by Mr Hay and Mr Nathan about their opinion as to the material adverse change suffered by the company, omits any mention of the termination of the ANZ term loan. Again, one would have expected this would have been seen to be a much more material event than those referred to in the affidavits of Mr Hay and Mr Nathan if termination was really imminent. However, both Mr Hay and Mr Nathan say they would not have been prepared to extend their guarantee beyond 31 March 2002. Ms Ray said in her second affidavit she had been told by Mr Hay that the loan had been rolled over for a further 12 months.

[60] The evidential position therefore, appears to be both the writer of the letter (the ANZ bank officer) and the recipient of the letter (Mr Hay), had proceeded on the basis that the letter constituted an extension of the facilities, as a result of the annual review, in the same way as had occurred in February 2001. However, on its face the letter does not say that. The bank officer's recanting of his assurance to Frances Ray that the extension had been agreed to, occurred after ANZ had assigned its position to SFL. There is no indication in the letter of 7 January 2002 that there has been any

concern on ANZ's part as to the performance of the plaintiff. The letter refers only to a variation, not a termination of facilities, and no-one, including the defendants, appears to have thought a termination of the term loan was imminent. In addition, the reference to a review of facilities (plural), on 16 June 2002 only makes sense if there has been an extension of the term, following the practice established in the previous year. It would be surprising if ANZ's intention to call in a $350,000 term loan in a few weeks time were communicated to an apparently non-defaulting customer in the form of the letter of 7 January 2002.

[61] In view of all those factors, I accept the plaintiff's submission that there is a serious question as to whether the loan has been extended to 31 March 2003, and that there is insufficient evidence before me to make a finding that the loan expires on 31 March 2002.

Balance of convenience: other factors

[62] The argument as to balance of convenience focused on the potential damage to the plaintiff from the appointment of a receiver and the difficulty of retrieving that position later. The plaintiff argued its current trading is profitable, that the receivership will make it very difficult for the company to maintain its trading relationships with customers, and this will be very difficult to retrieve. It says damages is unlikely to be an appropriate remedy because of the problem in calculating damage. On the other hand, the defendants, Mr Hay and Mr Nathan, say they have substantial assets (although the receivership appointment is by SFL rather than those individuals), that they would be able to pay any damages, that damages could be assessed appropriately and that therefore damages are an adequate remedy. They argue that preserving the status quo exposes them to further losses in their capacity as shareholders and guarantors (Mr Hay and Mr Nathan), and potentially SFL (although its position is secured by the debenture and also by guarantees, including one from Ms Ray).

[63] In my view, the balance of convenience lies in favour of the plaintiff in this case, because of the very significant and probably irretrievable impact that the appointment of a receiver would have on its business. I accept this exposes the

defendants to the on-going business risks of the continuation of the plaintiff's business, which have now been added to by their purchase of the ANZ debenture, but that latter risk is something they must have taken into account when they made the decision to purchase the debenture from ANZ.

[64] The defendants argued that if I were minded to grant an injunction I should take steps to protect their position and referred me to the decision of Hillyer J in *Herbison v Papakura Video Ltd* (1985) 2 NZCLC 99,364 where the Judge granted an injunction restraining exercise of powers of enforcement under a debenture, but required full payment of the amount owed into Court. The defendants argued this was necessary because the undertaking as to damages from the plaintiff could not be relied on.

[65] In my view, this is not an appropriate case for adoption of the approach taken in *Herbison*. The plaintiff has established a serious issue to be tried, to the effect that there has been no breach of the debenture and there has been an extension of the term loan to 31 March 2003. If the plaintiff succeeds at trial in establishing there has been no breach and there was an extension, then there would be no basis for early repayment. The position of SFL is secured by the debenture and the guarantees, including that of Ms Ray, in an environment where the plaintiff appears to be trading profitably, so it is hard to see why an effective acceleration of the loan could be justified.

[66] Of course, if there is any deterioration of the position, then it may be necessary for matters to be revisited, and as suggested by Mr Carden, any injunction will be subject to leave being reserved to SFL to apply for discharge or variation of the injunction at short notice, if events occur requiring the exercise of enforcement rights by SFL.

Interests of justice

[67] As the Court of Appeal made clear in *Klissers Farmhouse Bakeries v Harvest Bakeries Limited* [1985] 2 NZLR 129, the analysis of serious issue to be tried and balance of convenience, is an analytical framework designed to determine where the

overall interests of justice lie. In my view, those interests lie in the plaintiff's favour in this case, and I therefore grant the injunction sought.

Order

[68] I grant an interlocutory injunction restraining the first defendants until further order of this Court from proceeding as receivers and managers of the plaintiff, and a further injunction directing the first defendants to return to the plaintiff any property of the plaintiff held by them. I also grant an interlocutory injunction restraining the second defendant from appointing any receiver or manager of the property of the plaintiff, until further order of this Court. I reserve leave to the second defendant to apply at 48 hours notice for any amendment or discharge of that injunction if circumstances change.

[69] Counsel for the first defendants indicated that the first defendants have paid bills on the plaintiff's behalf, and the sum they hold is an amount which reflects the fact that those payments have been made. The order to return property to the plaintiff should be interpreted accordingly.

Costs

[70] I heard no submissions as to costs and reserve the position. If either party believes that costs need to be dealt with at this stage, I observe leave to apply by memorandum. Any such memorandum should be filed within 21 days of the date of this judgment.

Delivered at 12.50 p.m. on Thursday 28 March 2002.

Mary Regan J

M A O'Regan J