Receivers’ Duties When Selling Assets

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Introduction

The purpose of this paper is to examine the nature and scope of receivers’ duties when selling assets. To this end, this paper initially briefly reviews a receiver’s relationship with the mortgagee which has appointed him/her and the mortgagor to whom he/she has been appointed and how the nature of this relationship impacts upon receivers’ duties. It then examines the duties imparted on a receiver at general law before analysing the duties imparted on a receiver in statute. In each case, a number of relevant decisions will be reviewed in order to demonstrate the requisite standards and the manner in which those standards differ. Having outlined the duties imposed upon a receiver at general law and in statute, this paper then highlights a number of practical considerations for receivers to bear in mind when seeking to ensure that they comply with their general law or statutory duties, whatever the case may be. Penultimately, this paper considers some specific issues which have recently received some consideration in the courts before finally contemplating how receivers’ specific duties when selling assets of a corporation interrelate with other general duties imparted on a receiver in the Corporations Law.

The Position of a Receiver

Whilst there is a plethora of material which examines the position of a receiver in his/her various modes of appointment, here is not the place to examine in detail the relevant issues. It is pertinent, however, for the purposes of this paper to make some general points about the position of a receiver when appointed by a court as opposed to out of court and how each particular position impacts upon a receiver’s obligations.

It is first necessary to make a distinction between a receiver appointed by a court and a receiver appointed privately. It is undoubted that a court appointed receiver owes fiduciary obligations to all persons interested in the subject property. Street J in Duffy v Super Centre Development Corporation Ltd posited that:

A court appointed receiver does not fill the same position [as a privately appointed receiver]. He is not so much as what might be described as a company doctor, but rather his function is that of a company caretaker. His function is not so much to restore profitability. It is rather to preserve those assets of the company upon which its fortunes may be dependant and to preserve its potentiality for earning profits in the future.

The purpose of the appointment of a receiver privately or out of court is somewhat different. Such a receiver is not appointed for the benefit of the company but for the benefit of the mortgagee for the purpose of realising the security held by the mortgagor. The appointment of a receiver privately is performed by the mortgagee pursuant to the terms of its security instrument. Usually, the security instrument provides that the receiver is the agent of the mortgagor. At first glance, this agency

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1 Cape v Redarb Pty Ltd (1992) 8 ACSR 67 at 78 per Higgins J.
2 [1967] 1 NSWR 382.
3 Ibid at 384.
4 Re B Johnson & Co (Builders) Ltd [1955] 1CH 634 at 644 per Evershed MR; Duffy v Super Centre Development Corporation Limited [1967] 1 NSWR 382 at 383-384 per Street J.
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seems a little strange given that the desires and aims of the mortgagee are often quite different to that of the mortgagor.

Put simply, the mortgagee is primarily concerned with getting its money back as soon as possible. The mortgagor on the other hand, is primarily concerned with seeing the asset sell for the best price possible. The desire to see the asset sell for the best price possible is usually premised on the fact that the mortgagor seeks to limit its personal liability to the mortgagee (if the mortgage debt is not entirely satisfied by the sale of the mortgaged property). Additionally, often the mortgagor has a strong emotional attachment to the asset in the sense that the mortgagor has worked hard to acquire or build up the asset and would feel robbed if the asset was sold at a value less than that which the mortgagor thinks the asset is worth. It is particularly in this type of situation that the receiver can feel the pressure of his/her unusual agency position. On one hand, the mortgagee is requesting a quick sale whereas on the other, the mortgagor is stressing that he/she would be less than happy if the asset were sold for less than a good price.

The purpose and effect of rendering the receiver the agent of the mortgagor, however, is to relieve the mortgagee from the liabilities which the law casts upon a mortgagee going into possession and to place upon the mortgagor the liability for the acts and defaults of the receiver. Although the purpose of rendering the receiver the agent of the mortgagor is to protect the mortgagee from liability, it is important to bear in mind how a privately appointed receiver’s peculiar position as agent of the mortgagor impacts upon the receiver’s duties and obligations.

In this regard, Starke J in Visbord v FCT cautioned:

> We must not lose sight of the substance of the appointment. It was made for the benefit of the mortgagee and to protect the mortgagee from liability as mortgagee in possession or as principal. Yet it is a contrivance which has the effect of removing a receiver appointed out of court from those classes of persons who may be said to be fiduciary.

Professor Finn (as he then was) examined this “contrivance” in his work Fiduciary Obligations and concluded that there are no reasons for the imposition of fiduciary obligations where, although one party agrees to act for or on behalf of another, the other party is able to control what powers are exercised for or on his/her behalf or able to control the manner of its exercise. Professor Finn further asserted that because a receiver is made the agent of the mortgagor, “the receiver – mortgagor relationship becomes one founded upon agreement and escapes the imposition of general fiduciary obligations.”

Therefore, given that the agency of a receiver appointed out of court is non-fiduciary, it is necessary to examine the sources of receivers’ duties and obligations. In particular and for the purposes of this paper, the sources of receivers’ duties and

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5. Gaskel v Gosling [1886] 1 QB 669 at 692-693 per Rigby LJ (dissenting) approved on appeal; Gosling v Gaskel [1897] AC 575 at 589, 590, 595; Visbord v FCT (1943) 68 CLR 354 at 368 per Latham CJ.
6. (1943) 68 CLR 354.
7. Ibid at 376.
9. Ibid at p 12.
10. Ibid at p 13.
obligations when selling assets arise in general law and in statute. The general and statutory duties seek to set a standard which aims to balance the competing interests of the mortgagor and mortgagee. The general law and statutory duties and obligations vary and apply differently to receivers depending on the nature of the entity being administered. It is therefore appropriate to examine the general law duties and the statutory duties in some detail.

**General Law Duties**

The general law is the source of duties and obligations imparted upon a receiver appointed to an entity other than a corporation, for example an individual or a partnership.

The general law imposes at least 3 duties upon a receiver. These duties are:

1. The receiver has a duty to the mortgagee to collect and realise the assets of the company for the purpose of discharging the security;\(^\text{11}\)

2. The receiver holds in trust for the mortgagor, any proceeds from the sale of the mortgagor’s assets after the satisfaction of the claims of the mortgagee and subsequent creditors;\(^\text{12}\) and

3. The receiver, as the donee of a power, must exercise the powers and duties granted to him or her in good faith and for a proper purpose.\(^\text{13}\)

It is the content and scope of this last duty that is most relevant for present purposes. The receiver’s duty to exercise the powers and duties granted to him or her in good faith and for a proper purpose is closely aligned with and has long being regarded as very similar to the duty of a mortgagee to act in good faith, without wilfully or recklessly sacrificing the interests of the mortgagee.\(^\text{14}\) This formulation of the duty imparted upon a mortgagee (and therefore a receiver) was originally stated by Lord Herschell in *Kennedy v De Trafford*.\(^\text{15}\) His Lordship’s formulation was subsequently adopted and applied by Griffith CJ in *Barnes v Queensland National Bank Limited*.\(^\text{16}\) In that case, the evidence indicated that the mortgagee had conducted the sale in pursuit of a personal vendetta against the mortgagor. Griffith CJ posited that a power of sale exercised not for the purpose of obtaining payment of a debt, but to deprive the mortgagor of the opportunity of retaining the property by a redemption or which wilfully and recklessly sacrificed the interests of the mortgagor was not a power exercised in good faith.\(^\text{17}\) The High Court again applied Lord Herschell’s test in *Pendleberry v Colonial Mutual Life Assurance Society Limited*.\(^\text{18}\) In that case, their Honours held that the failure of a mortgagee to place proper or sufficient advertising

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\(^{11}\) *Expo International Pty Ltd v Chant* (1979) 2 NSWLR 820 at 831 per Needham J.

\(^{12}\) *Visbord v FCT* (1943) 68 CLR 354 at 384 per Williams J, *Expo International Pty Ltd v Chant* (1979) 2 NSWLR 820 at 830 per Needham J.

\(^{13}\) *Expo International Pty Ltd v Chant* (1979) 2 NSWLR 820 at 832 per Needham J.

\(^{14}\) *Medforth v Blake* [1999] 3 WLR 922 at 936 per Sir Richard Scott VC.

\(^{15}\) [1897] AC 180 at 185.

\(^{16}\) (1906) 3 CLR 925.

\(^{17}\) Ibid at 943.

\(^{18}\) (1912) 13 CLR 676.
of a sale was so manifest as to amount to recklessness and hence a failure to act in good faith.\(^{19}\)

As a result of these two High Court decisions, the duties and obligations imparted upon mortgagees and therefore receivers when selling assets were clearly grounded in good faith. Since then, however, what exactly the duty to act in good faith requires has been the subject of differing opinion. In this regard, it is pertinent to examine the development and divergence of authority between English and Australia law.

The English principles as to what constitutes good faith are stringent in the sense that English law requires the receiver to take reasonable care to obtain a proper price. The classic formulation of this approach is that of Lord Justice Salmon in Cuckmere Brick Co v Mutual Finance Ltd.\(^{20}\) In that case, Lord Justice Salmon postulated:

> Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are “neighbours”. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of sale.\(^{21}\)

This statement prompted some consideration as to whether a receiver might be liable in negligence to a mortgagor for a failure to achieve the true market value at the date of sale.\(^{22}\) This question, however, was authoritatively decided in the negative in Parker - Tweedale v Dunbar Bank Plc (N o. 1)\(^{23}\) where it was held that the duty of care owed by a mortgagee to a mortgagor arises under the rules of equity and not the tort of negligence. This position was confirmed in Downsview Nominees Limited v First City Corporation Limited.\(^{24}\) Although confirming that the duty is grounded in equity rather than negligence, the English requirements as to good faith when selling mortgaged property remain that the receiver is under an obligation to take reasonable care to obtain the true market value of the asset at the date of sale.\(^{25}\)

The more stringent English formulation of the good faith requirement of taking reasonable care to obtain the true market value of the asset at the date of sale has been rejected in Australia. Whilst at times considering the English formulation,
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Australian courts have not followed it.26 A most often cited Australian decision in this regard is that of Needham J in Expo International Pty Ltd v Chant27 (Expo). This decision is generally regarded as enunciating the correct formulation of the Australian general law duties of a receiver.28

In Expo, Needham J reviewed whether a receiver could be held liable for loss caused by negligence and determined that the Australian authorities do not support such an approach.29 Having decided that the good faith requirement is grounded in equity, His Honour considered the scope of the general law duty imparted on a receiver and concluded:

[The] duties [owed by a receiver to the mortgagor] include the duty to exercise his powers in good faith (including a duty not to sacrifice the mortgagor’s interests recklessly); to act strictly within, and in accordance with the conditions of his appointment; to account to the mortgagor after the mortgagee’s security has been discharged, not only for the surplus assets, but also for his conduct of the receivership. ... There is no justification in logic for suggesting that a receiver [who has decided to sell assets of the mortgagor for the purpose of realising the security] becomes saddled with more onerous duties, such as, for example, a duty to obtain the “true market value” of the property at the time of sale, or a duty not to act negligently in connection with the sale.30

His Honour considered himself bound to follow the expressions of principle contained in Pendleberry v Colonial Mutual Life Assurance Society Limited31 and therefore concluded that his task was to:

ascertain whether the [receiver] wilfully or recklessly sacrificed the interests of the [mortgagor] ... If the [receiver] acted bona fide, and certainly, if it took reasonable precautions to obtain a proper price, the [mortgagor] must fail, even if the price obtained was below market value, and even if, by waiting, or by spending more money on the property, a better price could have been obtained.32

The general law duty in Australia, therefore, is far less stringent than the English duty as it merely requires a receiver to exercise his powers in good faith which includes a duty not to sacrifice the mortgagor’s interests recklessly. There is no general law duty imparted on a receiver in Australia to ensure that, when exercising a power of sale, the true market value is obtained.

Having determined the extent and scope of the general law duty imparted upon a receiver, it is necessary to examine to whom that duty is owed or who, in other words, may seek relief against the receiver in the event that the receiver fails to comply with his/her general law duties. The receiver’s duties to persons or entities other than the mortgagor was considered in Downsview Limited v First City Corporation

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27 [1979] 2 NSWLR 820.
29 [1979] 2 NSWLR 820 at 834.
30 Ibid.
31 (1912) 13 CLR 676.
32 Expo International Pty Ltd v Chant (1979) 2 NSWLR 820 at 835 per Needham J.
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Limited. In that case, Lord Templeman considered that the argument that a mortgagee owes no certain duties to subsequent encumbrances was a fallacy. His Lordship stated:

The owner of property entering into a mortgage does not by entering into that mortgage cease to be the owner of that property any further than is necessary to give effect to the security he has created. The mortgagor can mortgage the property again and again. A second or subsequent mortgage is a complete security on the mortgagor’s interests subject only to the rights of prior encumbrances. If a first mortgagee commits a breach of his duties to the mortgagor, the damage inflicted by that breach of duty will be suffered by the second mortgagee, subsequent encumbrancers and the mortgagor depending on the extent of the damage and the amount of each security.

Having decided that a mortgagee owes a duty to any subsequent encumbrancer, and ultimately the mortgagor, Lord Templeman considered whether the position of a receiver was any different as it was alternatively submitted that, even if a mortgagee owed certain duties to subsequent encumbrancers, a receiver appointed by a mortgagee is not under any such duty where the receiver is deemed to act as agent for the mortgagor. His Lordship concluded that because the receiver is dealing with the security and exercising the power of sale for the purpose of securing repayment of the debt owing to the mortgagee rather than merely selling or dealing with the interests of the mortgagor, his/her position is akin to that of a mortgagee exercising a power of sale. Accordingly, the receiver must act in good faith so as not to wilfully compromise the interests of any other persons or entities interested in the mortgaged property.

As for the position of a guarantor, it follows that the guarantor, as a person or entity interested in the mortgaged property through the guarantor’s rights of subrogation, is owed the same duty of good faith by the receiver.

Statutory Duties

The duties imparted upon a receiver appointed to a corporation are grounded in statute, specifically in s420A of the Corporations Law. That section relevantly provides:

420A (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:

(a) If, when it is sold, it has a market value – not less than that market value; or
(b) Otherwise - the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.

420A (2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183 or 184.

33 [1993] 2 WLR 86.
34 Ibid at 95.
35 Ibid.
36 In this regard, see Australia and New Zealand Banking Corporation Limited v Carnegie (unreported, Supreme Court of Victoria, Crockett J, No 5152, 16 June 1987).
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The reference to controller rather than a receiver imparts the duty contained within s420A further afield than a receiver as a controller is defined in s9 of the Corporations Law as:

In relation to property of a corporation, it means:

(a) a receiver, or receiver and manager, of that property; or
(b) anyone else who (whether or not as an agent for the corporation) is in possession or has control, of that property for the purpose of enforcing a charge.

Despite this wide definition, for the purposes of this paper, the duties and obligations imparted on a controller pursuant to s420A will be examined in the context of receiverships only.

The purpose behind the introduction of s420A can be gleaned from the Explanatory Memorandum37 to the Bill for amending legislation which ultimately introduced it into the Corporations Law. That Explanatory Memorandum outlines:

It is sometimes said of receivers that they are prepared to sell property at a price less than the best obtainable, so long as it is sufficient to cover the debt of the chargeholder who appointed them. Proposed s420A makes it clear, that in selling company property, a controller must take all reasonable care to sell the property for the best price that is reasonably obtainable having regard to the circumstances existing when the property is sold.38

The impetus for reform was by and large based on the findings of the Australian Law Reform Commission General Insolvency Inquiry Report39 in 1988, otherwise known as the Harmer Report. In that report, the Australian Law Reform Commission favoured the English approach as one that should be adopted as the law in Australia. The Report states:

The duty of a receiver, a chargee who takes possession and the agent of the chargee should be expressly stated to be to take reasonable care in the exercise of that person’s power. In particular, the duty would be to take reasonable care in the management of property and, if the property is sold, to ensure that it is not sold at a price below the best price reasonably obtainable.40

Despite the insertion of s420A into the Corporations Law in 1992, there are few cases which consider the operation and scope of s420A in any great detail. A recent decision in this regard, however, is Jeogla Pty Ltd v A N Z Banking Corporation Limited & A nor.41 It is appropriate to examine this case in some detail.

Jeogla Pty Ltd (Jeogla) was the owner of rural property, beef cattle and associated plant and equipment which it had mortgaged to ANZ (the Bank). As a result of Jeogla defaulting under it various facilities with the Bank, the Bank appointed a receiver and manager to Jeogla who was charged with conducting the marketing and

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37 Explanatory Memorandum to the Corporate Law Reform Bill 1992.
38 Ibid at [585].
40 Ibid at [42].
sale of the rural property, the beef cattle and the plant and equipment. In fulfilling this task, the receiver appointed a real estate agent to market and sell the mortgaged property as well as an expert to value the beef cattle.

After completion of the sale of the mortgaged property, Jeogla commenced proceedings against the Bank and the receiver on the basis that both had sold the rural property and the beef cattle at less than their respective market values and thereby breached the obligations imposed upon them by s420A. At trial, however, Jeogla did not make separate submissions with respect to the Bank’s liability but rather focussed its action on the receiver’s liability.

Einstein J ultimately dismissed Jeogla’s claim in respect of the rural property, however, he upheld the claim against the receiver in respect of the sale of the beef cattle at less than their market value.

This finding was primarily based upon the fact that the receiver caused the beef cattle to be sold to the wrong market because they were marketed and sold as a going concern with the rural property and therefore ultimately sold as live weight cattle for slaughter rather than as a breeding herd. The beef cattle were a very highly regarded brand in the beef cattle market and were accredited to international quality standards. Because the beef cattle were sold as live weight cattle for slaughter to a production market rather than as a breeding herd to a breeding market, the sale of the beef cattle to a production market resulted in their sale at an undervalue compared to what would have been realised upon sale of the beef cattle to a breeding market given their quality reputation. Despite the fact that the receiver had commissioned stock and station agents to conduct the marketing and sale of the beef cattle, Einstein J found that the receiver was ultimately liable for the acts of the agents whom he had appointed.

In reaching these conclusions, His Honour examined in some detail the operation of s420A and the conduct ordinarily required of a receiver in order to meet the duties and obligations imparted upon a receiver pursuant to s420A.

In considering the effect and operation of s420A, Einstein J stated:

> In my view, [s420A] does not affect the pre-existing position in so far as a mortgagee’s entitlement to in fact exercise a power of sale is concerned. By definition, the mortgagee has become entitled to exercise a power of sale. Hence, the proper construction of [s420A] takes, as a given, that it deals with the exercise of a power of sale by a controller. Granted then that a mortgagee or a receiver appointed by a mortgagee has become entitled to exercise a power of sale, the section operates to require that all reasonable care is taken to sell the property for its market value.

In considering exactly what is market value and how it might be achieved, His Honour considered issues relating to timing of the sale of the mortgaged property, the concept of market value and the extent to which a receiver may rely upon experts appointed by him/her.

As for the timing of the sale, Einstein J considered that s420A clearly imposes no requirement that the property be sold at any particular time. In any event, His...
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Honour cautioned by alluding to the arguments of Lightman and Moss in Law of Receivers of Companies who postulated that it has not yet been decided by cases dealing with market value whether:

a receiver who knows the market is very bad, is entitled to go ahead and sell at a bargain price. The debentureholder’s understandable wish for an early realisation may be incompatible with obtaining the absolute maximum price.

In acknowledging such argument, Einstein J noted Aitken’s assertion in The Receiver’s Duty in Equity: The impact of Statute and the Privy Council that imposing a requirement as to timing “would probably only increase the opportunities for second guessing and the adducing of expert evidence with all the benefits of hindsight that necessarily entails.” This conjecture aside, following Einstein J’s conclusion, it would seem that there is no obligation upon the receiver to sell at any particular time provided of course that the receiver makes his decision with respect to timing of the sale in good faith and in any event seeks to achieve the market value of the property at the time of sale.

As for determining exactly what the concept of market value means, Einstein J referred to the Explanatory Memorandum to the Bankruptcy Legislation Amendment Bill 1996 (Cth). That Memorandum explained the concept of market value as referring to:

The value of the property concerned if it were disposed of to an unrelated purchaser bidding in a market on an ordinary commercial basis for property of the kind disposed of, without any sort of discount or incentive for purchase being offered...it is not intended to include a situation where the property was being disposed of at a fire sale, at discounted prices because of some immediate need on the part of the owner to liquidate his or her assets.

Put simply, it seems that market value could be achieved at a sale where any party could be present and where the ultimate transaction between the buyer and seller is at arm’s length. Nonetheless, the problem of achieving market value is compounded by the fact that the receiver must ensure that he/she sells to the correct market as a particular item of property may have a number of different markets at which it could be sold. Accordingly, following Einstein J’s decision in Jeogla, a receiver must take care to sell the mortgaged property at a market which is reflective of the true nature and value of that mortgaged property.

Another issue considered by Einstein J in relation to the concept of market value was whether a particular piece of property could have no market value. In this regard, His Honour noted the comments of Professor Lang who observed:

44 Ibid at 447.
45 (Sweet & Maxwell, London, 1986).
46 Ibid at p 72.
49 Ibid at 122.
51 Explanatory Memorandum to the Bankruptcy Legislation Amendment Bill 1996 (Cth) at [84.13].
52 Jeogla Pty Ltd v A N Z Banking Corporation Limited & Anor (1999) 150 FLR 359 at 446.
On the basis of value, in accordance with the classic statement in Spencer v Commonwealth (1907) 5 CLR 418, every property has a determinable market value, even if the property is very unusual and the market (that is, demand and supply) is virtually non-existent.\(^{54}\)

If this is the case, then the operation of s420A(1)(b) would be redundant. Following Einstein J’s approach by referring to the definition of market value in the Explanatory Memorandum to the Bankruptcy Legislation Amendment Bill, it would seem that a particular piece of property would have a market value if it was able to be disposed of to an unrelated purchaser bidding in a market on an ordinary commercial basis for property of the kind disposed of. If this was not possible, then it is arguable that there is no market for the particular piece of property. Presumably, this would be because the property would have a number of significant defining characteristics which would render its sale viable only if it is sold to an unique purchaser. For example, a particular piece of property which is in fact a component or part of a series or group of property may have no market value in the sense that it is worthless to anyone other than that person who owns the other property with which the particular piece of property should belong. In any event, the issue as to whether property can have no market value becomes one of semantics given that at a practical level the standards required are almost identical.\(^{55}\)

Ultimately, Einstein J did not decide the issue of whether property could have no market value because is was unnecessary for him to do so in determining the outcome of the case. Nonetheless, Einstein J concluded that s420(1)(b) will only come into effect if s420A(1)(a) cannot apply. In other words, s420A(1) does not provide an either/or approach as there is no requirement that the price obtained be the better of s420A(1)(a) or s420A(1)(b). Rather, the price obtained should be the market value or, if there is no market for the particular piece of property, the best price reasonably obtainable having regard to the circumstances existing when the property is sold.

In deciding the issue of whether the receiver could rely upon an expert to carry out certain tasks incidental to the receivership so as to absolve him/herself from liability, Einstein J examined the High Court’s decision in Commercial and General Acceptance Ltd v Nixon and A nor:\(^{56}\) In that case, the High Court considered an identical provision to s420A contained in s85 of the Property Law Act 1974 (Qld) where deficient advertising by the mortgagee’s agent led to a sale of the property for less than its market price. The High Court held that the mortgagee was ultimately responsible and therefore liable and could not satisfy its responsibilities by delegating its duties to another. Einstein J agreed with the High Court’s approach and rejected the argument that a receiver can discharge his/her statutory duties by delegating those duties to the agents retained to advise in relation to and act on the sale of the mortgaged property.

In terms of the effect of s420A, Einstein J concluded that it:

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\(^{54}\) Ibid at 454.

\(^{55}\) Ibid.

\(^{56}\) (1981) 152 CLR 491.
now clearly imposes a higher standard of duty to that previously in place on a controller when selling property of a corporation. Under this statutory duty, controllers ... are required to take all reasonable care to sell property under their control where there is a market value at the time of sale, for not less than that market value, or, if there is no market value at the time of sale, at the best price reasonably obtainable, having regard to the circumstances existing when the sale is effected.\textsuperscript{57}

It should be noted that an application for leave to appeal from Einstein J’s decision was recently argued before the New South Wales Court of Appeal.\textsuperscript{58} Leave was required pursuant to s471B of the Corporations Law because Jeogla Pty Ltd had, since the date of the orders made by Einstein J, gone into liquidation. Although determining that it was reasonably arguable that the construction of s420A adopted by Einstein J was in error\textsuperscript{59}, leave to proceed with the appeal was refused by reason of the additional costs that would be incurred and because a successful appeal would require that the proceedings be remitted for further consideration with the likelihood of little practical result in terms of the payment of money, by anybody.\textsuperscript{60} Following the recent comments of the New South Wales Court of Appeal, therefore, at least elements of Einstein J’s reasoning in \textit{Jeogla} is on shaky ground. Until such time as s420A is before the courts again, however, the decision in \textit{Jeogla} stands. It is, therefore, very much a matter of watch this space.

Having determined the extent and scope of the duty imparted upon a receiver pursuant to s420A, it is necessary to examine to whom that duty is owed or who, in other words, may seek relief against the receiver in the event that the receiver fails to comply with s420A.

The starting point is s1324 of the Corporations Law which empowers the court to grant an injunction to stop contraventions of the Corporations Law or order damages\textsuperscript{61} to be paid by a person who has contravened the Corporations Law. Either the ASIC or any person whose interests have been, or would be affected by the contravening conduct may seek relief by way of injunction or damages. The important point to be made about the effect of s1324 is that it may vastly extend the class of persons who may be affected by conduct which contravenes s420A. If this is the case then it indeed extends the receivers duty in s420A to far more persons than envisaged by the Explanatory Memorandum to the Corporate Law Reform Bill 1992 which contemplated that “the controller’s duty under the proposed s420A(1) will be owed to the company”.\textsuperscript{62}

As outlined above, at general law, the duty imparted upon receivers is only owed to those who have an interest in the mortgaged property, ie. the mortgagor, any guarantors and subsequent encumbrancers. Section 1324, however, arguably extends its ambit to all persons whose interests have or would be affected by the receiver's

\textsuperscript{57} Jeogla Pty Ltd v ANZ Banking Corporation Limited & A nor (1999) 150 FLR 359 at 444.

\textsuperscript{58} Keith William Skinner v Jeogla Pty Ltd & Ors [2001] NSWCA 15.

\textsuperscript{59} Ibid at [34-42] per Spigelman CJ.

\textsuperscript{60} Ibid at [51-2] per Spigelman CJ.

\textsuperscript{61} Corporations Law, s1324(10).

\textsuperscript{62} Explanatory Memorandum to the Corporate Law Reform Bill 1992 at [406]. See also Australian Law Reform Commission supra n 39 at [43] which considered that the mortgagor company or the guarantor/s (if any) would be entitled to bring an action for breach of s420A.
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conduct in contravention of the law. Therefore, if a shareholder or an unsecured creditor, for example, could prove that their interests were affected by the receiver’s conduct, then they may seek relief under s1324.

In practical terms, however, s1324 should not necessarily open the floodgates for all persons whose interests might be affected by the receiver’s conduct allegedly in breach of s420A. As injunctive relief, s1324 is a discretionary remedy where damages are not available as of right.\(^{63}\) Furthermore, s1324 is a procedural provision which will be subject to the operation and jurisprudence of s420A which is a substantive provision.

Aside from s1324, s1321 is a further avenue by which a person aggrieved by the receiver’s conduct may seek some form of redress in the courts. In practical terms, however, the relief that the Court may grant pursuant to s1321 is relatively limited and therefore rarely used.

Having examined the scope and operation of the duty imparted on a receiver pursuant to s420A and the classes of persons to whom that duty is owed, it is appropriate to highlight some practical considerations. In this regard, there are a number of decisions which largely turn on their facts and which have had various outcomes for receivers.\(^{64}\) Such cases are useful as they illustrate the steps that a receiver should ordinarily take (or not ordinarily take, whatever the case may be) in seeking to discharge the duties and obligations imparted upon them at general law and/or pursuant to s420A. A recent case which highlights some practical issues is that of Kyuss E xpress Pty Ltd v Sellers and A nor\(^{65}\) (Kyuss). The facts of Kyuss are somewhat complicated, however, for present purposes the relevant facts may be stated as follows.

In the early 1980s, Mr and Mrs O’Connor, through Laskin Nominees Pty Ltd (Laskin), established a business for the retail sale and manufacture of upholstered furniture for commercial use (the business). Laskin owned the land on and from which the business operated. In 1996, the O’Connors sold the land and the business for $1,300,000 to Kyuss Express Pty Ltd (Kyuss), the sole director and shareholder of which was Mr Lawler, a lifetime friend of Mr O’Connor who had actually for a short time during the late 1980’s owned a share in the business. The O’Connors agreed to stay on as employees of the business and remained very involved in the management of the business.

In order to finance the purchase of the land and the business, Kyuss obtained a number of facilities with the Commonwealth Bank (the Bank). It also obtained an overdraft to assist with cash flow requirements. In time, Kyuss fell into arrears under its various facilities. Kyuss then secured a significant contract for fitting out a new development of serviced apartments being constructed by Walker Corporation (the

\(^{63}\) For some comment as to the possible limits of s1324 see the decision of Hansen J in Commonwealth Bank of A ustralia v Milder E Ilman Szmerling Kryer Pty (unreported, Supreme Court of Victoria, Hansen J, No 2238, 18 February 1998).


\(^{65}\) [2001] VSC 10.
Walker contract) which was predominantly obtained as a result of the O’Connor’s contacts and goodwill in the marketplace. Consequently, Lawler approached the Bank for further advances in order to purchase materials and begin production of the work required pursuant to the Walker contract.

In determining whether further advances would be commercially viable, the Bank appointed Sellers and Lockwood (Sellers) as investigating accountants to report on Kyuss’ financial position and the potential exposure of the Bank. Sellers’ report concluded that Kyuss could not fund the Walker contract and that Kyuss’ unsound financial position justified the appointment of receivers and managers to protect the Bank’s security. The Bank ultimately followed that advice and appointed Sellers as receivers and managers on 10 October 1997.

The receivers obtained a market valuation of the plant and equipment of Kyuss at $154,115. They then spoke to Mr O’Connor, who indicated that he would not continue his involvement with the business if Lawler was not involved. The only asset of any value was the Walker contract which, in any event, was potentially determinable given that the appointment of receivers to Kyuss was an event of default under the Walker contract. Sellers, however, did not approach Walker to determine whether the contract could be assigned to a purchaser of the business. Rather, Sellers took the view that Walker would only be prepared to continue with the Walker contract if the O’Connors were involved. He therefore believed that the O’Connors were ideally placed to purchase the business. If the O’Connors did not wish to purchase the business, then Sellers considered the value of the business essentially was represented by the value of its debtors, stock, plant and equipment and client list.

In the meantime Lawler had been making enquiries with a number of his business associates as to how he might save the business. Consequently, Nasot Pty Ltd (a company friendly to Lawler) made a without prejudice offer to the Bank to purchase a one-third share in the business for $300,000. Lawler also examined refinancing options. The Bank ultimately rejected Nasot’s offer. Sellers was, at all times, aware of Nasot’s offer and Lawler’s attempts to refinance his facilities with the Bank.

On 24 October 1997, Sellers sold the business to the O’Connors for $120,000 which was all that the O’Connors were prepared (or able) to pay.

Kyuss issued proceedings against Sellers alleging that in selling the business they failed to comply with the obligations imparted upon them pursuant to s420A of the Corporations Law. In their defence, Sellers claimed that the O’Connors (through Laskin) were the only possible purchasers of the business because only the O’Connors were in a position to take a reassignment of the Walker contract. In other words, the value of the business was negligible to any possible purchaser other than the O’Connors.

Despite some initial consideration as to whether the action was framed in the context of s420A(1)(a) or s420A(1)(b), Mandie J proceeded on the basis that the appropriate duty was that enunciated in s420A(1)(a) (ie the duty to sell mortgaged property for its market value at the date of sale). In this regard, His Honour commented:

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66 Ibid at [90-3].
Receivers’ Duties When Selling Assets

the reference to “market value” in s420A (1)(a) no doubt serves to emphasise a controller’s obligations in ordinary circumstances to take all reasonable steps to advertise or notify the availability of a property to potential buyers and to ascertain the market value of the property before selling.\(^67\)

Mandie J considered that Sellers failed to attain this standard. In particular, he considered that Sellers:

- acted with undue haste in the sale of the business;
- failed to investigate the offer by Nasot Pty Ltd to purchase a one-third share of Kyuss for $300,000;
- failed to make enquiries with Walker in order to ascertain whether or on what terms the benefit of the Walker contract might be passed to a purchaser of the business;
- took insufficient steps to properly ascertain, or attempt to ascertain, the market value and prospects of the business both with and without the Walker contract; and
- failed to advertise the sale of the business and to call for tenders for the purchase of the business which would have likely established that there was no offer other than the O’Connors or no offer better than that obtained from the O’Connors and which also eliminated any chance that the O’Connors might be induced to increase their offer.\(^68\)

In any event, however, Mandie J considered that Kyuss only suffered a nominal loss. His Honour considered that:

- the Walker contract added no value to the business unless the O’Connors (through Laskin) were the purchasers because Walker would only assign the Walker contract to an entity associated with the O’Connors; and
- the offer by Nasot was not capable of acceptance and provided no reasonable evidence of the market value of the business.\(^69\)

Hence, the only loss suffered by Kyuss was the possibility that the O’Connors (through Laskin) might have been induced to increase their offer if the business had been advertised or tendered for sale. Mandie J assessed this loss of chance at $20,000.

Kyuss, and other cases like it, illustrate the practical steps that a receiver should ordinarily take in order to comply with the duties and obligations imparted upon a receiver not only at general law but also pursuant to s420A of the Corporations Law. It is appropriate to make some comment about these practical steps.

**Practical steps towards discharging the receivers’ obligations**

It is not possible to outline a step by step approach for receivers to blindly follow in their conduct of a receivership as the facts of every receivership differ and therefore

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\(^67\) Ibid at [94].
\(^68\) Ibid at [98-101].
\(^69\) Ibid at [130-1].
also the commercial considerations, requirements and pressures imposed upon the receiver by those around him/her. In any event, it is possible to identify the broad issues which normally require some form of action or attention. These include:

♦ undertake appropriate due diligence enquiries to identify the true nature of the mortgaged property and the market or markets in which the mortgaged property could be sold;

♦ engage appropriate experts who are familiar with the mortgaged property and the potential markets in which the mortgaged property might be sold to supplement the receiver’s understanding of the mortgaged property gleaned from his/her initial due diligence enquiries;

♦ engage the expert or other marketing/selling agents to conduct the sale of the mortgaged property;

♦ at all times ensure that the experts and/or marketing/selling agents complete their tasks in accordance with the instructions given by the receiver;

♦ ensure that the mortgaged property is properly advertised for sale detailing all necessary information about the features of the mortgaged property in order to fully inform the market and attract all possible buyers;

♦ sell by public auction if possible or, if an auction sale is not feasible in the circumstances, ensure that all offers made by buyers during a tender process or private sale are thoroughly investigated and considered;

♦ refrain from disclosing details of the amount due to the mortgagee or the reserve of the mortgaged property so as not to compromise the market by informing buyers of what the receiver might accept; and

♦ when difficult decisions have to be made, consult with the mortgagor and others whose interests may be affected in order to identify the issues which are contentious from the mortgagor’s point of view in an attempt to seek adequate solutions to the potential problems.

In any event, the receiver should never blindly follow his/her general commercial experience. The receiver must ensure that in making a commercial decision the receiver nonetheless investigates all the options and does not discount all reasonable possibilities. In “making a commercial decision” the receiver should refrain from “taking a punt”. As the decision in Kyuss indicates, making a commercial decision which is nonetheless ultimately or almost correct may, in any event, result in protracted and costly litigation.

Has the General Law Position changed?

It is important to consider the issue of whether s420A, in significantly raising the standard required of receivers when exercising a power of sale over the mortgaged property of a corporation, has altered the general law with respect to receivers duties when selling assets. This is an important issue because the Courts have, in other
contexts, supported or at least considered the proposition that regard be had to statute (past and present) in construing the common law.\textsuperscript{70}

A recent decision which examines the state of the general law in light of the higher standard imposed with by the enactment of s420A is that of \textit{Inkhorn Pty Ltd v Herbert}.\textsuperscript{71}

In \textit{Inkhorn}, the defendant, Herbert, was a receiver who had exercised the power to sell the property of Inkhorn Pty Ltd, the plaintiff. Inkhorn commenced proceedings against Herbert alleging that Herbert had breached his duty to take reasonable care to sell the property for its market value or for the highest price available. Herbert applied to have these claims struck out.

As Inkhorn’s cause of action arose before s420A commenced, Inkhorn had to rely on Herbert’s obligations at general law. In this regard, Inkhorn sought to rely on a number of English authorities which held that a receiver owed a mortgagor a duty to take care to achieve a proper price when exercising the power of sale over the mortgaged property. Herbert, on the other hand, argued that the English authorities did not represent the law in Australia. Rather, Herbert asserted that the law in Australia required a receiver to merely act in good faith which would ordinarily be established provided that the receiver acted without fraud and without wilfully or recklessly sacrificing the interests of the mortgagor.

At first instance, Master Sanderson agreed with Herbert and struck out the relevant parts of Inkhorn’s claim. Inkhorn subsequently appealed.

Upon appeal, Inkhorn postulated, amongst other arguments, that because receivers’ duties when selling assets of a corporation are now statutory, regard ought to be had to the legislative position to determine the content of the preceding rule in equity.\textsuperscript{72} Ipp and Miller JJ considered that this argument had no foundation.\textsuperscript{73} Their Honours noted that in some instances it is appropriate to have regard to legislative changes in construing the common law, however, in determining receivers’ duties at general law the appropriate authority is the High Court decision in \textit{Pendlebury v Colonial Mutual Life Assurance Society Limited} which established that the relevant duty is one to act in good faith: that is, without fraud and without wilfully or recklessly sacrificing the interests of the mortgagor, but stopping short of exposing the mortgagee to liability for mere negligence or carelessness.\textsuperscript{74}

Inkhorn therefore establishes that the duties imparted upon a receiver at general law are different from the duties imparted upon a receiver in statute; the latter imposing a standard significantly higher than the former.

\textsuperscript{71} Unreported, Supreme Court of Western Australia, Sanderson M, 11 February 2000 at first instance, and [2000] WASCA 333 upon appeal.
\textsuperscript{72} \textit{Inkhorn Pty Ltd v Herbert} [2000] WASCA 333 at [23].
\textsuperscript{73} Ibid at [8] per Ipp J and at [24] per Miller J.
\textsuperscript{74} (1912) 13 CLR 676.
Mortgagees’ liability for receivers’ actions

As outlined above, the purpose and effect of rendering the receiver the agent of the mortgagor is to relieve the mortgagee from the liabilities which the law ordinarily casts upon a mortgagee entering into possession of mortgaged property and instead place upon the mortgagor the liability for the receiver’s acts and defaults. Unfortunately for the mortgagee, however, the appointment of a receiver does not absolve the mortgagee from liability if the mortgagee interferes with the receiver’s conduct of the realisation of the mortgaged property. A recent decision where the issues pertaining to a mortgagee interfering in the receivership is that of State Bank of New South Wales Limited v Chia; Chia v Rennie.76

Chia’s case is a very lengthy decision where Einstein J considered a myriad of legal issues arising from relatively complex facts. For present purposes, however, the relevant facts may be stated as follows.

As part of a New South Wales Government project involving construction and operation of the Mount Druitt cinema complex in the late 1980s the State Bank of New South Wales Limited (the Bank) granted a number of facilities to Dr Chia which were guaranteed by Mrs Chia (together, the Chias). The facilities were substantially utilised in relation to the construction of the Astro Cinema. From time to time additional advances were provided to accommodate cost overruns. In time, the project experienced a number of difficulties which resulted in debt servicing shortcomings. Dr Chia’s financial position worsened and consequently, on 7 February 1997, the Bank appointed a receiver to the Astro Cinema and its undertaking including the freehold of which the registered proprietor was Dr Chia.

On 5 May 1997, the receiver sold the Astro Cinema to Hoyts Cinema Limited (Hoyts). The Bank subsequently commenced proceedings against Dr Chia for repayment of the monies due by him to the Bank pursuant to the terms of the facilities. Specifically, it claimed possession of a number of properties owned by Dr Chia. The Bank also commenced proceedings against Mrs Chia for repayment of the monies due and payable pursuant to her guarantees.

The Chias cross-claimed against the Bank and the receiver alleging that the receiver breached a duty of good faith and a duty of care owed to them as mortgagor/guarantor by failing to obtain the best price possible for the cinema and by demonstrating wilful default and neglect in the management of the business of the cinema.

Put simply, the Chias considered that the receiver sold the Astro Cinema to Hoyts at an under value. Furthermore, the Chias posited that the Bank and the receiver denied Dr Chia the ability to make a higher offer in response to Hoyts’ offer because both the Bank and the receiver failed to inform Dr Chia of the impending sale to Hoyts. Additionally, the Chias considered that the receiver’s sale to Hoyts was not at arms length, not only because Hoyts was an audit client of the receiver’s firm, Ernst & Young but also because Hoyts was a client of the Bank which allegedly wished to ensure that its client received a good bargain. The Chias contended that the Bank

76 [2000] NSWSC 552.
placed considerable pressure upon the receiver to accept Hoyts' offer as soon as possible.

As the mortgagor and guarantors were persons, s420A did not apply and accordingly, Einstein J determined the case with reference to the general law duties imparted upon a receiver appointed out of court.

Einstein J ultimately dismissed the Chias’ arguments and concluded that the Chias’ claims against the receiver and the Bank for breach of duty owed to them as mortgagor/guarantor failed. His Honour considered that both the receiver and the Bank acted in good faith and did not wilfully or recklessly sacrifice the interests of the Chias.

Although dismissing the claims by the Chias against the receiver and the Bank, Einstein J nonetheless found that the receiver carried out his tasks as receiver and ultimately executed the sale of the Astro Cinema to Hoyts in close association with the Bank and that, in fact, it was the Bank who made the ultimate decision to sell the cinema to Hoyts. 77 His Honour considered that if liability had been established by the Chias then it would have been proper in the circumstances for the Bank to be held to account to the Chias in the same manner and to the same standards. 78

In reaching this conclusion, His Honour examined the authorities in relation to whether a mortgagee can be held liable for the receiver’s acts if the mortgagee interferes in the receivership. Einstein J 79 cited the comments of Sir Richard Scott VC in Medforth v Blake 80 who stated:

If a mortgagee establishes a relationship with the receiver he has appointed under which the receiver exercises his powers in accordance with instructions given by the mortgagee, I can see the force of an argument that if the receiver is liable to the mortgagor then so will the mortgagee be liable. ... If the mortgagee chooses to instruct the receiver to carry on the business in a manner that is a breach of the receiver’s duty to the mortgagor, it seems to be quite right that the mortgagee, as well as the receiver, should incur liability. This conclusion does not in the least undermine the receivership system. What it might do is promote caution on the part of mortgagees in seeking to direct receivers as to the manner in which they (the receivers) should exercise their powers. I would regard that as salutary. 81

Einstein J ultimately considered this to be the correct view of the law and therefore considered that in circumstances where the mortgagee is heavily involved in the performance of the receiver's duties, such as directing when and to whom a receiver is to exercise the power of sale, it is proper that the mortgagee be held to account in the same manner as the receiver and to the same standard. 82

77 Ibid at [880].
78 Ibid at [886].
79 Ibid at [885].
80 [1999] 3 WLR 922.
81 Ibid at 930.
82 State Bank of New South Wales Limited v Chia; Chia v Rennie [2000] NSWSC 552 at [886].
Chia’s case therefore serves as a warning to mortgagees to maintain some distance from the receivership process. Obviously, a mortgagee must necessarily consult with the receiver and will usually have to instruct the receiver to some degree. If the mortgagee’s instructions, however, require the receiver to compromise his/her duties, then the mortgagee may be equally liable to the mortgagor or that person for the receiver’s breach of duty.

Relationship between s420A and ss180-184

As outlined above, s420A(2) relevantly provides:

Nothing in subsection (1) limits the generality of anything in s180, 181, 182, 183 or 184.

Section 420A(2) therefore requires consideration as to how s420A inter-relates with or impacts upon the duties imparted upon a receiver in s180-184 which deal with the duties of officers of a corporation and which arise as a result of a receiver being included in the definition of an officer of a corporation.

It should firstly be made clear that there is some conjecture as to whether s180-184 should (or actually do) apply to receivers realising mortgaged property.\(^{83}\) Put simply the argument is that s180-184 only apply to a receiver when he/she is managing the property of a corporation as opposed to when he/she is exercising a power of sale over the property of a corporation. The distinction is fine but nonetheless significant because a receiver may face civil and criminal sanctions for conduct that contravenes the duties contained within s180-184. It is important therefore to make some comment about the operation and effect of s180-184 and the associated penalty provisions and briefly state why the duties might be relevant to a receiver who is realising mortgaged property.

It is appropriate to deal with s181-184 separately from s180. Sections 181-183 are primarily a statutory enactment of equitable/good faith principles which are, in any event, imparted upon a receiver at general law. By way of summary, s181-183 require a receiver to:

- act in good faith in the best interests of the corporation and for a proper purpose\(^{84}\);
- not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the corporation\(^{85}\);
- not improperly use information gathered during the receivership process to gain an advantage for themselves or someone else or cause detriment to the corporation\(^{86}\).

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84 Corporations Law, s181(1).
85 Corporations Law, s182(1).
A receiver who fails to comply with the above duties may be liable for criminal or civil penalties depending on the nature of the conduct giving rise to the contravention.

As for liability for a criminal penalty, s184 makes it a criminal offence to fail to comply with the statutory duties in s181-183 if the contravention was intentional or reckless. For example, a receiver who fails to discharge the duty of good faith, or the duties with respect to misuse of position or information commits an offence if the contravention is reckless or intentionally dishonest. If the receiver’s contravention amounts to a criminal offence, the receiver may be liable for a term of imprisonment or a monetary fine.\(^\text{87}\)

As for liability for a civil penalty, recourse is to be had to Part 9.4B of the Corporations Law. The purpose of imposing a civil penalty is to render liability upon a receiver whose contravening conduct is not serious enough to justify a criminal penalty but is nonetheless a contravention of the law.\(^\text{88}\) If a court declares that a receiver has contravened a civil penalty provision (of which s180 – 183 are such provisions) with conduct that is serious or which materially prejudices the interests of the company, it may order that the receiver pay a pecuniary penalty to the Commonwealth Government of up to $200,000.00.\(^\text{89}\) Alternatively, the court may disqualify the receiver\(^\text{90}\) or order the receiver to pay compensation to the mortgagor company for the damage suffered by it.\(^\text{91}\)

In terms of how s181-184 interrelates with s420A, it is important to bear in mind the scope of the duty in s420A within the context of all the duties owed by a receiver. Those who argue that s181-184 should apply to a receiver realising mortgaged property view s420A as quite narrow and specific in its operation because its focus is upon the end result of the sale of the mortgaged property. It is primarily concerned with whether the receiver sold the property for its market value or its best price depending on the circumstances rather than the receiver’s conduct. Sections 181-184 therefore necessarily supplement s420A because they focus on the receiver’s conduct rather than the end result. In other words, the logic is that it does not necessarily follow that a receiver who sells mortgaged property for its market value or its best price conducts the sale in a manner which exhibits conduct in good faith to the mortgagor or other persons or entities who might be affected by the receiver’s conduct. Here is not the place, however, to review the relevant arguments and definitively resolve the issue. Nonetheless, as outlined above, it is necessary to bear in mind the consequences that may flow from a breach of s181-184 because of the criminal and civil penalties that may be imposed upon a receiver.

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\(^{86}\) Corporations Law, s183(1).

\(^{87}\) Corporations Law, s1311(1A) and Schedule 3.


\(^{89}\) Corporations Law, s1317G.

\(^{90}\) Corporations Law, s206C.

\(^{91}\) Corporations Law, s1317H.
As for s180, the position is a little different. Its inter-relationship with s420A requires consideration of some different issues to those associated with the inter-relationship of s181-184 with s420A. Section 180(1) imposes a duty to take care which is almost identical to that required in s420A. There are, however, some important differences. These include:

♦ Section 180(1) is a civil penalty provision but not a criminal penalty provision, whereas s420A is neither a civil nor criminal penalty provision;

♦ Section 180(1) states that the receiver’s conduct is to be assessed in light of the particular circumstances, whereas s420A does not permit recourse to the particular circumstances except in so far as s420(1)(b) requires consideration of the circumstances existing when the property is sold when determining whether the best price reasonably obtainable was achieved in the case of property which has no market value;

♦ the business judgement rule contained in s180(2) applies to conduct which may prima facie contravene s180(1) but it does not apply to s420A.

Here is not the place to examine in detail the efficacy of having overlapping duties in s180 and 420A which may in any event have differing outcomes if they are contravened. Nonetheless, it is arguable that s420A will apply before s180(1) as a matter of statutory construction because it is the more specific provision.92

Until the inter-relationship between s180-184 and s420A is clarified beyond the mere statement in s420A(2) that s420A(1) does not limit the operation of s180-184, receivers should, in any event, aim to comply with all duties as a matter of prudent conduct so as to limit any potential liability. At a practical level, conduct which complies with s180-184 will likely result in compliance with s420A.

This paper is only intended to provide an alert service on matters of concern or interest to readers. It should not be relied upon as advice. Matters differ according to their facts. The law changes. You should seek legal advice on specific fact situations as they arise.

92 Specific statutory provisions prevail over general statutory provisions: Smith v R (1994) 181 CLR 338 at 348.