RECEIVERS' RIGHTS TO RETAIN FUNDS AFTER DISTRIBUTION: THE COMMON LAW AND THE *RECEIVERSHIPS ACT 1993* (NZ)

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ABSTRACT

While receivers are generally entitled to an indemnity and lien with respect to the costs incurred in carrying out their duties as receivers, the position is less clear-cut when the receivership has ended and claims against the receivers remain unresolved. The issue is complicated in New Zealand by the *Receiverships Act 1993* (NZ) s 20(b), which provides that receivers are not entitled to any indemnity from the property in receivership in respect of any liability arising from a breach of s 19. Section 19 imposes a duty on receivers to obtain the best price reasonably obtainable at the time of sale when selling the company's property.

The article analyses the differences in the approaches of two High Court decisions. It also suggests how section 20(b) should be interpreted, considering the general law and the history of the provisions.

I INTRODUCTION

In 2022 Van Bohemen J of the New Zealand High Court in *Fistonich v Gibson*[1] ('*Fistonich*') considered the right of receivers to retain some of the surplus funds received from the sale of charged assets in respect of which the receivers were appointed. The retention is to pay their fees and legal costs to defend future proceedings against them. While it is accepted at general law that receivers are entitled to an indemnity and lien for their costs as receivers, the issue before the Court was whether receivers are entitled to retain funds from any surplus available after repayment of a secured creditor when the issue of their neglect, default or breach of duty had not (yet) been established.

In the New Zealand context, the *Receiverships Act 1993* (NZ) ('*Receiverships Act*') is also relevant. Specifically, s 20(b) provides that a 'receiver is not entitled to compensation or indemnity from the property in receivership or the grantor[2] in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section 19'. Section 19 imposes a statutory duty on receivers to obtain the best price reasonably obtainable at the time of sale of the debtor company's property in receivership.[3]

This article considers in what circumstances receivers are entitled to retain excess funds beyond the end of receivership to protect against expenses likely to be incurred in relation to receivership-related litigation and whether *Receiverships Act* s 20(b) limits this entitlement when the litigation is in respect of an alleged breach of the duty in s 19. In *Fistonich*, the Court found that the receivers were entitled to retain funds, and s 20(b) had no application as the receivers' fault (if any) had yet to be determined.[4] However, these issues were first considered by the High Court by Pankhurst J in 2011 in *Taylor v Bank of New Zealand* ('*Taylor*'),[5] where the Court had suggested a different interpretation of s 20(b).

This article outlines the law in this area and then compares the contrasting approaches taken in both cases. The article then traces the history of the relevant law and concludes by proposing an explanation of s 20(b).

II OVERVIEW

A *Receivers' Rights of Indemnity and Lien*

In New Zealand, a receiver's rights to an indemnity and lien are governed by a mix of common law and the *Receiverships Act*. It is settled law that 'a receiver is ordinarily entitled to an indemnity and lien in respect of their costs incurred in the carrying out their duties as a

[1] *Fistonich v Gibson & Jackson* [2022] NZHC 1422 [16 June 2022] per Van Bohemen J (*'Fistonich').*
[2] *The Receiverships Act 1993* (NZ) ('the Receiverships Act') defines a grantor as the 'person in respect of whose property a receiver is, or may be, appointed' and accordingly a grantor may be a non-corporate person. However, as almost all receiverships involve debtor companies in practice, for the purposes of this article, the grantor is treated as a company.
[3] Receiverships Act s 19 provides this duty is owed to (a) the grantor, (b) persons claiming, through the grantor, interests in the property in receivership, (c) unsecured creditors of the grantor, and (d) sureties who may be called upon to fulfil obligations of the grantor.
[4] *Fistonich* (n 1) [63]-[64].
[5] *Taylor v Bank of New Zealand* [2011] 2 NZLR 628.

receiver'.[6] Indeed, in both *Fistonich* and *Taylor*, this was the starting point for the respective judicial analysis. In *Fistonich,* Van Bohemen J summarised the relevant law by reference to the following extract from Blanchard and Gedye, *The Private Law of Receivers of Companies in New Zealand*:

> A receiver who in good faith incurs personal liability in the course of carrying out the duties of the receivership is entitled to be indemnified by the company against that liability out of the charged assets. This indemnity extends also to the receiver's fees. Often this indemnity is provided for in the security agreement under which the receiver is appointed but the right to an indemnity, even in the absence of such a contractual indemnity exists under the general law. … The right is both a right to claim indemnity from the company as its creditor and a right of recourse against the charged assets to give effect to the indemnity. …The receiver has an equitable lien on the charged assets as a means of securing and enforcing the company's liability to indemnify.[7]

His Honour observed that this right to an indemnity from charged assets is based on principles of general law and is not contingent on the provisions of the *Receiverships Act*.[8] In addition, he noted no distinction between the entitlement of court-appointed receivers as distinct from privately appointed ones in terms of their rights to assert a lien over company assets and retain funds to defend proceedings against them.[9] In *Taylor*, Pankhurst J made similar observations. He noted that as the receivers were agents of the secured creditors under a general security agreement under which they were appointed, they were paid for their services by the company and they 'enjoyed a right of indemnity from charged assets. The right extended to fees and expenses properly incurred in the course of the receivership'. Furthermore, he noted that '[t]he receivers were also entitled to an equitable lien over the assets in order to secure and enforce the Company's liability to indemnify'.[10]

However, the right to assert a lien over company assets is not absolute. Van Bohemen J again quoted from Blanchard and Gedye:

> Receivers are not entitled to an indemnity from the company in respect of claims against them arising out of any neglect, default, breach of duty or breach of trust on their part, whether the claim is made by the secured creditor or another party. "It is trite law that an agent is not entitled to be indemnified by his principal against losses or liabilities incurred in consequence of his own negligence or default.[11]

In the New Zealand context, the *Receiverships Act* is also relevant, especially if the alleged breach of duty relates to a failure to comply with s 19. Section 19 states:

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[6] *Fistonich* (n 1) [35].
[7] Peter Blanchard and Michael Gedye, *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, 3rd ed, 2008) 154 (footnotes omitted).
[8] *Fistonich* (n 1) [37]
[9] Ibid [38]-[39].
[10] *Taylor* (n 5) [246].
[11] Blanchard and Gedye (n 7) 159 (footnotes omitted).

> 19 Duty of receiver selling property
> A receiver who exercises a power of sale of property in receivership owes a duty to—
> (a) the grantor; and
> (b) persons claiming, through the grantor, interests in the property in receivership; and
> (c) unsecured creditors of the grantor; and
> (d) sureties who may be called upon to fulfil obligations of the grantor—
> to obtain the best price reasonably obtainable as at the time of sale.

Section 20 limits a receiver's right to indemnity in the event of a breach of s 19 as follows:

> Notwithstanding any enactment or rule of law or anything contained in the deed or agreement by or under which a receiver is appointed,—
> (a)…
> (b) A receiver is not entitled to compensation or indemnity from the property in receivership or the grantor in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section 19.

The other relevant statutory duty is s 18, which sets out the general duties of a receiver, these being:

> (1) A receiver must exercise his or her powers in good faith and for a proper purpose.
> (2) A receiver must exercise his or her powers in a manner he or she believes on reasonable grounds to be in the best interests of the person in whose interests he or she was appointed.
> (3) To the extent consistent with subsections (1) and (2), a receiver must exercise his or her powers with reasonable regard to the interests of—
> (a) the grantor; and
> (b) persons claiming, through the grantor, interests in the property in receivership; and
> (c) unsecured creditors of the grantor; and
> (d) sureties who may be called upon to fulfil obligations of the grantor.
> (4) ….
> (5) Nothing in this section limits or affects section 19.

B *Rights on Termination*

While it is commonly accepted that receivers have the right to receive compensation and a lien for their expenses as receivers, the law is less clear as to when receivers can hold onto excess funds after the termination of the receivership to cover their likely litigation expenses when allegations of misconduct, negligence, or breach of duty have yet to be determined.

On termination of a receivership, Blanchard and Gedye state that once receivers have paid the preferential debts and the secured creditor, they are under a duty to terminate the receivership. Receivers at that time also must pay over or surrender the surplus assets or proceeds of sale to the company or its liquidator. The authors continue: 'However, an order directing a receiver to pay over moneys will not generally be made unless it can be determined that on no possible

basis could the receiver be liable for claims arising out of the receivership (with a consequent continuing right of indemnity).'[12]

Blanchard and Gedye refer to the Australian decision of *Expo International v Chant*[13] as the authority for this statement. However, in *Chant*, the receivers had realised all of the company's property but were still involved in litigation on the company's behalf. On this basis, the Court in *Chant* held that the receivers had ample reasons to retain funds. This is a different scenario from the facts of *Taylor* and *Fistonich*, outlined below. Finally, it is worth noting that Blanchard and Gedye do not discuss s 20(b) in the context of termination and the payment of surplus funds.

III DISCUSSION OF RECENT CASES

A *Taylor*

Taylor was a shareholder of a company that went into receivership and had guaranteed, through a family trust, a loan from the Bank of New Zealand to the company. The company's receivers sold its assets but could not generate sufficient funds to repay the Bank fully. As a result, the Bank recovered the shortfall from the trust under the guarantee. Taylor and the trustees initiated legal action against the Bank and the receivers for their losses. The claims against the receivers alleged that they had violated their duties under general law and the Act, including a breach of s 19 in that they had failed to obtain the best possible price for the assets at the time of sale. Additionally, Taylor claimed that the receivers had held onto funds they were not entitled to, awaiting the outcome of the litigation against them.

In relation to this last claim, Pankhurst J reviewed the common law, starting with *Dyson v Peak,*[14] where Eve J had rejected the retention of funds by a receiver of a colliery against the possibility of future claims. On this basis, Pankhurst J observed that 'a mere apprehension of the possibility of litigation does not enable a receiver to withhold funds'.[15] His Honour then considered two more recent Australian decisions at the other end of the spectrum. In the first decision, *Expo International Pty Ltd v Chant*,[16] the receiver's retention of funds was upheld as the receiver's ongoing litigation was on behalf of the company. In the second, *Flexible Manufacturing Systems Pty Ltd v Fernandez*,[17] a notice of the action against the receiver was received after the receivership had terminated. The Federal Court of Australia declined to uphold the equitable lien because its validity must be assessed at the termination of the receivership. At that time, the claim against the receiver was, at best, a contingent claim; accordingly, the receiver was not entitled to retain funds.

[12] Blanchard and Gedye (n 7) 276 (footnotes omitted).
[13] *Expo International Pty Ltd v Chant* (1979) 3 ACLR 888 (NSWSC).
[14] *Dyson v Peat* [1917] 1 Ch 99 (Ch).
[15] *Taylor* (n 5) [251].
[16] *Expo International Pty Ltd v Chant* (n 13).
[17] *Flexible Manufacturing Systems Pty Ltd v Fernandaz* [2003] FCA 1491, (2004) 22 ACLC 47.

Against the background, Pankhurst J in *Taylor* considered s 20(b), although his Honour noted that the provision had not been included in the original statement of claim against the receivers. His Honour concluded that as there were several claims against the receivers, in addition to the alleged breach of the s 19 duty to obtain the best price reasonably obtainable at the time the charged property was sold, a reasonable receiver in November 2008 (when the receivership terminated) would have concluded that the right of indemnity from the company continued, as did the right to a lien.[18]

However, his Honour did indicate, in what must be considered obiter, that if the claim had only extended to an alleged failure to obtain the best price for the assets under s 19, the indemnity would not have been available. As a result, neither could a lien have been asserted against the surplus funds.[19] Accordingly, although Pankhurst J does not expound further on this point, his Honour indicates that when an alleged breach of duty relates only to the duty in s 19, then irrespective of the fact that the allegation has yet to be proven, receivers lose their rights to retain funds, a more restricted approach than under the general law.

B *Fistonich v Gibson & Jackson*

The *Fistonich* case arose from an application by Sir George Fistonich ('Fistonich'), the founder of Villa Maria Estate Ltd ('Villa Maria'), a well-known, long-established New Zealand winery. In 2019, ANZ Bank and Rabobank ('the Banks'), who had extended substantial loans to Villa Maria and were joint security holders over its assets, had concerns about the governance and management of Villa Maria and its debt levels.[20] These concerns led to the restructuring of Villa Maria, with Fistonich Family Wines Ltd ('FFWL') being incorporated as the holding company for Villa Maria. At that time, Fistonich ceased to be a director of or be involved in the day-to-day management of Villa Maria. However, he held all the shares in FFWL and was also a company director.

In 2020, Villa Maria continued to have financial problems, and it was agreed that Villa Maria's business and assets would be offered for sale. Fistonich agreed with this process. Separate offers were then received for the winery and its surplus land. The Banks decided that the offer prices were acceptable. However, Fistonich refused to accept the proposed sale values. Fistonich's refusal triggered an event of default under the Banks' facility agreements, which led in May 2021 to the Banks appointing receivers over FFWL. The receivers continued with the asset sales, and after full repayment of the amounts owed to the Banks, the receivers had surplus funds. The receivers proposed to pay the surplus of NZD 40 million to Fistonich, although retaining NZD 5.16 million to pay their fees and legal costs, which they expected to incur in claims currently being brought against the receivers by Sir George or in respect of future claims against them by him.[21]

[18] *Taylor* (n 5) [257].
[19] Ibid [258].
[20] *Fistonich* (n 1) [4].
[21] Ibid [5]-[11].

Fistonich had already sought orders to obtain all relevant documents relating to the land sale and business. He had also commenced proceedings against the receivers concerning the conduct of the receivership, alleging they had breached duties of redemption owed to him.[22] Fistonich also indicated he intended to file a further proceeding, alleging the receivers negligently sold assets at an undervalue, in breach *Receiverships Act* s 19. He considered that better prices would have been obtained if the receivers had been prepared to entertain sales to overseas persons. Neither of these proceedings had been heard at the time of the application to the Court objecting to the retention by the receivers of surplus funds.[23]

As the claims against the receivers in *Fistonich* related to claims beyond that of the receivers' duty of care when selling property, the Court was not bound to follow the statement in *Taylor* relating to a single allegation of breach based on the s 19 duty, irrespective of whether it was obiter or not. However, Van Bohemen J expressly stated that he declined to follow this part of the decision in *Taylor* as he considered it did not pay sufficient attention to the language of s 20. In his view, it is 'inherent' in the wording of s 20(b) that a breach of the duty in s 19 must have already been established for a receiver to lose their rights of indemnity and lien. His Honour continued that 'it would be contrary to well-established principles if the right of a receiver to secure the liability to indemnity could be abrogated simply by an allegation of a breach of duty',[24] and, if the analysis in *Taylor* were correct, 'a receiver would be required to fund their own defence to any allegation of breach of duty, no matter how trivial, and bear the risk that, if the claim were found to be without substance, but the company had no funds, the receiver would not be able to recover costs incurred in the exercise of the receivership'.[25] On this basis, the decision by the receivers to retain part of the surplus funds was upheld.[26]

With respect to Van Bohemen J, this summary of *Taylor* does not reflect the approach taken by the Court in *Taylor,* as Parkhurst J clearly accepted that a mere allegation of breach would not receive judicial support as grounds for a receiver to retain funds. Van Bohemen J referred to a general statement in an Australian case, *Australian Securities Investment Commission v Lanepoint Enterprises Pty Ltd*,[27] to support his interpretation of the relevant law. In *Laneport,* the Federal Court held as a general principle that a receiver has a general entitlement to deduct and to retain, out of funds realised from the company's assets, the receiver's costs, charges, and expenses, including the costs of defending themselves from unsuccessful claims against them.[28] The *Laneport* decision did not refer to either of the earlier Australian cases.

The Court in *Fistonich* held that s 20(b) only applies when a receiver's liability has been established. Furthermore, if receivers have been found liable, they have no right to indemnity and must account to the company for any company funds expended in defending the claim

[22] *Fistonich v Gibson* Auckland HC CIV-2021-404-2234.
[23] *Fistonich* (n 1) [16].
[24] Ibid [56].
[25] Ibid [57].
[26] Ibid [66].
[27] *Australian Securities Investment Commission v Lanepoint Enterprises Pty Ltd* [2006] FCA 1493.
[28] Ibid [47]-[48]]

against them. Accordingly, the Court in *Fistonich* interpreted s 20(b) as not altering or restricting the general law as it applies to the receiver's rights of retention and lien.[29]

IV HISTORY OF SS 19 AND 20(B)

A *1980 Amendments to the Companies Act 1955 (NZ)*

Due to the conflicting views as to the circumstances in which s 20(b) applies in *Taylor* and *Fistonich,* the correct application of the provision is uncertain. The history of this sub-section is examined below to determine whether this provides any insight as to how it should be interpreted.

The equivalent provisions to Receiverships Act ss 19 and 20 were inserted in the *Companies Act 1955* (NZ) ('the 1955 Act') as s 345B by *Companies Amendment Act 1980* (NZ) s 39.[30] However, before the creation of this statutory duty, a receiver's duty of care when selling assets based on general law and duties in equity had been recognised by the courts. Blanchard and Gedye extensively discuss this duty, covering the historical general law and duties in equity. They observe that the liability of a receiver in selling the property of a debtor company is much the same as that of a mortgagee. 'Equity imposes on a mortgagee general duties to the mortgagor and also to everyone else who is entitled to redeem the mortgage. That includes the holder of any subsequent encumbrance and also a surety for the performance of a mortgagor.'[31]

Blanchard and Gedye trace the early development of this duty at general law leading up to the 1971 decision in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*,[32] where the Court of Appeal of England and Wales widened the scope of a mortgagee's liability and 'appeared to ground it in tortious negligence'.[33]In this decision, the Court found that a mortgagee who had carelessly failed to advertise the mortgaged property as having planning permission for redevelopment was held liable for substantial damages. The Court observed that provided adverse factors such as poor market, poorly attended auction or low bidding, were not 'due to any fault of the mortgagee, he can do as he likes',[34] provided the mortgagee had taken reasonable steps to obtain the best price obtainable at the time of sale. Blanchard and Gedye continued that the decision in *Cuckmere Brick* 'was wholeheartedly embraced'[35] in New Zealand and interpreted as imposing a duty of care when selling property.

[29] Counsel for FFWL and Fistonich also sought declarations from the Court that the sum that the receivers proposed to retain to pay their estimated legal costs was unreasonable. The Court declined to deal with this as it had not been provided with information relating to the scale of the claims made in the proceedings or proposed proceedings against the receivers, See *Fistonich* (n 1) [61]-[63].
[30] *Companies Amendment Act 1980* (NZ) s 39 inserted new section 345B into the *Companies Act 1955* (NZ). At that time, the statutory provisions applying to receiverships were located within the *Companies Act 1955* (NZ) (and its predecessors).
[31] Blanchard and Gedye (n 7) 316 (footnotes removed)
[32] [1971] Ch 949, [1971] 2 All ER 633.
[33] Blanchard and Gedye (n 7) 317.
[34] [1971] CH 949 at 965, [1971] 3 All Er 633 at 643 per Salmon J.
[35] Blanchard and Gedye (n 7) 317.

As discussed below, this article suggests that the rationale for the new statutory duty in s 345B(1) was the development of this duty of care at common law following *Cuckmere Brick,* although there is no supporting evidence for this suggestion in the Companies Amendment Bill 1979 (146–1) or associated documents. The Explanatory Note to that Bill simply states:[36]

> The proposed new section 345B provides that where a receiver sells any property of the company, he shall exercise all reasonable care to obtain the true market price for the property. …and that notwithstanding the provisions of any instrument the receiver is not entitled to be indemnified by the company against liability under this section.

However, in s 345B(1), as enacted, the requirement to obtain the 'true market price' was replaced by a requirement to exercise all reasonable care to obtain the best price reasonably obtainable for the property at the time of sale.[37] Section 345B(2) stated that this duty was owed to the company and s 345B(2)(b) provided that a 'receiver or manager shall not be entitled to compensated or indemnified by the company for any liable he may incur as a result of a breach of his duty.

The *Companies Amendment Act 1980* (NZ) inserted several other receivership-related provisions into the 1955 Act, primarily due to recommendations from the 1973 Macarthur Committee Report.[38] The Macarthur Report did not discuss the issue of a receiver's duties when selling debtor-company property, but its recommendations are the genesis of the other provisions.[39] As stated above, this article suggests that the purpose of the new s 345B(1) in 1980, which is now *Receiverships Act* s 19, was to codify the law following the decision in *Cuckmere Brick.* The language used in s 345B (1) requires a receiver to 'take reasonable care to obtain the best price reasonably obtainable at the time of sale', which reflects the language used in *Cuckmere Brick.* Blanchard and Gedye also reached the same conclusion. They state, when discussing s 19 that it imposes a duty that is 'obviously drawn *from Cuckmere Brick'.* This suggestion is supported by an observation of the New Zealand Court of Appeal in *Apple Fields Ltd v Damesh Holdings Ltd*[40] concerning *Property Law Act 1952* (NZ) ('*Property Law Act*') s 103A. This section was an equivalent provision to s 345B(1) but applied to mortgagees when selling property and was inserted in the *Property Law Act* at the same time as the amendments to the 1955 Act in 1980. The Court of Appeal observed that *Property Law Act* s 103A was to be read as a legislative affirmation of the scope of the duty of care in negligence

[36] Explanatory Note, Companies Amendment Bill 1979 (146–1) (NZ) x.
[37] See (29 October 1980) 434 NZPD (Companies Amendment Bill – Second Reading, Hon Jim McLay) who stated that the Statutes Revision Committee had received submissions about the inappropriateness of a true market price test which is the price that would be paid by a willing seller and willing buyer.
[38] Special Committee to Review the Companies Act, *Final Report of the Special Committee to Review the Companies Act* (New Zealand Government Printer, 1973 (known as the Macarthur Report) 168-80.
[39] See the Explanatory Note, Companies Amendment Bill 1979 (146–1) x which states that four sections relating to receivers and managers are to be inserted into the 1955 Act and provides references to specific paragraphs of the Macarthur Report for three of the sections, but not for new section 345B.
[40] [2001] 2 NZLR 586. The decision was affirmed on appeal by the Privy Council, [2004] 1 NZLR 721. Also see *First City Corporation Ltd v Downsview Nominees Ltd* [1993] AC 295 at 318, [1993] 1 NZLR 513 at 526, [1994] 3 All Er 626 at 637, per Lord Templeman.

owed by a mortgagee who has decided to sell 'as recognised since 1974 by the New Zealand Courts'.[41]

In terms of s 345B(2), there is even less policy discussion regarding the reasons for its enactment. As outlined above, the Explanatory Note simply states that 'notwithstanding the provisions of any instrument the receiver is not entitled to be indemnified by the company against liability', which suggests that it was designed not just to limit the ability of receivers to be indemnified when they are in breach of the duty of care when selling debtor company property, but also to restrict any attempt to contract out of the duty.

It is plausible that in the same manner that s 345B(1) was enacted to codify developments in the general law, s 345B(2)(b) was also drawn from existing equitable principles. Blanchard and Gedye observe that if receivers breach their duty of care, then a 'the receiver is required to account for what would have been available to them if there had been no misconduct and to pay compensation for any shortfall caused by a breach of duty'.[42] In addition, where the misconduct of receivers has been established, they also lose their rights of indemnity and lien from the company's assets. In addition, under general law, if a receivership has been terminated before an allegation of misconduct has been established, courts have allowed receivers to retain funds provided any such misconduct claims have been formalised by the date of termination.[43]

B *Subsequent Legislative Changes*

The subsequent history of the sections does not provide any additional insights into the interpretation of s 345B(2)(b). The New Zealand Law Commission, in Report No 9 and Report No 16, recommended the repeal of Part VII of the 1955 Act, which dealt with receivers and managers and the enactment, as an amendment to the *Property Law Act*, of new statutory provisions applying to receiverships generally.[44] Instead, the decision was made to enact a new Act dealing with receiverships and to make several separate amendments to the Property Law Act.[45] Clauses 149 and 150 of the Companies Ancillary Provisions Bill 1991 (75–1), as introduced to Parliament, contain the provisions that subsequently were enacted as *Receiverships Act* ss 19 and 20.

Clause 150 was enacted unchanged as *Receiverships Act* s 20. The only statement about the purpose of cl 150 in any of the legislative documents is the following rather unhelpful statement in the Explanatory Note to the Bill: 'Clause 150 provides that a receiver cannot claim in an action for breach of the duty imposed by clause 149 that he or she was acting as the grantor's

[41] [2001] 2 NZLR 586, 598. Also see Blanchard and Gedye (n 7) 319 fn 24.
[42] Ibid 320.
[43] See *Dyson v Peat* [1917] 1 Ch 99 (Ch); *Expo International Pty Ltd v Chant* (n 13); *Flexible Manufacturing Systems Pty Ltd v Fernandaz* [2003] FCA 1491, (2004) 22 ACLC.
[44] New Zealand Law Commission, *Company Law Reform and Restatement* (Report No 9, June 1989) and New Zealand Law Commission, *Company Law Reform: Transition and Revision* (Report No 16, September 1990).
[45] Explanatory Note, Companies (Ancillary Provisions) Bill 1991 (75–1) vii.

agent and prohibits a receiver claiming indemnity from the property in receivership or from the grantor.'[46]

However, the Explanatory Note does state that cls 149 and 150 'carry forward the principles contained in section 345B of the 1955 Act',[47] which indicates that the new provisions were not intended to alter the law as codified in s 345B.

Despite this statement in the Explanatory Note, cl 149 was amended at the Select Committee Stage. Clause 149, as introduced into the House, retained the direction that the duty to take reasonable care to obtain the best price reasonably obtainable at the time of the sale was only owed to the grantor (the debtor company).[48] However, as enacted, the duty in s 19 was extended to include persons claiming through the grantor and any sureties.[49] This can be contrasted to s 18, which makes a distinction between the primary duties of good faith and acting in the interests of the appointing creditor and the secondary duties that are owed to the grantor, persons claiming through the grantor and any sureties to the extent consistent with the primary duties. A receiver is statutorily directed to have reasonable regard for the interests of these secondary parties only to the extent consistent with the receiver's primary s 18 duties.

Regarding the relationships between the provisions, s 18(5) states that 'nothing in this section limits or affects section 19'. Accordingly, all persons or entities listed in s 19 who are owed a duty of care by a receiver when selling the debtor-company property would have standing to bring an action for breach of that duty, irrespective of the operation of s 18.

[46] Ibid.
[47] Ibid.
[48] Companies (Ancillary Provisions Bill) 1991 (75-1) (NZ), cl 149.
[49] Justice and Law Reform Committee, New Zealand Parliament, *Companies (Ancillary Provisions) Bill 1993* (75–2).

V CONCLUSION

In conclusion, having reviewed the general law as it applies to receivers and their rights to retain funds on the distribution of surplus assets, as well as the history of s 20(b), it is suggested that there is no evidence that this provision of the Act alters in any way the position at general law that applies in respect of any other breach of duty, neglect, or default by a receiver. Accordingly, while the reasoning of Van Bohemen J in *Fistonich* may be criticised, his interpretation that s 20(b) only applies once the receivers' liability is established is plausible. The provision does not prevent the retention of funds to defend proceedings or proposed proceedings prior to liability being determined.[50] Until the outcome of the litigation against them is known, receivers may use the retained funds, but if they are found liable for negligence, breach of duty or default, they will have to account to the company for the full amount of retained funds.[51] This result provides some reassurance to receivers seeking to use retained funds until the outcome of litigation against them is known. Still, clarification of this point by a higher court would be welcome.

[50] *Fistonich* (n 1) [48].
[51] Ibid [56], [64].