FEDERAL COURT OF AUSTRALIA

Connelly, in the matter of Gregorski Investments Pty Ltd (in liq) v 320 Nominees Pty Ltd as trustee of the Gregorski Property Trust [2019] FCA 1400

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| File number: |  |
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| Judge: | **DERRINGTON J** |
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| Date of judgment: | 29 August 2019 |
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| Catchwords: | **CORPORATIONS** – insolvent corporate trustee – new trustee appointed – liquidators’ application to be appointed receiver over assets of trust to enforce lien of former trustee  **TRUSTS** – former trustee’s right of exoneration – appointment of trustee’s liquidators as receivers of trust asset to enforce right to exoneration and supporting lien – whether current trustee should sell trust assets to discharge right of indemnity |
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| Legislation: | *Corporations Act* 2001 (Cth), Sch 2 ss 45-1 and 90-15  *Federal Court of Australia Act 1976* (Cth), 57 |
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| Cases cited: | *ASIC v Brendale Capital Securities Pty Ltd* [2019] FCA 595  *Bruton Holdings Pty Ltd (in liq) v Commissioner of Taxation* (2009) 239 CLR 346  *Carter Holt Harvey Wood Products Australia Pty Ltd v Commonwealth* (2019) 93 ALJR 807  *Chief Commissioner of Stamp Duties v Buckle* (1990) 192 CLR 226  *Cremin, re Brimson Pty Ltd (in liq)* [2019] FCA 1023  *Hosking, re Business Aptitude Pty Ltd (in liq)* [2016] FCA 1438  *Lane v Deputy Commissioner of Taxation* (2017) 253 FCR 46  *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360  *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99  *Trenfield, re Crusaders Managers Pty Ltd (administrators appointed)* [2018] FCA 876 |
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| Date of hearing: | 28 August 2019 |
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| Counsel for the Plaintiffs: | Mr B Wacker |
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| Solicitor for the Plaintiffs: | DLA Piper |
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| Counsel for the Defendant: | Mr M Martin QC |
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| Solicitor for the Defendant: | Mills Oakley |

ORDERS

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|  | | QUD 512 of 2019 |
| IN THE MATTER OF GREGORSKI INVESTMENTS PTY LTD (IN LIQUIDATION) | | |
| BETWEEN: | ANTHONY NORMAN CONNELLY AND WILLIAM JAMES HARRIS AS LIQUIDATORS OF GREGORSKI INVESTMENTS PTY LTD (IN LIQUIDATION) ACN 156 032 594  First Plaintiff  GREGORSKI INVESTMENTS PTY LTD (IN LIQUIDATION) ACN 156 032 594  Second Plaintiff | |
| AND: | 320 NOMINEES PTY LTD ACN 633 169 856 AS TRUSTEE OF THE GREGORSKI PROPERTY TRUST  Defendant | |

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| JUDGE: | DERRINGTON J |
| DATE OF ORDER: | 29 AUGUST 2019 |

THE COURT ORDERS THAT:

1. It is declared that:
   1. Gregorski Investments Pty Ltd (in liquidation) ACN 156 032 594 (the company) has a right of exoneration from the property of the Gregorski Property Trust for debts incurred by the company as trustee of that trust which are provable in the company’s liquidation (Property Trust Creditors);
   2. the company has a right of exoneration from the property of the Gregorski Investment Trust for debts incurred by the company as trustee of that trust which are provable in the company’s liquidation (Investment Trust Creditors);
2. The first plaintiffs, as the liquidators of the company, are justified in treating:
   1. all property of the Gregorski Investment Trust as being held by the company as bare trustee, subject to any charge or lien that the company has over that property to secure the payment of Investment Trust Creditors;
   2. subject to paragraphs 6, 7, 8 and 9 below, all proceeds of property of the Gregorski Property Trust received in the winding up of the company pursuant to the right of exoneration referred to in paragraph 1(a) above as being available for distribution to Property Trust Creditors in accordance with the order of priorities provided for in Div 6 of Pt 5.6 of the *Corporations Act 2001* (Cth) (the Act); and
   3. subject to paragraphs 6, 7, 8 and 9 below, all proceeds of the property of the Gregorski Investment Trust received in the winding up of the company pursuant to the right of exoneration referred to in paragraph 1(b) above as being available for distribution to Investment Trust Creditors in accordance with the order of priorities provided for in Div 6 of Pt 5.6 of the Act.
3. Pursuant to section 57 of the *Federal Court of Australia Act 1976* (Cth), the first plaintiffs be appointed as receivers, without security, over all present and after acquired property, rights and undertaking of the following trusts (together, the Trusts and each, a Trust), including the proceeds of any such property:
   1. the Gregorski Property Trust; and
   2. the Gregorski Investment Trust.
4. The first plaintiffs be conferred with the following powers in respect of the property of the Trusts:
   1. the powers recited in s 420 of the Act, as if the references in that provision to ‘property of the corporation’ was a reference to property of the relevant Trust; and
   2. the powers that a liquidator has in respect of property of a company by s 477(2) of the Act.
5. The need for the first plaintiffs, as receivers, to file a guarantee under r 14.21 and r 14.22 of the *Federal Court Rules 2011* (Cth) be dispensed with.
6. The first plaintiffs, in their capacity as receivers of the property of the Trusts or in their capacity as liquidators of the company, may have recourse to:
   1. the property of the Gregorski Property Trust for their costs, expenses and remuneration in respect of work undertaken to render that property available to meet the claims of creditors whose debts were incurred by the company as trustee of that Trust;
   2. the property of the Gregorski Investment Trust for their costs, expenses and remuneration in respect of work undertaken to render that property available to meet the claims of creditors whose debts were incurred by the company as trustee of that Trust; and
   3. the property of both Trusts for their other costs, expenses and remuneration properly incurred in the winding up of the company generally.
7. For each Trust, the work referred to in paragraph 6 is to include work relating to:
   1. the identification of Trust assets and liabilities;
   2. the identification of Trust creditors and distinguishing them from creditors of the other Trust;
   3. the ascertaining of the state of the accounts between the beneficiaries and the trustee;
   4. the recovering or attempting to recover Trust assets for the purposes of meeting the right of exoneration;
   5. the realisation or the attempted realisation of Trust assets for the purposes of meeting the right of exoneration;
   6. the securing of Trust assets (or their value) to meet the right of exoneration and their application to the Trust creditors;
   7. the distribution of funds which are the subject of the right of exoneration to those who are entitled to them; and
   8. any matter in the administration of the Trust which is reasonably ancillary to the above to the extent to which it had been undertaken for the purposes of the identified tasks.
8. The amounts which the first plaintiffs are entitled to from the property of the Trusts under paragraphs 6(a) and 6(b) above are to be determined by the Court.
9. It is declared that the first plaintiffs have a lien over the property of the Trusts in respect of the amounts to be paid to them under paragraphs 6, 7 and 8 above.
10. It is declared that the company has an equitable charge over the property of the Trusts, including the Property described as Lot 1 on RP 10335 (Title Reference 16779239) in the State of Queensland, to secure the amounts referred to in paragraphs 1(a) and 1(b) above.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1. The application before the Court is brought by the liquidators of Gregorski Investments Pty Ltd, Mr Anthony Connelly and Mr William Harris. They seek orders pursuant to s 600K of, and ss 45-1 and 90-15 of Sch 2 to, the *Corporations Act* 2001 (Cth) (the Act) as well as s 57 of the *Federal Court of Australia Act 1976* (Cth) appointing them receivers of property of the Gregorski Property Trust and the Gregorski Investment Trust.

## Background

1. Gregorski Investments Pty Ltd (the company) was formerly the trustee of the Gregorski Property Trust (the Property Trust). It has been and remains the trustee of the Gregorski Investment Trust (the Investment Trust). It had no other business in its own right and it only incurred debts as trustee of either of those trusts.
2. The company was appointed trustee of the Property Trust by a deed dated 20 November 2014. That trust deed provided that the appointers, being Mr Nicholas Grzegorzewski and Mrs Meagan Grzegorzewski (née Miller), have the power to appoint new trustees. The company was also appointed the trustee of the Investment Trust pursuant to a deed dated 29 March 2012. Pursuant to that trust deed the trustee was automatically removed if the trustee became insolvent. The expression “insolvent” was defined widely, including where any step is taken to wind the trustee up.
3. On 10 April 2019, the Deputy Commissioner of Taxation served a statutory demand on the company, demanding payment of $355,689.24. The demand was not complied with within the 21 day statutory period, or at all.
4. On 10 May 2019, the appointers under the Property Trust deed resolved to retire the company as trustee, and substituted the defendant in these proceedings, 320 Nominees Pty Ltd (320 Nominees) as trustee. The deed purporting to effect this change has not yet been disclosed by the defendant in full. Mr Grzegorzewski is the sole director of 320 Nominees. He and Mrs Grzegorzewski are the directors of the company.
5. On 24 May 2019, the Deputy Commissioner of Taxation applied to wind the company up in insolvency.
6. On 26 June 2019, the company appointed administrators to itself, being Mr John Shanahan and Ms Claire Birnie.
7. Nevertheless, on 26 July 2019, the Court ordered the company to be wound up in insolvency and the first plaintiffs were appointed liquidators.
8. In these circumstances the company ceased to be the trustee of the Property Trust. If the purported deed of change of trustee was valid, that would have occurred on 10 May 2019. Alternatively, if that deed did not effect the removal of the company as trustee it was nevertheless removed once the petition to wind up the company was filed.
9. It appears that the company ceased to be the effective trustee of the Investment Trust by 26 June 2019, on the appointment of administrators to it, however as no other trustee has been appointed, it remains a bare trustee of the trust.

### Assets in the Property Trust

1. The sole material asset of the Property Trust is the freehold title to land at 320 Boundary Street, Spring Hill, Brisbane, on which is located the building called the Alliance Hotel. The land together with the hotel premises will be referred to in these reasons as “the hotel”. It appears that shortly after the execution of the deed of change of trustee, the title to the hotel was transferred from the company to 320 Nominees.
2. Currently the hotel is leased to a third party which is paying rent in the sum of $17,000 per month.
3. There is in evidence before the Court a valuation of the hotel which had been obtained by a secured creditor, Westpac Banking Corporation, in early 2018. It valued the freehold of the hotel at $2.45 million.
4. Although the liquidators have not yet called for proofs of debt, their current estimate is that the Property Trust owes at least $2,278,808 to a variety of creditors. That sum does not appear to include the costs of and expenses of the liquidation to date. Of that sum, $1,457,639 is owed to the secured creditor, Westpac.

### Assets in the Investment Trust

1. The Investment Trust previously owned the business of operating the Alliance Hotel. That business was sold in about July 2018.
2. Presently the only asset of the Investment Trust is a debt owed to it by the Property Trust which is said to be around $604,000.
3. Again, although proofs of debt have not been called for in relation to the Investment Trust, it is estimated that its debts approximate $592,167. That figure does not include any amount in respect of the liquidators’ or administrators’ fees and expenses.

## Relevant principles

1. As mentioned, the liquidators seek to have themselves appointed receivers pursuant to s 57 of the *Federal Court of Australia Act*. That section provides:

**57 Receivers**

(1) The Court may, at any stage of a proceeding on such terms and conditions as the Court thinks fit, appoint a receiver by interlocutory order in any case in which it appears to the Court to be just or convenient so to do.

(2) A receiver of any property appointed by the Court may, without the previous leave of the Court, be sued in respect of an act or transaction done or entered into by him or her in carrying on the business connected with the property.

(3) When in any cause pending in the Court a receiver appointed by the Court is in possession of property, the receiver shall manage and deal with the property according to the requirements of the laws of the State or Territory in which the property is situated, in the same manner as that in which the owner or possessor of the property would be bound to do if in possession of the property.

1. The principles pertinent to the appointment of receivers under this section were not in dispute before the Court. Nor was it disputed that they were accurately identified by Gleeson J in *Hosking, re Business Aptitude Pty Ltd (in liq)* [2016] FCA 1438, as follows:

17. The general ground upon which the Court appoints a receiver is the protection or preservation of property for the benefit of persons who have an interest in it: *QBE Insurance (Australia) Ltd v WA Metal Recycling Pty Ltd, in the matter of WA Metal Recycling Pty Ltd (in Liq)* [2016] FCA 238 (“*QBE Insurance*”) at [13], citing *Sapphire (SA) Pty Ltd v Ewens Glen Pty Ltd* [2011] FCA 600 at [15].

18. Where a trustee is removed, it retains a right of indemnity from the trust assets secured by an equitable charge over them for its liabilities incurred by reason of acting as trustee: *In the matter of Stansfield DIY Wealth Pty Ltd (in liquidation)* [2014] NSWSC 1484; (2014) 291 FLR 17 (“*Re Stansfield*”) at [10].

19. There is a conflict of authority as to whether the liquidator of a corporate trustee, which has ceased to be trustee, has the power to sell trust assets to enforce the (former) trustee’s right of indemnity. In *Apostolou v VA Corporation of Aust Pty Ltd* [2010] FCA 64; (2010) 77 ACSR 84, Finkelstein J held, at [48]-[50], that the liquidator of a corporate trustee which held legal title to trust property in which it also had an equitable interest could sell the subject property pursuant to the power of sale conferred by s 477 of the Act and that this survived the removal of the corporate trustee.

20. However, in *Re Stansfield*, Brereton J disagreed with the decision of Finkelstein J and held (at [10],[16]-[20],[30],[33]) that, if a trustee company ceases to be trustee of a trust it can no longer exercise the trustee’s power of sale under the trust instrument or general law and that s 477(2)(c) of the Act does not empower the liquidator to sell property held by the trustee company on trust, even if the trustee company has an equitable charge over it, because the property is not in itself “property of the company”.

21. Notwithstanding this conflict of authority, it is well-established that a receiver and manager can be appointed over trust property to secure the trustee’s right of indemnity out of the assets of the trust: *SMP Consolidated Pty Ltd (in liquidation) v Posmot Pty Limited* [2014] FCA 1382 (“*SMP Consolidated*”) at [7] citing *Re Indopal Pty Ltd* (1987) 12 ACLR 54 at 57; *Kerr, in the matter of Angel’s Castle Pre-School Pty Ltd (In Liquidation)* [2010] FCA 786 (“*Angel’s Castle Pre-School*”) at [25]; *In the matter of Gramarker Pty Ltd; Clifford Sanderson (as liquidator of Gramarker Pty Ltd) v Kerr* [2014] NSWSC 243 at [6]–[7]; *Re Stansfield* at [31], [33], [45].

22. This Court has exercised its power under s 57(1) of the FCA Act for the purpose of appointing a liquidator of a former trustee company as receiver and manager of the trust, for example, in *QBE Insurance* and in *Kite v Mooney, in the matter of Mooney’s Contractors Pty Ltd (in liq)* [2016] FCA 886.

1. In *Trenfield, re Crusaders Managers Pty Ltd (administrators appointed)* [2018] FCA 876 at [11], I observed that Gleeson J’s observations reflected the general principles on which a court might appoint an erstwhile trustee as the receiver of trust property for the purposes of preserving and benefitting the persons who have an interest in it. Again, that was not disputed.
2. Similarly, in *Cremin, re Brimson Pty Ltd (in liq)* [2019] FCA 1023, Moshinsky J said at [50]:

The courts are generally willing, upon an appropriate application, to make orders permitting the liquidator of a (former) corporate trustee to sell trust assets. In situations where the property of the trust will be exhausted following its sale and subsequent distribution to creditors, it may be appropriate merely to give the liquidator a power of sale: see *Jones & Matrix* at [91]. The more common course is, however, for the liquidator of the insolvent (former) corporate trustee to apply to be appointed a receiver for the purpose of selling the trust assets and distributing the proceeds among trust creditors: see *Jones & Matrix* at [142] per Siopis J; *Amirbeaggi, in the matter of Simpkiss Pty Ltd (in liq)* [2018] FCA 2121 (*Amirbeaggi*); *Taylor v CJ & KL Bond Super Pty Ltd, in the matter of CJ & KL Bond Pty Ltd (in liq)* [2018] FCA 1430 (*Taylor v CJ & KL Bond Super Pty Ltd*); *Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) (No 3)* [2019] FCA 924. Orders appointing a liquidator as a receiver for this purpose may be made *nunc pro tunc* to authorise sales of trust assets that have already occurred: *Jones & Matrix* at [91], [152], [198].

1. It must also be observed that an erstwhile trustee who owes debts incurred in the performance of its duty as trustee is entitled to a lien over the assets of the trust despite the cessation of their trusteeship. In *Lane v Deputy Commissioner of Taxation* (2017) 253 FCR 46 at [52] I said:

Additionally, as the lien which protects the right of exoneration is merely an equitable lien, it is only enforceable by judicial sale or by the appointment of a receiver and the making of an order by the Court that the trustee is to be reimbursed or exonerated. A trustee has no further “ownership rights” which, necessarily, would need to exist before a trustee would be entitled to the remedy of foreclosure or sale out of Court (*Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550 at [18]; *Melbourne Tramways Trust v Melbourne Tramway & Omnibus Company Ltd* (1887) 13 VLR 487 at 490; *Re Pumfrey* (1882) 22 Ch D 255 at 262; *Re Stucley* [1906] 1 Ch 67). Given the above, it is difficult to ascertain how these limited rights in the trustee could be described as amounting to “trust property” which is legally owned by the trustee but which beneficially belongs to the beneficiaries and which is only to be used for their benefit.

1. Despite the absence of ownership rights in the assets of the trust, the trustee’s interest as the holder of the lien is proprietary and to the extent to which it exists it, *pro tanto*, reduces the interests of the beneficiaries in the trust assets. This was made clear in *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 369-370 where four of the five members of the High Court (Stephen, Mason, Aickin and Wilson JJ) said:

Property which is an asset of a trading estate carried on by a trustee is properly described as trust property: *Dowse v Gorton*; *Jennings v Mather*. However, as we have already indicated, that does not mean that the cestuis que trust are necessarily entitled to call for the delivery of the property. If the trustee has incurred liabilities in the performance of the trust then he is entitled to be indemnified against those liabilities out of the trust property and for that purpose he is entitled to retain possession of the property as against the beneficiaries. The trustee’s interest in the trust property amounts to a proprietary interest, and is sufficient to render the bald description of the property as “trust property” inadequate. It is no longer property held solely in the interests of the beneficiaries of the trust and trustee’s interest in that property will pass to the trustee in bankruptcy for the benefit of the creditors of the trust trading operation should the trustee become bankrupt.

(footnotes omitted)

1. See also *Chief Commissioner of Stamp Duties v Buckle* (1990) 192 CLR 226 at 246-247 [50] and *Bruton Holdings Pty Ltd (in liq) v Commissioner of Taxation* (2009) 239 CLR 346 at 358-359 [43].
2. The lien identified above may not be enforced absent a court order, and it has now been recognised that the liquidators of an erstwhile corporate trustee might properly be appointed as receivers of the property of the trust in order to effect a sale so as to enforce the lien.
3. In this case the company was a trustee of more than one trust. That, however, does not alter the principles as they apply in respect of each trust separately. See the comments in *Carter Holt Harvey Wood Products Australia Pty Ltd v Commonwealth* (2019) 93 ALJR 807 at [97] (per Bell, Gageler and Nettle JJ) and [160] (per Gordon J) and the observations of King CJ in *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99.
4. The defendant initially submitted that the test for the appointment of a receiver in the present circumstances ought reflect the principles applied when the Australian Securities and Investments Commission seeks such relief under s 1323 of the Act. Reliance was placed on *ASIC v Brendale Capital Securities Pty Ltd* [2019] FCA 595. However, the circumstances in such a case are entirely different to the present. There the appointment of receivers is to protect the interests of persons who may be affected by contraventions of the Act which are alleged in an action by ASIC but are yet to be established. That is entirely different where the purpose of the appointment of a receiver is to sell assets which are the subject of a lien in support of an undoubted existing right.

## Whether the plaintiffs ought to be appointed as receivers of the property of the trusts

1. The defendant did not oppose the making of orders in relation to the Investment Trust. The essential dispute at the hearing of the application was whether the plaintiffs ought be appointed receivers of the assets of the Property Trust to enforce the company’s lien which protected its right of indemnity. The defendant did not dispute the entitlement of the company to an indemnity nor its entitlement to a lien. Its only opposition was as to the appointment of the plaintiffs as receivers over the hotel. The basis of that opposition is that it would be an unnecessary step and a waste of time and costs, and that the property and title of the Alliance Hotel is not in jeopardy. Initially, it was said that 320 Nominees and its directors, who are the directors of the company, proposed to sell the property and apply the net proceeds in payment of the company’s creditors identified by its former administrators. Those creditors included related parties to whom it was alleged substantial amounts are owing. In the course of the hearing of the application, the improvidence of 320 Nominees and Mr and Mrs Grzegorzewski effectively undertaking a *de facto* winding up of the company was realised, and the defendant’s position reverted to one whereby it and the directors would simply arrange for the sale of the hotel and pay the net proceeds to the liquidators. In substance, it was said that it would be simpler and cheaper if the sale was conducted in that way than if the company’s liquidators were involved in the sale. That change of direction by the defendant had a significant impact on the plaintiffs’ submissions which were directed in part to the suggestion by the defendant that it discharge the liabilities of the company.

### Relevant considerations

1. Each party relied on a number of matters which they claimed ought cause the discretion to be exercised in their favour. Some relied upon by the plaintiffs are unnecessary to consider as a result of the defendant abandoning its desire to use the sale proceeds to meet the claims of various creditors. Both parties recognised that the exercise of power to appoint receivers as sought by the plaintiffs was, in part, discretionary.

### Obligations of the liquidator

1. One of the primary obligations of liquidators is to get in and take possession of the assets of the company in liquidation: s 474 of the Act. Once realised, the proceeds are to be applied in accordance with the provisions of the Act. Here the assets of the company include its right of exoneration and lien with respect to debts incurred in the proper administration of the Property Trust. That lien can be enforced through the appointment of the company’s liquidators as receivers of the property with the power to sell. As the authorities above reveal, such an appointment facilitates the objective of the Act to bring the assets of the company into the winding up process. With that in mind it is a matter of some significance in the present matter that, vis-à-vis the defendant, the company has a much greater substantive interest in the hotel. As the erstwhile trustee it incurred substantial debts in the performance of its obligations. Even if the amount of $2.45m is accepted as being the value of the hotel, the presently identifiable trust debts (being a short-hand reference to debts incurred by the trustee in the proper administration of the trust) total in excess of $2,278,808, which includes an amount of $1,457,639 owed to Westpac which is secured over the hotel. Even if the relevant figures are assumed in favour of the defendants’ submissions, the vast majority of assets of the trust are subject to the company’s right of indemnity and supporting lien. To the extent of the company’s interest it is not correct to refer to the assets in the Property Trust as being “trust property”, because it is no longer held solely for the beneficiaries: *Re Suco Gold*.
2. When the entirety of the liabilities which might be discharged from the funds of the Property Trust is taken into account, there is a real likelihood that, after Westpac is paid, there will be insufficient funds to fully discharge the unsecured trust debts. Although proofs of debt have not yet been called for, the liquidators have undertaken an analysis bringing into account all of the debts which they anticipate exist. That analysis discloses that, if the hotel sold for the amount of $2.45m, there would be a deficit of funds for the purposes of meeting trust creditors. The prognosis worsens on the assumption that the anticipated sale price is not reached. It must also be kept in mind that the process of calling for proofs of debt may reveal additional creditors and it is unlikely that it will reveal less. The defendant’s suggestion that there will be more than sufficient funds to discharge the trust debts is also dependent upon acceptance of a valuation which was made 18 months ago. The lapse of time since its preparation gives rise to concern that the value identified as at the valuation date would accurately reflect the present market value. In addition, the valuation valued the hotel on the basis that the entity which operated it owned the freehold. Presently, the hotel is leased on a ten year lease with two five year options. It cannot be certain that the value of the freehold will not have altered in these circumstances. As Mr Wacker for the plaintiffs submitted, the hotel business was sold by the company for substantially less (being $750,000) than the amount for which it was valued in the valuation. That might give some force to the suggestion that the valuation from early 2018 no longer reflects the market value.
3. In any event, on any view, the company and the liquidators have greater interest in ensuring that the hotel sells at the best price possible. The company has all or substantially the entirety of the proprietary interest in the hotel and the liquidators are concerned to have that interest realised for the benefit of the creditors. Although the creditors of the company include entities related to the defendant or its directors, in the course of the liquidation the liquidators’ duties are towards them all collectively. These considerations provide powerful reasons as to why the liquidator ought to have control of the process of the realisation of the assets over which the lien exists.
4. It can be accepted that the involvement of the liquidators will necessarily involve greater costs than if 320 Nominees and its directors conducted the sale, but that of itself is not a sufficient reason for denying the entity which has either all or the greater interest in the hotel the ability to ensure that it is realised at the best possible price. Whilst the position may well be different if the value of the right of indemnity was small in comparison to the value of the trust assets, that is not the situation in this case.

### The right of subrogation

1. Mr Wacker for the plaintiffs submitted that, if the defendant were allowed to sell the hotel and discharge the secured creditor, it would follow that the company would lose a valuable trust asset, being the right of subrogation in respect of some of the secured debts. It transpires that the security granted by the company in favour of Westpac secures guarantees of finance facilities of an entity called Gregorski Group Pty Ltd. That company is owned and controlled by Mr and Mrs Grzegorzewski. The submission by Mr Wacker was that if the defendant arranges the sale of the hotel and, on settlement, discharges the secured debt to Westpac (which includes the amount of the company’s guarantee liability), the company will effectively lose the entitlement to be subrogated to the bank’s right against Gregorski Group Pty Ltd.
2. The submissions advanced by the parties in relation to this point were somewhat thin. The defendant made no submission in relation to it at all. It can be accepted that were the plaintiffs, as liquidators of the company, to sell the hotel and discharge the guarantee debt from the proceeds received to use in the exoneration of debts, the company would retain the right of subrogation in respect of that indebtedness against Gregorski Group Pty Ltd. It is not self-evidently clear that, were the defendant to sell the property and discharge the debt, the same result would not be achieved. However, I accept there is real doubt as to that proposition. Where the sale occurs other than through the plaintiffs exercising their right of indemnity, an argument may well be raised that it has not discharged the guarantee debt at all. In those circumstances a risk exists that the company would be denied the benefit of its right of indemnity were it to be prevented from exercising its right by enforcing its lien. This also is a powerful reason for making orders that the liquidators be appointed as receivers of the property.

### The sale process

1. The plaintiffs submitted that the sale process which the defendant proposes to pursue through a real estate agent to cause the sale of the hotel is inadequate. It appears that the defendant’s plan is to attempt a “soft marketing” approach to begin with and, if that fails, to engage in a more intensive marketing program. The plaintiffs’ criticism is that a soft marketing approach is unlikely to secure a purchaser at the best possible price. It is not clear that such criticism is warranted. It may well be that the marketing consultant, CBRE, correctly identifies a reasonable approach to the marketing of this property. There is insufficient evidence before the Court on which a determination might be made as to whether the marketing strategy proposed by the defendant is sufficient. However, the more significant issue is that the defendant does not propose to obtain a current valuation of the property so as to determine at which price a sale ought to take place. That necessarily renders the process proposed difficult to accept. No doubt hotels are specialised forms of real estate and an appropriate methodology is required to ascertain the value of any such property. That is particularly so where a hotel comprises a substantial structure. In the ordinary course the quality of the building, the need for capital improvement, the cost of maintenance and outgoings may significantly affect the freehold value. In the ordinary course of a sale by a security holder either the Court would require or, as a matter of prudence, a receiver would obtain, an up-to-date valuation of the property to be sold. Whilst it is no doubt an added expense, it is an essential yard stick against which to measure any offer.

### Conduct of the defendant and Mr and Mrs Grzegorzewski

1. The plaintiffs rely upon certain conduct of Mr and Mrs Grzegorzewski and 320 Nominees in their dealings with the liquidators as indicating the Court ought not place faith in them for the purposes of conducting a sale of the hotel. There is substantial force in that submission.
2. The first matter relied upon is the failure of Mr and Mrs Grzegorzewski as the directors of the company to provide the books and accounts of the company to the liquidators. Pursuant to s 530A(1) of the Act the directors are required to deliver to the liquidator all books in their possession that relate to the company. On 2 August 2019, the liquidators, by letter to Mr and Mrs Grzegorzewski, requested copies of the company’s books, amongst other documents. No documents were provided in response to that letter. By a further email on 5 August 2019, the liquidators again sought the production of those documents. Again, they were not produced.
3. On 9 August 2019, a further request was made by the solicitors for the plaintiffs for, *inter alia*, the production of the company’s books as had been identified in the letter of 2 August 2019. Again no documents were produced.
4. As at the date of the hearing of the application there was no evidence that Mr and Mrs Grzegorzewski had complied with their obligations under s 530A of the Act. There was no direct evidence that they actually intended to do so. There was also no evidence of any explanation as to why they had neglected and failed to comply with their statutory duty. It is apparent that unless and until all relevant documents are considered by the liquidators they are not in a position to correctly ascertain the financial state of the company. That is a matter which would have been acutely obvious to Mr and Mrs Grzegorzewski and the inference is open that their failure to comply with their statutory duty has occurred, in part, in order to ensure that the liquidators remain uncertain as to the state of the company’s affairs. That conduct, unexplained as it is, weighs heavily against impeding the entitlement of the company to enforce its right of indemnity. Indeed, the unexplained non-compliance with the statutory obligations by Mr and Mrs Grzegorzewski creates doubt that they will comply with any obligations in relation to the sale of the hotel were the liquidators not to be appointed as receivers.
5. The plaintiffs also relied upon the conduct of the defendant and Mr and Mrs Grzegorzewski leading up to the filing of this application. On or around 2 August 2019 it was apparently agreed that the defendant would retire as the trustee of the Property Trust and Mr and Mrs Grzegorzewski would reappoint the company as trustee. That agreement was referred to in the liquidators’ letter to Mr and Mrs Grzegorzewski of 2 August 2019 and there was no demur by them to the assertion. The solicitors for the defendant and Mr and Mrs Grzegorzewski confirmed that they held instructions to effect the changes. Subsequent confirmatory emails were sent by the liquidators to the defendant’s solicitor and documents were prepared to carry the proposed changes into effect. Thereafter Mr and Mrs Grzegorzewski and the defendant indicated through their solicitor that the necessary documents would be executed. Some discussion occurred around a deed of variation of trust which was intended to be executed so that the company, although insolvent, might be validly appointed as the trustee.
6. On 6 August 2019, Mr Dale Cliff of Mills Oakley, for the defendant and Mr and Mrs Grzegorzewski, indicated that he would review the documents which had been prepared and quickly revert to the plaintiffs’ solicitors. On 8 August 2019, Mr Cliff, by an email, indicated he proposed having his clients sign the relevant documents that day. However, on the following day, a letter was sent by Mr Cliff on behalf of his clients effectively repudiating the agreement. Although several arguments were raised about the appropriateness of the appointment of liquidators as receivers, no valid explanation was given as to why the agreement apparently reached between the parties for the reappointment of the company as trustee of the two trusts had been repudiated.
7. The answer to that question seems to become apparent from an email of 19 August 2019 from Mr Cliff to the plaintiffs’ solicitors. In it he advises that his clients had attempted to sell the property privately but had failed and that they had instructed CBRE to sell the property. Enclosed was an agency agreement appointing CBRE. It was signed by the agent on 9 August 2019.
8. The defendant and Mr and Mrs Grzegorzewski had an opportunity to explain the above circumstances. They did not do so. An inference can be properly drawn that whilst the defendant and Mr and Mrs Grzegorzewski displayed to the plaintiffs an intention to reappoint the company as the trustee of both trusts, their conduct was misleading. An inference can be drawn that they engaged in that misleading conduct for the purposes of stalling whilst they attempted to sell the hotel or engage estate agents to sell it on their behalf. There is nothing in the affidavits filed by the defendant which displaces those inferences.
9. The misleading conduct engaged in by the defendant and Mr and Mrs Grzegorzewski is relied upon by the liquidators in support of their submission that the Court could not properly entrust the sale of the hotel to them. In the circumstances that submission ought to be accepted. It appears from the evidence before the Court that there was a sustained attempt by the defendant and Mr and Mrs Grzegorzewski to mislead the liquidators as to their intention and it is axiomatic that a court would not entrust the sale of the hotel to people who engage in such conduct, and that is especially so when the interests of other parties might be affected by their conduct.

### Delay in effecting sale

1. As the plaintiffs submit, there is no temporal limitation on the sale process proposed by the defendant. The campaigns proposed by CBRE are somewhat open ended and there is some doubt as to when and how they would be put into effect. The vagueness of the proposals advanced by the defendant tells heavily against allowing it any involvement in the sale of the hotel.

### Sale price

1. It should not be accepted that a sale by the liquidators will achieve a lower price than that which Mr and Mrs Grzegorzewski or the defendant could secure. Whilst there may be an argument that particularly unique items will be sold at a lower price on a forced sale that is not necessarily so in relation to a hotel freehold. The marketing campaign is intended to achieve the market price and that ought to be so regardless of whether the sale is conducted by the liquidator or another person. Commercial experience shows that many hotel businesses sell as a result of mortgagee action and that the cause of that is multifactorial.

### Undertakings

1. A number of undertakings were offered by Mr Grzegorzewski and the defendant, one of which was not to transfer, encumber or otherwise deal with the hotel other than in the ordinary course of business. That, however, is inadequate. When the inadequacies were identified, Mr Martin QC for the defendant suggested the undertaking might be tightened, however, no further proposal was advanced.
2. Were the matter to be evenly balanced, the proffered undertakings or a derivative thereof might have some importance. However, in the circumstances of this case, where there is little to be said for acceding to the defendant’s submissions, that is not the case.

### The existence of the caveat

1. The company has lodged a caveat over the title to the hotel and the defendant submits that this provides sufficient protection for the company and the plaintiffs. That is no so. Without the orders now sought the company needs to rely upon the defendant to advance its interests in relation to its lien. If receivers are appointed to enforce its equitable lien the company will be in a position to secure the best price possible for the hotel or, more accurately, it will be able to secure the best return on its equitable lien. Whilst Mr Martin QC submitted that the plaintiffs, as liquidators of the company, have no duty to ensure that the hotel sells at its best price, that submission ought be rejected. Whilst the plaintiffs may have no direct duty in relation to the hotel, they have a duty to recover, as best they can, the value of the right of exoneration and the supporting lien. That duty carries with it the obligation to attempt to obtain the market value for the property which is the subject of the lien. In that way, the plaintiffs’ obligation extends to ensuring the marketing and sale of the hotel is undertaken in a professional manner.

### Position in relation to the mortgage

1. The defendant submitted that presently, the liabilities to Westpac on the outstanding indebtedness which is secured by the mortgage over the hotel are being met. Approximately $17,000 is received monthly in rent from the tenant of the hotel and approximately $16,000 is paid in discharge of the liabilities on the Westpac facilities. That said, it is not clear that all the costs of the hotel are being met and there is some evidence that rates and water charges are accumulating.
2. Nevertheless, the defendant submits that the liquidator has not undertaken to ensure that payments to the Westpac facility will continue if they are appointed as receivers. Whilst that may be so, the liquidators are commercially minded and aware of the consequences of not meeting the expectations of a secured creditor. To date they have had correspondence with that secured creditor and no doubt will engage further with it in the future. Whilst the possibility exists that the secured creditor will move on its security, given that there have already been a number of breaches of the security, the appetite of the secured creditor to sell the property itself is doubtful.
3. Moreover, the fact that the mortgagee may execute against the security is no more than speculative. If the defendant wished to advance a case that there was a real risk that Westpac would appoint receivers, it ought to have called evidence to support it. It failed to do so and its submission in this respect lacked any foundation.

## Conclusion

1. In the result, it is apparent that the weight of the relevant considerations in this matter lean heavily in favour of appointing the plaintiffs as receivers of the hotel. In substance, the company has all but the entirety of the beneficial interest in the hotel. It is likely, or quite possible, that the trust debts exceed its present market value. The company is presently entitled to seek exoneration out of the trust assets and its creditors are entitled to be paid their debts. The defendant, as the new trustee of the trust, has not discharged that obligation and no reason has been identified as to why the company should not pursue its right to enforce its entitlements. Further, the company is now in liquidation and the liquidators’ obligation is to “get in” its property. No valid reason is shown as to why this should be delayed. Moreover, the plaintiffs as liquidators of the company have a greater interest than any other party in achieving the highest possible value for the property. Although there is some doubt as to the exact quantum of the debts owed by the company, that uncertainty would appear to arise as a result of the conduct of Mr and Mrs Grzegorzewski who have refused to comply with their statutory duty to provide the books of the company to the liquidators. Necessarily the defendant, 320 Nominees, is connected to that conduct through its sole director, Mr Grzegorzewski. It is difficult to believe other than that the failure of the directors to provide the books of the company is to advance the interests of the defendant. In any event, on the reasonable assumptions made by the liquidators, it can be inferred with some confidence that the entirety of the assets in the Property Trust beneficially belong to the company.
2. Further, the conduct of the defendant and Mr and Mrs Grzegorzewski in their dealings with the liquidators all but precludes them from having any involvement in the sale of the hotel. On the basis of the evidence before the Court it has been demonstrated that they are not persons in whom the Court should repose any trust. Moreover, the proposal by which they intend to offer the hotel for sale is vague and open ended and is intended to proceed without them being aware of the hotel’s current market value.
3. In light of the above the plaintiffs ought to be appointed as receivers of the assets of the Property Trust.
4. The defendant did not dispute that, if the orders appointing the liquidators as receivers were made, the ancillary orders were appropriate. I accept that is so. It follows that the orders ought to be made in the form sought. It is also appropriate to make the declarations sought. They are justified on the evidence before the Court and there was no real dispute as to their accuracy by the defendant.

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| I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington. |

Associate:

Dated: 29 August 2019