Michaelmas Term
[2023] UKPC 42
Privy Council Appeal No 0061 of 2021

JUDGMENT

Keith Arjoon and 2 others (Respondents) *v* Maria Daniel (Receiver) (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Lloyd-Jones
Lord Leggatt
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
4 December 2023

Heard on 7 November 2022

Appellant
Kerwyn Garcia
(Instructed by Ward Hadaway (Newcastle))

Respondent
Fyard Husein SC
Devesh Maharaj
(Instructed by Devesh Maharaj & Associates)

LORD RICHARDS:

Introduction

1. This appeal arises out of proceedings brought against a receiver appointed over the undertaking and assets of KPG Co Ltd ("the Company") by the holder of a debenture securing substantial indebtedness of the Company. The claimants are the two directors of the Company, and the Company itself, acting by its directors.

2. On the same day as the claim form was filed, the claimants were granted an ex parte injunction, restraining proposed sales by the receiver of the business and assets of the Company. The receiver subsequently applied (i) to discharge the injunction, (ii) to strike out the Company as a claimant on the grounds that no indemnity had been offered to protect the Company's assets against depletion due to any order for costs against the Company, and (iii) to strike out the directors' claims for alleged breaches of duty by the receiver on the grounds that they lacked standing to bring these claims. The High Court (Mohammed J) acceded to the receiver's application in full. On appeal, the Court of Appeal (Pemberton JA and Dean-Armorer JA) reversed her decision and dismissed each part of the receiver's application. The receiver appeals to the Board with leave granted by the Court of Appeal.

3. The issues on this appeal are the same as those which were before the courts below and may be summarised as follows:

(i) Should the Company be struck out as a claimant on the grounds that it had failed to provide an indemnity as regards any depletion of the Company's assets on account of costs?

(ii) Should the claims for breach of duty brought by the directors be struck out on the grounds that they do not have standing to make those claims?

(iii) If the answer to either of those issues is negative, should the interim injunction be discharged?

The factual background

4. The Company operates in the oil and gas sector in Trinidad and Tobago and its business includes, or included, marine construction and fabrication and equipment rentals. Its only directors are the first and second claimants, Keith Arjoon and Shandon

Arjoon ("the directors"). During the period 2008 to 2014, Republic Bank Ltd ("the Bank") granted loan facilities to the Company, secured by a deed of debenture ("the debenture") and a deed of mortgage ("the mortgage") over two parcels of land ("the La Brea Land") both dated 15 August 2008. These were followed subsequently by a series of charges on vessels and chattels. The debenture secured all the liabilities of the Company to the Bank by fixed and floating charges on all its property, present and future.

5. The Company experienced difficulties in obtaining payment under several major contracts with the Petroleum Company of Trinidad and Tobago Ltd ("Petrotrin"), leading to defaults by the Company on its liabilities to the Bank.

6. By an order of the High Court made on 9 December 2016, Maria Daniel ("the receiver") was appointed interim receiver of all the Company's assets charged by the debenture and the mortgage. The receiver is the defendant in the proceedings and the appellant in the present appeal. On 26 April 2017, the Bank appointed the receiver as receiver of the Company's business and assets pursuant to the debenture, the mortgage and the vessel and chattel mortgages. The Company's indebtedness to the Bank was then $72,957,758.12 and US$808,629.71. (In this judgment, $ denotes TT$ unless otherwise stated.)

7. In or about November 2019, the receiver informed Shandon Arjoon of her intention to sell the Company's assets for the sum of $35.5m within 30 days, indicating that the assets were insufficient to discharge in full the indebtedness to the Bank. The directors objected to the proposed sale and, in a pre-action protocol letter from their lawyers dated 20 November 2019, alleged breaches of the receiver's equitable and statutory duties. The letter requested the receiver to reconsider her decision and to give further consideration to two prospective financiers who were willing to support the directors in rescuing the Company.

8. The receiver did not accede to this request but entered into an agreement dated 25 November 2019 for the sale of assets to Sammy's Multilift Services Ltd for $26m and into a further agreement dated 29 November 2019 for the sale of the La Brea Land to Inland and Offshore Contractors Ltd for $8.5m.

The Proceedings

9. On 16 December 2019, the directors caused the proceedings to be commenced by filing the claim form and statement of claim, naming themselves and the Company as claimants and the receiver as the defendant.

10. The claims pleaded in the statement of claim are based on allegations of breaches by the receiver of her equitable and statutory duties.

11. Some claims are pleaded as breaches of equitable duties only, in dealing with the property of the Company and managing its business. It is alleged that she failed to take steps to recover sums totalling $328.6m due from Petrotrin; to charge Petrotrin for storage costs totalling $2.27m; and to secure and maintain the Company's property (no value is pleaded for this claim, except $3.47m for missing equipment). It is also pleaded that the receiver's breaches of equitable duties in failing to pursue claims against Petrotrin and in failing to intervene in proceedings brought by Petrotrin on a third-party performance bond, against which the directors had given personal indemnities to the bond issuer, caused direct loss to the directors personally as they had been held liable for $8.8m on their indemnity.

12. Other claims are pleaded as based on breaches both of equitable and statutory duties to deal with the Company's property in a commercially reasonable manner. It is alleged that the receiver restricted the Company's business to equipment rental, resulting in a loss of profit of some $45m on other business. It is alleged that she failed to provide information to prospective financiers, resulting in the claimants' inability to secure a refinancing of the Company's secured liabilities to the Bank; this is also alleged to be a breach by the receiver of her statutory duties to act honestly and in good faith. It is further alleged that the proposed sales of the Company's land at La Brea and of its other assets were at gross undervalues, when there were financiers willing to provide funds to refinance the Bank's loan and to allow the Company to continue in business.

13. A third category of claims comprises alleged breaches of statutory obligations alone. It is alleged that the receiver failed to prepare interim reports relating to the receivership and to provide copies of them to (among others) the Company; to keep records of all receipts, expenditures and transactions involving the charged or other property of the Company or to prepare monthly summaries of her administration of such property; and to keep accounts of her administration and to make them available for inspection by the directors.

14. Damages of almost $60m are claimed, with some heads of loss yet to be calculated.

15. Although the declarations sought in the claim form state that the receiver acted in breach of duties owed to "the Claimants individually or collectively", the losses claimed are to a great extent losses said to have been suffered by the Company, rather than by the directors personally. The only clear exception is the claim for $8.8m in respect of the indemnity on which the directors had been held liable.

16. On 16 December 2019, the directors obtained the ex parte injunction mentioned above.

17. On 21 January 2020, the receiver filed the application to strike out the Company as a party and to strike out the director's claim. After a hearing on 6 March 2020, Mohammed J ("the judge") gave judgment on 8 April 2020, discharging the injunction, striking out the Company as a party to the proceedings and striking out the directors' claims.

18. By its judgment delivered on 23 September 2020, the Court of Appeal reversed the judge's order and restored the interim injunction.

Issue 1: Striking out the Company as a claimant

The directors' authority to issue the proceedings in the name of the Company

19. It is important to note that at all stages in the proceedings it has been accepted by the receiver that the directors of the Company had power to authorise the issue of proceedings in the name of the Company against her. This has not been an issue in the proceedings.

20. In *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814 ("*Newhart Developments*"), the Court of Appeal held that directors retained a residual power to bring proceedings on behalf of a company in receivership against a debenture-holder when, as would be expected, the receiver appointed by the debenture-holder declined to do so. Sir Nicolas Browne-Wilkinson V-C, sitting at first instance in *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53 ("*Tudor Grange*") expressed substantial doubts about the correctness of the decision in *Newhart Developments*, but accepted that he was bound by it.

21. The decision in *Newhart Developments*, that there are circumstances in which the directors of a company in receivership may authorise proceedings in the company's name against the receiver or debenture-holder, has been widely accepted and applied in many common law jurisdictions and the Board is not aware of any case in which the contrary has been held. Reference may be made to *Watts v Midland Bank plc* [1986] BCLC 15 (Peter Gibson J) and *Sutton v GE Capital Commercial Finance Ltd* [2004] EWCA Civ 315, [2004] 2 BCLC 662 in England; the Australian authorities reviewed in *Mainland Property Holdings Pty Ltd v Naplend Pty Ltd* [2022] FCA 1305; the decision of the New Zealand Court of Appeal in *Paramount Acceptance Co Ltd v Souster* [1981] 2 NZLR 38; the Canadian authorities reviewed by the Court of Appeal of Newfoundland and Labrador in *Maple Leaf Foods Inc v Markland Seafoods Ltd* (2007)

NLCA 7; and *Pan Caribbean Financial Services Ltd v Western Cement Co Ltd* [2011] JMCA Civ 2 (Court of Appeal) and *Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd* [2014] JMCC Comm 7 (Edwards J) ("*Ocean Chimo*") in Jamaica.

22. There are, however, significant differences in the reasoning in these decisions: compare, for example, *Newhart Developments* and *Maple Leaf Foods Inc v Markland Seafoods Ltd*. Notwithstanding these differences, underlying all the decisions is a recognition that, unless the directors are able to authorise such proceedings, the conflict of interest to which receivers are inevitably subject will in practice result in companies being denied access to the courts to seek remedies for legal wrongs alleged against receivers or the debenture-holders which have appointed them.

23. The present case is a claim against the receiver. Section 296 of the Companies Act 1995 (Chap 81:01 of the Laws of the Republic of Trinidad and Tobago) ("the CA") provides that the court may, on the application of "any interested person", make an order requiring a receiver or a person by whom the receiver was appointed to make good any default in connection with the receiver's custody or management of the property or business of the company. It cannot be open to doubt that the company is a "person interested" for these purposes which will inevitably have to act by its directors.

The lack of an indemnity from the directors

24. The application to strike out the Company as a claimant was made on the basis that the directors had not offered or procured an indemnity in respect of any adverse order for costs that might be made against the Company. The purpose of such indemnity would be to protect the assets of the Company available to meet the secured claims of the Bank.

25. The receiver filed evidence showing that the Company's assets were insufficient to meet the Bank's claim in full, with a likely shortfall of the order of $42m. Although the directors did not accept this evidence, the judge found that they had not provided evidence to dispute it, and she accepted that the secured debt of the Bank exceeded the realisable value of the Company's assets by some $42m.

26. The judge held that, in view of the shortfall, the Company's claim should, in the absence of an indemnity, be struck out as an abuse of the process.

27. The judge considered the application to strike out the Company as a claimant at paras 24-62 of her judgment. Having reviewed a number of authorities, including *Newhart Developments* and *Tudor Grange*, the decision of the Court of Appeal of Trinidad and Tobago in *Busy Printery Ltd v Bank of Commerce Trinidad and Tobago*

Ltd (Civil Appeal no. 134 of 1993) (vLex Justis VLEX-793917041) ("*Busy Printery*"), the decision of the Supreme Court of Newfoundland and Labrador in *Maple Leaf Foods Inc v North Atlantic Sea Farms Corp* 2005 NLT 36 ("*Maple Leaf*"), and *Ocean Chimo*, she held at para 60 that "without the appropriate indemnity, directors are not at liberty to commence proceedings on behalf of a company in receivership in circumstances where the assets of the company are insufficient to meet the debt owed to the debenture holder since the consequence is there may be inevitable costs orders against the company which will prejudicially deplete the assets available to the secured debtor for satisfaction of his debt".

28. The Court of Appeal considered this issue at paras 22-30 of its judgment. It was submitted for the claimants that the provisions concerning receivership introduced by the CA and by the Bankruptcy and Insolvency Act 2007 (Chap 9:70 of the Laws of the Republic of Trinidad and Tobago) ("the BIA") superseded the law as expressed in *Busy Printery*.

29. The Court of Appeal noted that the judge had held, based on *Busy Printery*, that it was a pre-condition for an action by a company against a receiver that a third-party indemnity should be provided at the start of the proceedings, failing which the action would be struck out as an abuse of process.

30. The Court of Appeal referred to section 295 of the CA and section 20 of the BIA, observing that the effect of the receivership regime is to give the court wide powers where allegations of breaches of statutory duty are made against a receiver and that the legislation does not state that a third-party indemnity must be provided as a precondition to proceedings. The court continued at para 27:

> "That is not to say that the court cannot conduct an inquiry into the need for a TPI once a party files an action. This to our mind… can be utilised as a management tool or be a procedural step to be dictated by a trial court and contingent upon the facts of each case. It may satisfy the express policy basis of the BIA balancing the rights of secured creditors and the rehabilitation of the debtor company. Having recognised that basis, we do not see how the lack of a TPI can automatically trigger the nuclear option of striking out an action on the ground that it constituted an abuse of process."

31. In those circumstances, the court concluded that the judge had been plainly wrong to strike out the company's claim.

32. Nonetheless, the court considered that "the rule that directors ought not to be at complete liberty to commence proceedings on behalf of a company and run the risk of a hostile costs order thereby depleting the assets of the debtor company remains relevant". The court should "conduct an exercise to determine the extent of the indemnity needed and who could provide such an indemnity" (para 30).

33. The effect of the Court of Appeal's judgment is that the judge had been wrong to treat a third-party indemnity as a necessary pre-condition to the existence of proceedings brought in the name of a company against a receiver, and on that basis set aside her order striking out the Company's claim in these proceedings. However, a requirement for a third-party indemnity was not necessarily inconsistent with the statutory provisions concerning receivers in the CA and the BIA. Whether a third-party indemnity should be required was a matter to be considered by the court in the light of the facts of each case. Although the Court of Appeal does not say so in terms, it can be assumed that the question of whether an indemnity should be required is one to be considered at an early stage in the proceedings. The Court of Appeal did not, however, provide guidance as to the approach to be adopted by the court in considering whether to order an indemnity.

34. Before considering the impact of the statutory provisions to which the Court of Appeal referred, the Board will refer to the relevant authorities.

Relevant authorities

35. In *Newhart Developments* the Court of Appeal (Stephenson and Shaw LJJ) held that in the circumstances of that case the directors had the power to bring proceedings against the debenture-holder in the name of the company, notwithstanding the appointment of a receiver, provided that "where so doing does not in any way impinge prejudicially on the position of the debenture holders by threatening or imperilling the assets which are subject to the charge" (per Shaw LJ at p 819). At p 821, Shaw LJ said that where the directors cause the company to bring proceedings, "it does not seem to me that the rights or function of the receiver are affected if the company is indemnified against any liability for costs (as here)". The directors were not precluded from bringing such proceedings "provided only, of course, that nothing in the course of the proceedings which they institute is going in any way to threaten the interests of the debenture holders". There was no adverse effect on the debenture holder in that case if the action were allowed to proceed "inasmuch as the company is not called upon to finance it out of its own resources, and will not have to meet any claim for costs if the action fails. If more were needed, Mr Hartley has provided an indemnity for the company against any possible liability to costs".

36. In *Tudor Grange*, the directors of companies in receivership brought proceedings against the debenture holders, challenging the validity of the security under which the receivers had been appointed. The debenture holders applied to strike out the action. One of the grounds of the application was that, in the absence of a third-party indemnity, the proceedings put the charged assets at risk.

37. Sir Nicolas Browne-Wilkinson V-C, sitting at first instance, noted at p 63 that in *Newhart Developments*, where a third-party indemnity was to be provided, "the bringing of proceedings by the directors in the company's name could not in any circumstances prejudice the property for which the receiver was responsible". By contrast, in *Tudor Grange*, the proceedings started by the directors "could directly impinge on the property subject to the receiver's powers in that they held no indemnity against the liability of the company's assets to satisfy a hostile order for costs made against the companies". In those circumstances, he held that the directors had no power to start the proceedings. He was prepared to allow 28 days for the provision of a third-party indemnity, but he struck out the action on other grounds.

38. Both decisions proceed on the basis that, while proceedings may be brought by the directors in the name of a company in receivership, the proceedings must not put the charged assets at risk and that the risk is avoided by the provision of a third-party indemnity in respect of any costs which may become payable by the company.

39. In *Tudor Grange*, Sir Nicolas Browne-Wilkinson put this specifically on the basis that, unless a third-party indemnity against a hostile costs order were in place when the proceedings were issued, the directors had no power to start the proceedings. He does not set out in the judgment his reasons for that conclusion. Since the powers of directors under a company's articles of association will not be subject to any such restriction, Sir Nicolas presumably considered either that it was an implied term of such debentures that the directors' residual powers to commence proceedings could not be exercised without an indemnity being in place or it was a necessary incident of the equitable obligation of a chargor not to imperil the chargee's interest in the charged property.

40. The Board has difficulty in seeing that the equitable obligation to protect the chargee's interest affects the extent of the directors' powers or the validity of an exercise of their powers. Rather, if those powers are exercised in a way which imperils the chargee's interest, the court will on the chargee's application take the steps it considers appropriate to safeguard the position of the chargee. So, the court may, and generally will, require the provision of an indemnity before permitting the proceedings to continue. In circumstances where the court has the power to intervene to enforce equitable obligations, it is neither necessary nor appropriate to imply a term into a debenture which is in any event entirely silent on the question of the directors' powers to commence proceedings.

41. Later English decisions and decisions in other jurisdictions either do not support or have not analysed the approach of Sir Nicolas Browne-Wilkinson in basing the requirement for an indemnity on the *vires* of the directors' decision to commence proceedings in the name of the company.

42. In *Sutton v GE Capital Commercial Finance Ltd* [2004] EWCA Civ 315 ("*GE Capital*"), the Court of Appeal (Chadwick and Rix LJJ) held that, in the particular circumstances of that case, proceedings commenced by the directors in the name of a company in receivership against the debenture holder were properly brought. Having referred to *Newhart Developments* (but not to *Tudor Grange*), the court added the following at para 51:

> "We should make it clear that nothing that we have said should be taken to suggest that the costs of bringing the APL action should fall on assets which are charged to GE. It is, we suspect, a necessary feature of cases, such as this - where all the assets of the company are charged to the debenture holder, who does not consent to the action being brought – that the director will have to find outside funds. Further, nothing that we have said should be taken to suggest that the defendant would not be entitled to seek an order that the claimant company provide, from outside funds, security for its (the defendant's) costs. But those considerations do not lead to the conclusion that the action is not properly brought."

43. Commenting on this passage (but again without reference to *Tudor Grange*), Richard Snowden QC (as he then was), sitting as a Deputy High Court Judge, said in *Closegate Hotel Development (Durham) Ltd v McLean* [2013] EWHC 3237 (Ch); [2014] Bus LR 405 ("*Closegate*") at para 12:

> "As explained by Chadwick LJ, where all of the assets of a company are caught by a floating charge, the position is that as a practical matter the directors who cause a company to bring such proceedings are likely to have to find outside funds to provide assurance to the solicitors that they instruct to act on behalf of the company that their fees and disbursements will be paid from some source other than the charged assets (which will be in the hands of the receiver). Further, the defendant to such proceedings may be entitled to apply for security for his costs of the action on the footing that the charged assets in the hands of the receiver will not be available to meet any adverse costs order against the company."

44. The point made by the Court of Appeal and Mr Snowden QC as regards the company's own costs appears, in the view of the Board, to be well made. The directors will have to find funds from sources other than the company to meet the costs of the company as claimant, because the liability for such costs will at best rank as an unsecured claim behind the debenture holder's secured claim. In most cases, including the present case, the indemnity sought by a defendant debenture holder or receiver relates not to the company's own costs but to costs orders that may be made against the company.

45. However, the suggestion that the costs of the debenture holder as defendant can be adequately protected by an application for security for costs in the ordinary way is open to question. The Board will return to this issue later in the judgment.

46. The position in Australia appears to be similar to that in England. An indemnity is not a pre-condition to the commencement of proceedings, but a debenture holder or receiver named as defendant may call for one. In *Deangrove Pty Ltd v Commonwealth Bank of Australia* (2001) 108 FCR 77, [2001] FCA 173, following a review of cases including *Newhart Developments* and *Tudor Grange*, Sackville J said at para 40 that the directors had power to initiate proceedings in the company's name against the debenture holder "provided the directors offer the company a satisfactory indemnity against costs. The latter requirement is designed to ensure that the interests of the debenture holder, qua debenture holder, are not prejudiced". It was only well after the commencement of the proceedings that an indemnity had been offered and the judge adjourned the debenture holder's application to dismiss the proceedings to allow a director to provide or offer security to support the indemnity. Sackville J's approach to the provision of an indemnity was approved by the full Federal Court (Branson, Marshall and Stone JJ) in *Ernst & Young (Reg) v Tynski Pty Ltd* (2003) 47 ACSR 433.

47. A similar approach is adopted in Canada. The application in *Maple Leaf*, a case brought by the debtor company against its secured lender, was to strike out the proceedings on the ground that, following the appointment of a receiver, the directors had no authority to commence the proceedings on behalf of the company or, in the alternative, for security for costs on grounds of the company's insolvency. The application to strike out the proceedings was refused, but the application for security for costs succeeded. Although the application was for security for costs and was not put on the same basis as in the present case or as in the authorities cited above, the judge accepted the approach developed in *Newhart Developments* and other cases. He said at para 36:

> "Debenture-holders should be protected from the negative consequences of litigation on the security document itself. Where, as in this case, the costs of any action are likely to diminish the value of the security, the courts will attempt to

> ensure that litigation does not proceed on the backs of the debenture holders ... Generally it would be considered as a condition for allowing the action to continue that the directors, or the guiding minds of the respondent, put up security."

48. This approach was confirmed by the Court of Appeal of Newfoundland and Labrador in *Maple Leaf Foods Inc v Markland Seafoods Ltd* (2007) NLCA 7 where, having reviewed the Canadian authorities, the court said at para 42 that the power of the directors to bring proceedings against a debenture-holder in the company's name was "subject the restriction that the litigation should not threaten the interests of the secured creditor… The 'interests of the secured creditor' in this context refers to the risk of dissipation of the assets of the debtor company. Accordingly the directors who wish to direct litigation will generally be required to post security for costs".

49. The Court of Appeal of Trinidad and Tobago applied the same approach in *Busy Printery.* The directors of a company in receivership commenced proceedings in the name of the company against the debenture holder and the two receivers appointed by it. Although the borrowings secured by the debenture had been repaid shortly after the appointment of the receivers, it was accepted that there were outstanding costs and expenses secured by the debenture. The court said at p 5: "As a result, the appellant company's property remained subject to the debenture and in that event the respondents were entitled to seek to ensure that the assets of the company were not imperilled by the acts or conduct of the directors of the appellant company to the possible detriment of the debenture holder".

50. The majority of the Court of Appeal (Gopeesingh JA and Permanand JA) held that, in view of the insufficiency of the company's assets, the defendants were entitled to a stay of the proceedings pending the provision by the directors of an indemnity for the costs which the company might incur and for any adverse order for costs that might be made against it.

51. Giving the lead judgment, Gopeesingh JA made clear that the defendants were not challenging the right of the directors to institute the proceedings: see, for example, vLex transcript at p 6. At pp 9-10, he said:

> "In view of the foregoing, I think the crucial factor in determining whether, subsequent to the appointment of a receiver pursuant to the terms of a debenture, directors of a company have power to institute and maintain proceedings is whether any prejudice would be occasioned to the debenture holder. Such prejudice would occur either if the proceedings would interfere with the receiver's function of getting in the

> assets of the company or if the proceedings would prejudicially affect the debenture holder by imperilling the assets of the company which are subject to the charge. It plainly emerges as well from the decisions in *Newhart* and *Tudor Grange Holdings Limited* that if the company in receivership is called upon to finance proceedings brought by its directors out of its own resources or may have to meet any claim for costs if the action brought by its directors fails then the debenture holder would be affected adversely and as a corollary the rights or functions of the receiver would similarly be affected. However, if the company is indemnified by outside sources against all liability, not only for its own costs of the action but also for costs which the company might be ordered to pay on a hostile order as to costs made against it then the action commenced by the directors of a company in the company's name would not impinge directly on the property subject to the receiver's powers. Conversely, unless the directors of the company hold such an indemnity against the liability of the company's assets, then the mere institution of proceedings by directors of the company would, *ipso facto,* prejudicially affect the debenture holder by imperilling the assets of the company subject to the charge. Accordingly, it would be unnecessary for either the debenture holder or the receiver to adduce any other evidence to show that the assets of the company are likely to be depleted thereby."

52. The minority (Hosein JA) took the view that, on the unusual facts of that case, it could not be assumed that the charged assets would or might be insufficient to cover the litigation costs as well as the outstanding costs incurred by the debenture holder and the receivers. He regarded the application as being in substance an application for security for costs and therefore the defendants were required by the rules to provide evidence that the charged assets might be insufficient for these purposes.

53. The principle that directors must provide a third-party indemnity when bringing proceedings in the name of the company if the proceedings would prejudice the position of the debenture holder by imperilling the charged assets was accepted by the Court of Appeal of Jamaica in *Pan Caribbean Financial Services Ltd v Western Cement Co Ltd (in receivership)* [2011] JMCA Civ 2.

54. Before the judge, the directors relied on the decision at first instance of Edwards J in the Supreme Court of Jamaica, Commercial Division, in *Ocean Chimo*. In that case, the directors had commenced proceedings, before the appointment of a receiver, against debenture holders for damages for breach of the loan agreement, fraud and conspiracy. Following the receiver's appointment, the defendants applied for a stay of the action

pending either the consent of the receiver to the continuation of the action or, failing that, a third-party indemnity against the company's costs and any costs that it might be ordered to be paid. The judge accepted that in principle an indemnity could be required but refused the application on the grounds that there was no evidence that the charged assets would be insufficient to cover all secured liabilities and any such costs. He held that the burden of proof in this respect lay on the debenture holders. On the facts of the case, it was not obvious that there would necessarily be insufficient assets. The decision in *Ocean Chimo* to refuse a stay pending the provision of an indemnity has no direct application to the present case where the Judge was satisfied that the charged assets were insufficient to pay the secured debts in full.

Propositions established

55. In the view of the Board, there are a number of propositions established by these authorities.

56. First, it is not a pre-condition to the institution of proceedings by the directors of a company in receivership that a third-party indemnity as regards costs be provided, so that the failure to provide an indemnity invalidates the proceedings. It is for the debenture holder or receiver to apply for a stay pending the provision of an indemnity.

57. Second, where the proceedings are brought against the debenture holder or the receiver and where the charged assets are or may be insufficient to meet all the liabilities secured on those assets, the debenture holder is entitled to be protected against any depletion in the charged assets as a result of costs incurred in the proceedings by an indemnity (secured, if appropriate) in favour of the company provided by the directors or other third parties.

58. Third, the basis of this approach is that the company as chargor is not permitted to incur costs or to risk the making of adverse orders for costs against it which may deplete the charged assets to the prejudice of the debenture holder. This is an aspect of a general principle that a chargor must not take steps that may damage or deplete charged property to the chargee's detriment.

59. Fourth, for this reason, an application for a stay of proceedings pending the provision of an appropriate indemnity is not the same as an application by a defendant for security for costs. To the extent that Richard Snowden QC stated otherwise in *Closegate*, and the Court of Appeal may have stated otherwise in *GE Capital*, they were in the Board's view wrong.

60. Fifth, it follows that, while a stay of the proceedings pending the provision of a third-party indemnity will not automatically be ordered when application is made for it, the debenture holder or receiver need show no more than a real risk of depletion of the charged assets. In most cases, it may be obvious from the appointment of a receiver following a failure by the company to pay the secured debts that the charged assets are insufficient, but the Board considers that the judge was wrong to say that the appointment of a receiver is always by itself proof of such insufficiency. If there is any doubt, it is for the debenture holder or receiver to establish by evidence the potential insufficiency. If, notwithstanding that a potential insufficiency has been shown, there are special circumstances which would justify the court in dispensing with a requirement to provide a third-party indemnity, it is for directors to establish them. They must show that a departure from the general rule against damage to the charged assets is justified, rather than the defendants showing that an order for an indemnity should be made.

61. Sixth, care is required that any indemnity does not go further than is required for the purpose of preventing a depletion of charged assets. As earlier observed, the Court of Appeal in *GE Capital* and Richard Snowden QC in *Closegate* were right to say that the company's own costs which the directors cause it to incur are unlikely to deplete the charged assets, as the directors will need to secure other sources of funding and the company's liability for its costs will generally rank behind the debenture holder's secured interest in the charged assets. Different considerations apply to any adverse order against the company for costs incurred by the debenture holder or receiver. Such costs will or are likely to be payable to the debenture holder out of the charged assets under the terms of the debenture and the receiver will be entitled to recover such costs out of the charged assets as an expense of the receivership. Unless there are special circumstances, the potential liability of the company on an adverse order for costs should be covered by a third-party indemnity.

62. If the present case is governed by these principles, the judge was right to hold that a third-party indemnity should be provided, although she was wrong to do so on the basis that an indemnity was a necessary pre-condition to the commencement of the proceedings and to the power of the directors to bring and prosecute them.

63. In disagreeing with the judge's conclusion, the Court of Appeal laid stress on the statutory regime governing receiverships contained in the CA and the BIA, which in the view of the Court of Appeal requires a different approach to that developed in the authorities.

The statutory regime

64. It is necessary therefore to consider the extent to which the statutory regime should alter the approach previously taken in the authorities.

65. The CA contains in sections 289-302 provisions relating to receivers and receiver-managers (collectively, "receivers"). Section 295 imposes a duty on receivers to act honestly and in good faith and to deal with any property of the company in the receiver's possession or control in a commercially reasonable manner. Section 296 provides that, on an application by "any interested person", the court may make any order it thinks fit, including "(e) an order requiring the receiver…or a person by or on behalf of whom he is appointed (i) to make good any default in connection with the receiver's…custody or management of the property or business of the company…". By section 297, a receiver is obliged, among other things, to keep detailed accounts of all transactions carried out by the receiver; to keep accounts of the administration of the receivership and make them available for inspection by the directors; and to prepare financial statements at the prescribed intervals, and to file a copy of any such financial statements with the registrar of companies within 15 days of their preparation.

66. Further provisions as regards receivers are contained in sections 12-24 of the BIA, which form part of Part III of the BIA. These provisions, in some cases, overlap or go further than equivalent provisions in the CA. Section 23 provides that, where, as here, the debtor is a corporation, sections 290-303 of the CA apply in the absence of related provisions in the BIA and, where the provisions of the BIA are inconsistent with those sections of the CA, the BIA shall prevail.

67. Section 14 of the BIA contains provisions identical to those of section 295 as regards the duty of a receiver to act honestly and in good faith and to deal with the company's property in a commercially reasonable manner. The obligation to deal in a commercially reasonable manner with the property of the company (with the addition of the words "in his possession or control", which must be implicit in section 14) is repeated in section 15(e).

68. Sections 14 and 15 impose duties on receivers as to accounting records and information which, so far as relevant to the present appeal, include the following. Section 14(e) requires a receiver to prepare interim reports relating to the receivership and to provide copies to the debtor company and any creditor who requests a copy. A receiver is required by section 15(g) to keep records of all receipts, expenditures and transactions involving collateral or other property of the company and by section 15(h) to prepare monthly summaries of accounts of the receiver's administration of the collateral and other property of the company. By section 18, a receiver is required to

give not less than fourteen days' notice of the disposition of the collateral in whole or in part to the company and to a director of the company.

69. Section 20 of the BIA confers powers on the court. Where the court is satisfied, on the application of (among others) the debtor company, that the receiver is failing or has failed to carry out any duty imposed in Part III, the court may make an order, on such terms as it considers proper, either directing the receiver to carry out that duty or restraining the receiver from realising or otherwise dealing with the property of the company until that duty has been carried out, or both.

70. It may be observed that the provisions of the BIA as they affect receivers do not greatly differ from those already contained in the CA. As the respondents submitted, they are largely similar. While the policy of the BIA is in part to encourage the rehabilitation of insolvent companies and individuals, there is no significant alteration in the role of a receiver appointed by debenture holders from that set out in the CA.

71. After referring to section 296 of the CA and section 20 of the BIA, the Court of Appeal noted at para 27 that the legislation does not state that the provision of a third-party indemnity for the company's costs liabilities is a pre-condition to proceedings, and further stated that it was open to the court to stay the proceedings pending the provision of a third-party indemnity. As is made clear above, the Board agrees with both of these points.

72. In their submissions to the Board, the respondents emphasised that the provisions of the CA and the BIA dealing with receivers had significantly enhanced the duties of receivers. While in equity, receivers owed duties in the manner in which they realised charged assets, the obligations under both the CA and the BIA to deal with the property of the company in a commercially reasonable manner go further. The duties to maintain accounting records and to prepare reports, and to make them available, were designed to introduce some oversight of the activities of receivers, so enabling better control of them, if necessary by the use of the statutory powers conferred on the court.

73. These provisions are to a considerable extent modelled on equivalent Canadian provisions, and counsel for the respondents referred to two Canadian authorities. In *Farm Credit Corporation v Corriveau* [1993] 6 WWR 360, Baynton J sitting in the Saskatchewan Court of Queen's Bench said at para 42 that the purpose of the Canadian provisions was "to enable the recipients of such reports to determine if the Receiver is carrying out his duties to act honestly and in good faith, and to deal with the property in a commercially reasonable manner…If necessary the court can be called on under s.248 to enforce compliance with those duties". In *Re Colour Box Ltd* [1995] OJ No 52, Lissaman J sitting in the Ontario Court (General Division) said at p.5: "The obligations

imposed are in the nature of a scheme that entails accounting and reporting and hopefully to eradicate abuses in this field that had existed for many years."

74. From this, the respondents argued that it would be inconsistent with this regime and its purpose if there were an inflexible principle that would require a debtor to provide a third-party indemnity as a pre-condition to an application to the court under the statutory provisions. As already stated, the Board accepts that there is no such inflexible principle.

The respondent's argument

75. The respondents accepted that there might be circumstances in which a requirement for a third-party indemnity was appropriate, but they submitted that it was not appropriate in the present case "where there were flagrant breaches of strict accounting rules of which the appellant cannot be relieved, and there were also evident breaches of the appellant's duty of commercial reasonableness, which caused unwarranted prejudice to the respondents". However, the Board agrees with the approach of the Court of Appeal on this point. The respondents submitted to the Court of Appeal that the Company should not be required to provide an indemnity "because the breaches complained of are obvious". The Court of Appeal rejected this submission, saying at para 29: "In effect, therefore, Counsel has asked us to view the breaches as proven on the pleadings. This is not an issue for determination in this appeal and we decline to use this as a basis for our decision."

76. The approach taken by the Court of Appeal in the light of the legislation, as it appears from paras 27 and 30 of its judgment quoted above, appears to be that the question whether a third-party indemnity should be required is at large, in contrast to the approach previously taken in the authorities including *Busy Printery* of generally requiring a third-party indemnity.

77. The Board can see nothing in the provisions of the legislation which can be taken as being inconsistent with the general approach previously taken in the authorities. Certainly, the fact that sections 296 of the CA and section 20 of the BIA give standing to the company to make applications under those sections is not inconsistent with the application of the court's general approach. The general approach does not deny the company the opportunity of challenging the acts or omissions of the receiver, but it does balance that right against the debenture holder's right not to have the charged assets put at risk of depletion by litigation brought by the company which gave the debenture. If the general approach established by the authorities was not to apply, or was to apply in a modified form, the legislation would have so provided, particularly as the CA was enacted less than two years after the Court of Appeal had decided *Busy Printery*.

78. Apart from the alleged merits of their case, the respondents have put forward no reasons why an indemnity should not have been required in this case.

79. In those circumstances, the Board considers that there was no proper basis in this case for departing from the general approach that a third-party indemnity is required when proceedings are brought in the name of the company against a secured creditor or a receiver appointed by it.

80. While the Board agrees with the Court of Appeal that the judge was wrong to say that an indemnity was a necessary pre-condition to the bringing of these proceedings by the Company, the Board considers that the Court of Appeal should have held, on the facts of this case and in line with what will normally be required, that an indemnity must be provided. As appears from para 30 of its judgment, the court was concerned that decisions had to be taken as to the extent of the indemnity and the person(s) who were to provide it. There need be no argument about the extent, or amount, of the indemnity. It should cover any costs orders made against the company. As to the person(s) who give the indemnity, it is for the directors to put themselves or others forward as the indemnifiers and to satisfy the court that they have the means to satisfy any claim that might be made on it.

81. The respondents observe in their written case that the Judge's order striking out the company's claims was a draconian measure and that in other cases, including *Busy Printery*, the proceedings had been stayed pending the provision of a third-party indemnity. However, in the present case, the respondents have at no stage, including on the appeal to the Board, demonstrated any interest in providing or procuring an indemnity, nor any ability to do so. Nor have they sought a stay of the proceedings if the appeal were allowed. In those circumstances, the Board considers the right course is to allow the appeal on Issue 1 and to restore the judge's order striking out the company as a claimant.

Issue 2: striking out the directors' claims

82. All the claims pleaded in the statement of claim are expressed as being made by the directors as well as by the Company.

83. The receiver's application dated 21 January 2020, as it related to the directors' claims, was to strike out the claims "for breach of an equitable duty to properly and diligently manage the business of the [Company] and for her removal as receiver". The Judge's order was made in those terms. Notwithstanding the apparent restriction in the claims affected, the application was treated before the Board, and has been treated in the courts below, as applying to all claims made by the directors. The Board proceeds on that basis.

84. The Judge recorded at para 63 of her judgment the receiver's submission that all the damages claimed in the action are in respect of loss alleged to have been suffered by the Company, and not by the directors personally. Further, they could not recover any loss in respect of any alleged diminution in the value of their shares, as this would merely be reflective of the Company's loss. In response, the directors submitted that it was not necessary for them to prove any actual loss but, in any event, they had suffered loss of $8.8m in respect of the indemnity given by them as regards the performance bond for the Company's contract with Petrotrin. The judge held at para 78 that, as all the pleaded loss was suffered by the Company and the directors had not pleaded any loss suffered by them personally, this was fatal to the directors' claims for breach of equitable duties and for the receiver's removal. The absence of any such pleaded loss meant that no cause of action lay at their suit against the receiver.

85. In reversing the judge's order, the Court of Appeal held at para 2(ii) of its judgment that, in the case of the alleged breaches of statutory duties, the effect of the CA and the BIA was to give the directors the status of interested persons and the capacity to maintain actions against a receiver. As regards claims for breach of the receiver's equitable duties, the continuing fiduciary duties of directors enabled them to maintain on behalf of their company an action against a receiver for improper conduct. The court concluded that: "On both counts, the Arjoons have the requisite *locus standi* to maintain this claim qua directors. There was no need to plead losses personal to them."

86. The Court of Appeal analysed the issue at paras 33-62. They noted at para 43 that, under the receivership regime, a receiver has two express duties that must be met in relation to directors. A receiver must give to a director of the debtor company at least 14 days' notice of any plan to dispose of charged assets (section 18(1)(d) of the BIA) and must make accounts available for inspection by the directors of the debtor company during usual business hours (section 297(e) of the CA).

87. As regards other statutory duties and equitable duties, the Court noted that section 20 of the BIA does not include directors among the class of persons who may make an application. However, the operative phrase in section 296 of the CA, "any interested person", is not defined. The Court of Appeal held that the directors had standing to commence proceedings in their own names on behalf of the Company, to recover losses suffered by the Company, although they could not challenge the receiver in their own right, that is, in their personal capacity: see paras 59 and 61 of the judgment. On that basis, the Court of Appeal allowed the directors' appeal against the Judge's order striking out claims by the directors.

88. In analysing the standing of the directors to bring proceedings in their own names against the receiver, it is helpful to distinguish and consider separately the different categories of pleaded claims.

89. The equitable duties of receivers of companies are owed to the companies and to other persons with an interest in the property of the company. With the exception of the claim for $8.8m in respect of the indemnity, all the claims pleaded by the directors based on alleged breaches of equitable duties are for damages for losses said to have been suffered by the Company. Such claims can only be brought by the Company itself. There might be circumstances in which a properly constituted derivative action could be brought by shareholders, but in a case such as the present where the directors retain the power to bring proceedings in the name of the company and have indeed sought to exercise that power, there is no scope for derivative proceedings. In any event, directors have no status to bring proceedings in their own name in order to recover damages or other relief for their company. Quite simply, it is not their claim. The judge was therefore right to strike out all these claims.

90. The claim in respect of the indemnity requires separate consideration. The directors' claim is that, by reason of the receiver's alleged breaches of her equitable duties, the directors can recover damages for loss allegedly suffered by them in their personal capacities under the indemnities. In order to recover such loss, the directors would have to plead and establish a duty owed by the receiver to them personally as regards such loss. No attempt is made in the statement of claim to plead any such duty, and no basis in equity or at common law for any such duty is apparent. The Judge was therefore right to strike out this claim.

91. Some of the claims for substantial damages are also put on the basis of alleged breaches of the statutory duties to deal with the Company's property in a commercially reasonable manner and to act honestly and in good faith. Unless the directors can point to a statutory basis for them to have standing to bring these claims, they too must be struck out on the basis that these are duties owed to the Company and the damages claimed are for loss suffered by the Company.

92. As the Court of Appeal correctly observed, no standing is conferred on the directors by the terms of section 20 of the BIA. The directors rely on section 296 which permits "any person interested" to make an application for such order as the court thinks fit, including an order requiring a receiver to make good any default in connection with the receiver's custody or management of the property or business of the company. The Board can see no basis on which a director can be said to be a "person interested". A director is a fiduciary agent of the company, with no personal interest in any claims which the company may have. The Court of Appeal's view that a director was a "person interested" for the purpose of bringing proceedings for the benefit of the company confuses, with respect, the authority of directors to commence proceedings in the name of the company for relief in respect of claims that the company may have against a receiver with the standing of directors to issue proceedings in their own name. There is no basis in section 296 or any other part of the CA, still less under the general law, for directors to bring derivative actions in their own names on behalf of the company.

93. The final category of claims for these purposes are those where the directors allege that the receiver failed to provide or make available accounts to them as directors or to give notice of the proposed sales in late 2019. Section 297(e) of the CA requires receivers to keep accounts and to make them available to directors for inspection during usual business hours. This, submit the directors, makes them interested persons entitling them to make an application in their own names in respect of a breach of that obligation. Likewise, they submit that they are entitled to bring proceedings in their names in respect of the alleged failure by the receiver to give the notice required by section 18(1)(d) of the proposed sales in late 2019.

94. The Board would not wholly rule out the possibility that there might be circumstances in which directors could apply in their own names for an order requiring a receiver to comply with these obligations. However, that would not entitle directors in their own names to seek damages or other relief on behalf of the company, for the same reason as above, that it is for the company to bring proceedings for remedies which are for its benefit. Nor, in the Board's view, would it entitle a director to bring proceedings in the director's own name in circumstances where the company itself, acting by its directors, can bring proceedings. That is the position in the present case. The duties to give notice to a director under section 18(1)(d) of the CA and to make accounts available for inspection under section 297(e) of the BIA do not confer rights on directors which they enjoy in their personal capacities. It is in their capacities as fiduciary agents for the company that they have these entitlements. For that reason, it is their principal, the company, which is the proper applicant, at any rate in circumstances where it can commence proceedings in its own name.

95. For these reasons, the Board concludes that the directors had no standing to bring the proceedings in their own names and the Judge was right to strike out their claims.

Conclusion

96. In view of the Board's conclusions on Issues 1 and 2, it is unnecessary to consider whether the Court of Appeal was right to restore the interim injunction restraining the sale of the Company's assets or business.

97. For the reasons given in this judgment, the Board allows the receiver's appeal. The claims of both the Company and the directors are struck out and the interim injunction is discharged.