IN THE CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No. BBCV2015/003
BB Civil Appeal No. 27 of 2012

BETWEEN

CANADIAN IMPERIAL BANK OF COMMERCE **APPELLANT**

AND

GYPSY INTERNATIONAL LTD
ROYSTON BEEPAT **RESPONDENTS**

Before The Honourables **Mr Justice R Nelson**
Mr Justice A Saunders
Mr Justice D Hayton
Mr Justice W Anderson
Mme Justice M Rajnauth-Lee

Appearances

Mr Roger C Forde, QC and Ms Sherica Mohammed-Cumberbatch for the Appellant

Sir Fenton Ramsahoye, SC, Mr Alrick Scott, Mr Roopnarine Satram, Mr Chandrapratesh Satram and Mr Mahendra Satram for the Respondents

JUDGMENT
of
Justices Nelson, Saunders, Hayton, Anderson and Rajnauth-Lee
Delivered by
The Honourable Mr Justice Hayton
on the 12th day of November 2015

JUDGMENT

A Sorry Saga

[1] Amazingly, in October 2015 we are determining whether or not the Respondents can impeach the validity of the appointment of a receiver made in April 1984 and ceasing in May 1988 pursuant to a debenture dated February 23rd 1983. In June 1988, the Appellant, after crediting the net amount realised on sales of the security, made a written demand on the Second Respondent (as guarantor of moneys due from the First Respondent) for $324,060.78, comprising a principal sum of $109,969.18 plus $214,091.60 interest. The debenture provided for payment of compound interest not exceeding a rate of two and a half per cent per annum over the Appellant's minimum lending rate 'as well after as before judgment', such liability over an extensive period being capable of dwarfing the amount of principal due. The demand for payment was followed by legal proceedings initiated in August 1988, provoking the Respondents to claim that the receiver had not been validly appointed so that they were entitled to counterclaim damages in trespass and conversion and for loss of profits.

[2] Chandler J heard the case over thirteen days commencing December 5th 2003 and finishing July 12th 2010, his judgment not being delivered until May 29th 2012[1] when being subject to submissions of counsel as to costs and interest that led to a consent order thereon on 11th June 2012. The Court of Appeal heard the appeal on January 13th and 14th 2014, delivering judgment on November 14th 2014.[2]

[3] Chandler J found that the receiver had been validly appointed, but if he erred in that conclusion the Bank would have been liable to pay damages amounting to $177,104.42 but no award would have been made for loss of profits.

[1] *Canadian Imperial Bank of Commerce v Gypsy International and Beepat*, Unreported, No. 1130 of 1988, (High Court of Barbados, 29 May 2012).
[2] *Gypsy International and Beepat v Canadian Imperial Bank of Commerce*, Unreported, Civil Appeal No. 27 of 2012 (Court of Appeal of Barbados, 14 November 2014).

[4] The Court of Appeal, however, held the receiver's appointment to be invalid and found the Bank liable to pay damages for inadequate realization of assets amounting to $2,551,302.77 and liable for loss of profits in the sum of $3,559,402.50.

[5] The Appellant appealed to this Court and the Respondents cross-appealed. The Appellant maintains it acted properly and is entitled to repayment of its money with interest as under the Order of Chandler J, but, otherwise, the damages are excessively high and there should be no liability for lost profits. The Respondents claim the Appellant acted improperly and the amounts awarded for inadequate realization of assets and for loss of profits are inordinately low so that they should receive a sum in the region of $300 million.

[6] A dispute over a relatively small sum has thus escalated into a $300 million dispute which could easily have been prevented. If the Respondents had straightaway indicated that they considered the appointment of the receiver invalid because no demand for payment had been made before the receiver took possession of the security, the Bank would immediately have put things right by making the demand.

[7] The parties must accept some blame when under the old rules of court they took a leisurely approach so that the 1988 suit was not heard till 2003. This was despite directions given by the Chief Justice in the hearing of a Summons for Directions on February 5th 1991 that provided for various steps to be taken to lead to setting down the case for hearing twenty eight days after those steps had been taken. After 2003, it is surprising that the case was part-heard for such a lengthy period and then there was an inordinate delay of twenty-two months before the judge delivered his judgment. This is the seventh case from Barbados where adverse comment has had to be made on judicial delay. We strongly endorse the recent three paragraphs of the judgment of Byron P in *Walsh v Ward*[3] deploring excessive and systemic delay in the administration of justice and which concluded, 'We urge the judiciary to take

[3] [2015] CCJ 14 (AJ) [68]-[70].

steps to address the problem of delay in the judicial process and ensure that citizens enjoy the benefit of the constitutional promise of fair and expeditious resolution of disputes.'

The Background

[8] In 1984 Canadian Imperial Bank of Commerce (the Appellant or the Bank) was a Canadian bank registered in Barbados and Gypsy International Ltd was a Barbadian company (the First Respondent or the Company). Mr Royston Beepat (the Second Respondent or Mr Beepat) was managing director of the Company which he and his brother had set up in 1981 to manufacture "high end" jeans. On November 24th 1982 Mr Beepat entered into a continuing guarantee with the Bank in respect of any existing or future liabilities of the Company. In December 1982 the Bank extended a line of credit to the Company in the form of an overdraft facility to the limit of $300,000 and a trade bills discount facility to the extent of $800,000. These facilities were secured by a debenture deed dated February 23rd 1983 which created a fixed charge over the Company's property, plant and equipment and a floating charge over its goodwill and other assets. The Barbados Development Bank also extended credit to the company, its security being an assigned insurance policy over the Company's assets, such security ranking *pari passu* with the Bank's demand debenture.

[9] The event which precipitated the appointment of a receiver was a fire at the Company's premises on March 25th 1984 which damaged its machinery, equipment and stock and led to an insurance claim in the region of $900,000 to $950,000. On March 28th or 29th 1984 Mr Beepat was arrested and charged with arson, a charge which was subsequently dropped after many court appearances. The Company's insurers on March 29th 1984 cancelled the insurance policy from that date, though protecting the Bank's interest as mortgagee until April 7th 1984.

[10] On April 10th 1984 the Bank, purportedly pursuant to its rights under the debenture, appointed as receiver Mr Grenville Phillips (the Receiver), who that day took and delivered his notice of appointment to the Company's premises and immediately

commenced the receivership. No demand was made for payment of moneys due to the Bank. The Receiver's focus was liquidation of the assets to try to discharge the Company's debts, the Company's business not restarting after the fallout from the fire. On June 15th 1984 the Bank wrote to Mr Beepat stating that it was 'prepared to relieve the Receiver of his appointment upon liquidation of the present outstanding overdraft of $342,710.71', though subject to the proceeds of the insurance claim being 'used to liquidate any outstanding discounted Bills with the Bank.'

[11] The Bank's offer was not taken up and the receivership ended on May 30th 1988 without full discharge of the Company's debt to the Bank. Thus, on June 22nd 1988 the Bank made a written demand on Mr Beepat as guarantor calling for payment of the principal sum of $109,969.18 plus interest of $214,091.60. When no payment was forthcoming the Bank initiated legal proceedings against the Company and Mr Beepat for such sums and further interest, leading to a counterclaim against the Bank for damages and loss of profits caused by the invalid appointment of the Receiver.

[12] In the light of the cancelled insurance policy amounting to a triggering event for appointing a receiver, Chandler J held that the Receiver had been validly appointed under the terms of the debenture. Thus Mr Beepat was liable under his guarantee for the principal sum of $109,069.18 and interest of $214,091.60, but the claim against the Company was dismissed since the Bank had made no demand on the Company for payment of outstanding moneys. The counterclaim was dismissed, though the judge indicated what sums he would have awarded to the Company if the Receiver's appointment had been invalid and the Bank had been responsible for his conduct. The relief sought by the Bank in its Notice of Appeal to this Court is that 'the Order of the Court of Appeal is reversed and the Order of the Trial Judge be restored.' Thus the Bank is content to leave the claim against the Company dismissed, but maintains that Chandler J's judgment against Mr Beepat as guarantor should stand.

[13] Chandler J made orders as to costs by consent and it was further ordered by consent that:

> 6. The Second Defendant [Mr Beepat] pay the Claimant contracted interest at the rate of 12.75% per annum on the sum of $109,969.18 in accordance with the debenture dated 23rd February 1983 made between the First Defendant and the Plaintiff from the 11th day of June 2012 until payment.

[14] The Court of Appeal held that the Receiver had not been validly appointed, reasoning that, as a matter of construction of the debenture, a demand for payment was required before there could be enforcement of the security by appointment of a receiver. Indeed, the court stated that even if a debenture purported to allow a receiver to be appointed without the need for a demand for payment this would be disallowed, following Canadian case law that the requirement for a demand cannot be excluded by the terms of a security instrument. Thus the court went on to award substantial sums for inadequate realization of assets and loss of profits, prepared to make every reasonable presumption it could against the Bank as a wrongdoer.

[15] The questions that need to be considered are therefore: (1) was the Bank's appointment of the Receiver valid, (2) in any event, were the Respondents estopped by their consenting conduct from complaining that the receivership was not valid, (3) could the Bank, in any case, be made liable for the Receiver's acts or omissions, if, indeed, they had led to any inadequate realization of assets or loss of profits?

Was the Bank's appointment of the Receiver valid?

[16] This issue requires consideration of the following terms of the Debenture:

> 1. The Company hereby covenants with the Bank to pay to the Bank on demand all moneys and liabilities now or hereafter due and owing to the Bank by the Company…
>
> 10. The moneys hereby secured shall become payable immediately by the Company to the Bank on the happening of all or any of the events following that is to say:
>
> (a) if the Company make default in the payment of the moneys hereby secured or any part thereof on any of the days and times and in the manner hereinafter provided for payment thereof;
>
> (b) if the Company make default for fourteen days in the payment of any interest hereby secured and the Bank before such interest is

received by the Bank by notice in writing to the Company calls in such principal money;

(c) on demand being made by the Bank for payment thereof;

(d) if the Company cease or threaten to cease to carry on its business or become insolvent;

(e) if a distress or execution or other process of law be levied upon or issued against any of the property of the Company;

(f) if an order be made or an effective resolution be passed for winding up of the Company;

(g) if a receiver be appointed of any of the Company's property by any Court or Debenture Holder or Trustee for Debenture Holder;

(h) if the Company commit any breach of (sic) non-observance of any covenant or stipulation herein contained and on its part to be observed and performed.

11. At any time after the moneys and liabilities intended to be hereby secured shall have become payable under the provisions of clause 10 hereof the Bank may with power to act through its attorney appoint in writing any person (whether an officer of the Bank or not) to be a receiver of all or any part of the property hereby charged and every receiver so appointed shall be the agent of the Company (which shall alone be personally liable for his acts defaults and remuneration)…

[17] As it happens, the Bank did not make a demand for payment within clause 10(c). Thus no issue arose as to whether, on the moneys becoming 'payable immediately', in the practical commercial context, a reasonable time had to be afforded to the debtor for the mechanics of gathering the money to make the appropriate payment.

[18] Instead, on April 10th 1984 the Bank simply appointed the Receiver because the secured moneys had become immediately payable by virtue of clause 10(h) above due to a breach of clause 8(d).[4] This latter clause required the Company:

> to insure and keep insured in an office or offices or other insurer to be approved by and in the name of the Bank against loss or damage by fire hurricane earthquake riot and civil commotion and (if required by the Bank) sea wave its property and effects of every description and against such contingencies and risks in such manner and or such amounts as the Bank shall require…

[19] However, after the fire and allegations of arson and the police securing the premises and taking away Company documents, the Company's insurers on March 29th 1984

[4] See *Canadian Imperial Bank of Commerce* (n 1) [73] and *Gyspy International and Beepat* (n 2) [88]-[89]. See also the evidence of Mr de Gannes, Record of Appeal 717 and the Company's letter to the Barbados Development Bank, Record of Appeal 849-850.

cancelled its insurance policy with effect from April 7th 1984. The Receiver entered the Company's premises on April 10th 1984, giving Mr Beepat a notice of his appointment dated April 10th 1984, and commenced the receivership. As stated in Mr Beepat's letter of July 30th 1984 to the Barbados Development Bank, copied to the Company, 'Due to the arrest of the Director and the cancellation of Insurance policies the CIBC was forced to place a Receiver on the company to protect the remaining assets and to establish a claim [on the insurance moneys]'.[5]

[20] Sir Fenton Ramsahoye SC for the Respondents submitted that, as a matter of construction of the debenture, no appointment of a receiver could be made by the Bank unless it had made a prior demand under clause 1 thereof for payment of the moneys due to it and the Company was allowed a reasonable time for such payment to be made. He further asserted that there is an overarching principle that no debtor can ever be exposed to the potentially disastrous appointment of a receiver without receiving a prior demand for payment of the moneys due, thereby enabling the debtor, if he has the money available, to discharge the debt and avoid such disaster. Counsel argued that this principle of law, established in Canada as the *Lister* principle,[6] applied with equal force in Barbados as held below by the Court of Appeal.

[21] Mr Roger Forde QC for the Bank submitted that no principle along the lines of the *Lister* principle could have applied under Barbados law until provision was made for adding a s 10B to the Bankruptcy and Insolvency Act, Cap 303, which Act itself only came into force on March 1st 2002. That new provision requires a secured creditor to send to the debtor company a notice, in a prescribed form and manner, of his intention to enforce the security and prevents enforcement until the expiry of ten days after the sending of the notice. Counsel submitted that at the time of execution of the debenture in 1983 the issue as to the appointment of a receiver was purely one of construction of the debenture, Barbados company law simply being

[5] ibid n 4.
[6] After *R E Lister Ltd v Dunlop Canada Ltd* 1982 CanLII 19 (SCC), [1982] 1 SCR 726.

based on the Companies Act 1910 that took effect on November 22nd 1910 and which was based on an English Act (the Companies (Consolidation) Act 1908).

[22] Lord Neuberger usefully summarised the proper approach to the construction of commercial contracts in *Marley v Rawlings:*[7]

> The court is concerned to find the intention of the parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions.

As Lord Steyn had earlier stated:[8]

> The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

We respectfully adopt these dicta as correct statements of the law applicable to the construction of commercial contracts.

[23] It is difficult to see how clause 1 can be construed as a precondition for the application of the triggering events in clause 10. The better view is that both clauses operate independently. We are fortified in this view by *Chase Manhattan Bank NA v Circle Corporation Ltd*[9] a decision of the Court of Appeal of the Eastern Caribbean Supreme Court (the ECSC). The ECSC had to construe a debenture which at clause 1 contained a requirement to pay the principal sum on demand but at clause 7 set out various triggering events upon the occurrence of which the principal monies became "immediately payable" (so enabling the appointment of a

[7] [2014] UKSC 2 [19], [2014] 1 All ER 807, 815.
[8] *Sirius International Insurance (Publ) Co v FAI General Insurance Ltd* [2004] UKHL 54 [18], [2005] 1 All ER 191, 200. See also *Sea Havens Inc v Dyrud* [2011] CCJ 13 (AJ) [30], (2011) 79 WIR 132, 145.
[9] (1986) 37 WIR 160.

receiver under clause 8),[10] though none of these events was contingent on a demand being made. Byron JA (Ag), as he then was, stated the 'phrase ["become immediately payable"] imports that the events set out in clause 7 *without more* make the principal sum immediately payable.'[11] The ECSC rejected the submission of the respondent that clause 1 was to be construed as qualified by clause 7. The ECSC emphasized that 'each of the clauses in the debenture is independent and complete.'[12] We endorse this construction and therefore hold that clauses 1 and 10 in [16] above do not operate in tandem so that there is an overarching requirement that a demand must be made for every triggering event contained in clause 10. Rather it is clear that where the parties intended that a triggering event and a demand were to operate in conjunction, this was specifically set out as evidenced by clause 10(c).

[24] The Bank's counsel accepted that if the Bank had wanted to rely on the triggering event in clause 10(c) it would, in accordance with the terms of the triggering event, have had to make a demand for payment permitting a reasonable time for the Company to resolve the necessary mechanics for payment out of its resources before the Bank could appoint a receiver under clause 11. We observe that the position is similar under clause 10(b) which requires the Bank to give notice in writing to the Company to call in the principal amount on 14 days' default in payment of interest. Clause 10(a) appears designed to catch moneys payable on days and times provided for payment under the debenture so that a default occurs once such a day and time has passed. Paragraphs (d) to (h) of clause 10, however, deal with acts or omissions which endanger the security and require prompt action to be taken and which may well occur in circumstances where a formal demand and time to pay would be otiose.

[25] In the current circumstances the Bank, most anxious over the value of its security in the absence of the Company having any insurance cover as required by clause 8(d), relied upon the occurrence of the triggering event within clause 10(h), namely,

[10] ibid 165 where clause 8 is set out after '(in clauses) as follows' which should read '(in clause 8) as follows'.
[11] ibid 165 (emphasis added).
[12] ibid 167.

'any breach of (sic) non-observance of any covenant or stipulation herein contained'. Based on the natural and ordinary meaning of the words of this clause the failure to have any insurance cover after cancellation of the policy was a triggering event that invoked the application of clause 11:

> At any time after the moneys and liabilities intended to be hereby secured shall have become payable under the provisions of clause (10) hereof the Bank may with power to act through its attorney appoint in writing any person (whether an officer of the Bank or not) to be a receiver of all or any part of the property hereby charged.

If it had been intended that the Bank would not be able to make such an appointment without having previously demanded the moneys due, clause 11 would have read 'At any time after the moneys…. shall have become payable under the provisions of clause (10) hereof *and after the Bank has made a demand for the payment of such moneys…*' Instead, the requirement for a demand for payment is restricted to the triggering events contained in clause 10(b) and (c). Of course, if the debtor is not happy with the appointed receivership and has grounds for impugning it then he must take immediate court action. Otherwise, he must pay or tender the moneys due so that the receivership terminates.

[26] We thus accept the submissions of Mr Roger Forde QC as to the construction of clauses 1, 10 and 11. This is what a reasonable person, circumstanced as the parties were, would have understood to be the meaning of the document in the particular commercial context.

[27] Sir Fenton Ramsahoye SC, however, submits on behalf of the Respondents that the issue is not one of construction of documents at all because the requirement of service of a demand for payment before the appointment of a receiver cannot, as a matter of law and equity, be excluded; a view supported by Canadian authority. Counsel relies upon *Waldron v Royal Bank*[13] where a debenture allowed enforcement, whether or not there had been a demand for the moneys, and the court

[13] 1991 Can LII 5710 (BC CA), (1991) 78 DLR (4th) 1.

held that in Canada there is an independent *Lister v Dunlop* principle of law relative to seizure of assets.

[28] In *R E Lister Ltd v Dunlop Canada Ltd*[14] a debenture contained the following section 6:

> 6.1….without prejudice to the right of the holder of this Debenture to demand payment at any time of the principal and interest hereby secured, all unpaid principal and interest owing under this Debenture shall forthwith become due and payable and the security hereby constituted shall become enforceable in each and every of the events following:
>
> (i) if the Company makes default in the payment of the principal of the Debenture when the same becomes payable;
>
> …
>
> (xix) if the Company fails to pay to Dunlop any monies due to Dunlop as and when they become due and payable.
>
> 6.2 Whenever the security hereby constituted shall have become enforceable and so long as it shall remain enforceable the holder of this Debenture may proceed to realize the security….
>
> 6.3 Whenever the security hereby constituted shall have become enforceable and so long as it shall remain enforceable the holder of this Debenture may by instrument in writing appoint any person to be a receiver (which term shall include a receiver and manager) of the charged premises …

[29] The receiver appointed by virtue of the Company's defaults as to payment of money due under s 6.1(i) and (xix) arrived at the Company's premises, delivering a letter demanding forthwith the money due under heads (i) and (xix) and immediately took possession before liquidating the assets. The Company argued successfully that no reasonable time had been afforded to it to pay up the moneys due. The Canadian Supreme Court applied *Massey v Sladen*[15] to hold that demanding money forthwith or immediately had to be construed to mean 'within a reasonable time.'

[14] *Lister* (n 6).
[15] (1868) LR 4 Exch 13.

[30] This was held, however, in the context of the court stating:[16]

> By its terms the debenture further provides that the principal and interest shall 'forthwith become due and payable' on the happening of any of nineteen specified events such as a default in payment of interest and principal by the Company [which the case concerned]. The security thereby constituted by the Debenture likewise becomes enforceable at the same time.

[31] Thus *Lister* has come to be considered in Canada as authority for the proposition that when *any* triggering events, including acts or omissions endangering the security, caused moneys forthwith to become due and payable, so as to enable the security to be realized by appointment of a receiver, a demand for payment within a reasonable time has to be made so that the debtor can avoid the perils of a receivership. It thus amounts in the words of Lambert JA in *Waldron v Royal Bank*[17] to the principle 'that a person from whom a seizure is being made under a security instrument is entitled to receive such notice of the seizure as is reasonable in the circumstances.' He also made it clear[18] that this is an independent rule of law about seizures providing for fairness in the enforcement of security interests that responds to the same fundamental demands as those which have resulted in the constitutional protection against unreasonable seizures found in s 8 of the Canadian Charter of Rights and Freedoms. Thus, as had been held in *Kavcar Investments Ltd v Aetna Financial Services Ltd,*[19] the law had developed to the point where, regardless of the wording of a debenture security, it cannot be enforced without first, the making of a demand for payment and second, the giving of a reasonable time to pay. This has subsequently been endorsed by the Supreme Court of Canada in *Royal Bank of Canada v W Got Associates Electric Ltd.*[20]

[32] The High Court of Australia, however, has not taken the Canadian approach but has allowed the commercial parties to negotiate their own terms, treating it as a matter of construction whether or not there needs to be a demand for payment

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[16] *Lister* (n 6) 746.
[17] *Royal Bank* (n 13) [6]. Here a formal demand had been made contemporaneously with taking possession of the security.
[18] ibid [13].
[19] 1989 Can LII 4274 (ON CA), 62 DLR (4th) 277.
[20] 1999 Can LII 714 (SCC), [1999] 3 SCR 408 [18]-[20].

within a reasonable time once a triggering event for enforcement of a security has occurred. This reflects the view of the Eastern Caribbean Court of Appeal in *Chase Manhattan* at [23] above.

[33] In *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd*[21] clause 18 of a debenture provided that the secured moneys shall:

> immediately become due and payable and the security hereby created shall immediately become enforceable without the necessity for any demand or notice…upon the happening of any one or more of the following events: ….
>
> (q) if the Mortgagor is carrying on business at a loss and in the opinion of any officer of the Bank further prosecution by the Mortgagor of its business will endanger this security.

By clause 19 the debenture provided that 'At any time after the moneys hereby secured become payable the Bank by notice in writing signed by any officer of the Bank may appoint any qualified person to be a Receiver of the mortgaged premises or any part thereof…'

[34] Callinan J stated:[22]

> The debenture is the document which directly protects the lender's security and is designed to facilitate action to prevent its loss or erosion, if need be, in great haste, if it is in peril. Clause 18 of the General Conditions therefore provides for the secured money to become immediately due and payable upon the occurrence of default without demand or notice. The Bank was therefore entitled to enforce its rights under the debenture without demanding repayment...

We endorse this common law approach that enables parties to provide for the appointment of a receiver to protect the interests of the security holder in circumstances considered by him to endanger his security, without the need for him to demand payment of moneys due within a reasonable period.

[21] [2000] HCA 20, (2000) 170 ALR 579.
[22] ibid [61]. See also Gleeson, CJ, McHugh and Hayne JJ at [8].

[35] It is to be noted that the decision of the High Court of Australia in *Bunbury Foods Proprietary Limited v National Bank of Australia*[23] relied upon by the Court of Appeal[24] was not concerned with the specific question of whether service of a demand for payment was an essential requirement to the valid appointment of a receiver, a question that *Pan Foods* answered. In fact, *Bunbury* was concerned with whether, when a demand for payment had been made and a receiver appointed, the demand and the receivership were invalid for the demand not having afforded the debtor reasonable time to satisfy the demand.

[36] We endorse the following remarks of Kirby J in *Pan Foods:*[25]

> …as between a commercial enterprise and a finance provider, such as a bank, the law should be the upholder of agreements. It should eschew artificialities and excessive technicalities for these will not be imputed to the ordinary businessperson. Business is entitled to look to the law to keep people to their commercial promises.

Thus the Bank's appointment was valid as made in accordance with the terms of the debenture that looked after the Bank's interest in repayment of the loan and in protecting its security expeditiously, thereby encouraging it to lend money for the benefit of businessmen.

Were the Respondents in any event estopped from claiming that the Receiver's appointment was not valid?

[37] It is clear that the Receiver took possession of the security from Mr Beepat without the Bank having made any demand for payment of monies due to it and that Mr Beepat for himself and the company knew this. No allegation as to the invalidity of the Receiver's appointment for lack of such a demand was, however, made until the Bank received the Respondents' Defence dated November 15th 1988. Indeed, the Respondents helpfully co-operated with the Receiver, as indicated by the Second Respondent's letter sent on behalf of the First Respondent to the Bank dated April 17th 1984 (after the receivership had commenced on April 10th 1984).[26] The

[23] [1984] HCA 10, (1984) 153 CLR 491.
[24] *Gyspy International and Beepat* (n 2) [50]-[51].
[25] *Pan Foods* (n 21) [24].
[26] Record of Appeal 846-848.

letter set out the Company's assets, provided accounts and notified the Bank that Mr Rafeek had been appointed to be 'Acting Financial Controller, Administrator and General Manager.'[27] It stated 'Mr Rafeek has an intimate knowledge of the company and will be able to continue the existing mechanisms already established and functioning. Mr Rafeek shall be working under the guidance of the appointed Receiver.'[28] The evidence of the Receiver, [29] whose credibility Chandler J preferred to that of Mr Beepat,[30] also indicated that there was dialogue and co-operation between the Receiver and Mr Beepat. Furthermore, Mr Beepat's letter to the Barbados Development Bank of July 30th 1984, copied to the Bank, assumed that the Receiver had been validly appointed for a breach of the insurance covenant and encouraged the Bank in this belief.

[38] Estoppel has been pleaded by the Bank, no doubt aggrieved by the fact that if the Respondents had alleged that the appointment was invalid because they had not received a demand for payment of the moneys due, the Bank would very easily indeed have rectified the position. It would have made a demand permitting a reasonable time to put together the requisite moneys. Instead, the Bank acted to its significant detriment by continuing with the receivership and finding itself now being sued for $300 million.

[39] If we had held the Receiver's appointment to be invalid, the estoppel in question would be estoppel by convention where the parties have clearly acted on the mistaken assumption that the appointment was valid, the Respondents' conduct confirming and reinforcing the mistaken belief of the Appellant.[31] It matters not that such estoppel may enable a party to enforce a cause of action which, without the estoppel, would not exist.[32] In the present circumstances we have no doubt that, even if the appointment had been invalid, it would be unconscionable for the

[27] ibid 847.
[28] ibid.
[29] Record of Appeal 655-703.
[30] As accepted in *Gypsy International and Beepat* (n 2) [45].
[31] Most recently considered in *Dixon and another v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023. See also *Bank of Baroda v Panessar* [1986] 3 All ER 751, 762 and *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 100-101, 104.
[32] *Amalgamated* (n 31) 105.

Respondents to seek to the detriment of the Appellant to take advantage of a crucial mistaken assumption shared by all parties that the appointment was valid.[33]

[40] As Clauson LJ stated in *Eaves v Eaves*:[34]

> It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal: *Cairncross v Lorimer*.[35] The principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error: *Sarat Chunder Dey v Gopal Chunder Laha*.[36]

[41] Since the Second Respondent as managing director of the First Respondent was acting for it in the dealings with the Bank, both are estopped from asserting the invalidity of the receivership, so that the Second Respondent would be liable as guarantor. Apart from that it would, in any event, appear that a person who has guaranteed the liabilities of a company cannot assert the invalidity of the Receiver's appointment which the company itself cannot assert, as pointed out by Walton J in *Bank of Baroda v Panessar*.[37]

Could the Bank be liable for the Receiver's conduct?

[42] Pursuant to clause 11 of the Debenture, on April 10th 1984 the appointed Receiver became the agent of the mortgagor Company but it is a peculiar agency, as pointed out by the English Court of Appeal in *Silven Properties Ltd v Royal Bank of Scotland*,[38] since the principal, the mortgagor, has no say in the appointment or identity of the receiver and is not entitled to give any instructions to the receiver or to dismiss him. Moreover, the receiver is not managing the mortgagor's property for the benefit of the mortgagor but the security, the property of the mortgagee, for the benefit of the mortgagee. Nevertheless, a receiver owes an equitable duty of due diligence to the mortgagor and others interested in the equity of redemption as well

[33] *Bank of Baroda* (n 31) 763.
[34] [1940] Ch 109,117-118.
[35] (1860) 3 Macq 827, 829.
[36] (1892) LR 19 Ind App 203, 215, 216.
[37] *Bank of Baroda* (n 31) 763.
[38] [2003] EWCA Civ 1409 [27], [2004] 4 All ER 484, 494, [2004] 1 WLR 997, 1007.

as to a guarantor of the mortgage debt.[39] We must make it clear, however, that Chandler J found that the Receiver acted honestly in discharge of his duties and sold the Company's assets at the best prices obtainable on the market,[40] while the Court of Appeal accepted that the trial judge preferred the credibility of the Receiver to that of Mr Beepat.[41] It is also noteworthy that the Respondents did not bring legal proceedings against the Receiver.

[43] The receiver is an independent person responsible for his own acts and omissions so that a mortgagee who has validly appointed a receiver has no duty to supervise him and has no right to instruct him as to how or when to exercise his receivership powers.[42] It is only if the mortgagee does give instructions which are obeyed by the receiver or otherwise actively intervenes so as to prevent the receiver exercising his independent judgment that the mortgagee can be made liable for the receiver's actions.[43] There is no evidence that this was the case, so that the Respondents' claims against the Bank must fail.

[44] Even if the Receiver had not been validly appointed this would not make the appointing Bank liable as principal for its agent's acts and omissions because it would have purported to make him the agent of the mortgagor Company under clause 11 of the Debenture, thereby giving the Receiver no authority to bind the Bank in any way, as pointed out by Walton J in *Bank of Baroda v Panessar*.[44] The Receiver would alone be liable unless the Bank had given him instructions which he obeyed or the Bank had otherwise actively intervened so as to prevent the Receiver exercising his independent judgment and so had exercised some sort of control over him.[45] There is no evidence that this was the case so the Respondents' claims against the Bank must also fail.

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[39] ibid. *Medforth v Blake* [2000] Ch 86 and *Standard Chartered Bank v Walker* [1982] 1 WLR 1410. See also the statutory duty in s 281 of the current Barbados Companies Act (Cap 308) to deal with the property 'in a commercially reasonable manner' which seems a statutory formulation of that duty.
[40] *Canadian Imperial Bank of Commerce* (n 1) [191].
[41] *Gypsy International and Beepat* (n 2) [45].
[42] *Medforth* (n 39) 94-95.
[43] *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637, 647-649 per Lloyd LJ (as he then was), having endorsed Lord Denning MR in *Standard Chartered Bank v Walker* (n 39).
[44] *Bank of Baroda* (n 31) 764.
[45] ibid 764 and *National Bank of Greece* (n 43) 648-649.

Damages for inadequate realizations and loss of profits

[45] Given our holding that the Respondents' claim against the Bank cannot succeed, there is no need to investigate the claims for inadequate realizations of the Company's assets and for loss of Company profits. Some points, however, are worthy of note. Both the trial judge and the Court of Appeal came to their conclusions against the background of valuing disposed of assets in strict liability claims for trespass and conversion resulting from the invalid appointment of the Receiver, though the focus of claims in the event of the validity of the appointment should have been the alleged negligence of the Receiver if the Bank could be made vicariously liable for that. Nevertheless, it so happened that Chandler J held that the various assets sold by the Receiver 'were sold in good faith and at the best prices obtainable on the market'[46] (the Receiver's evidence being that he had had to sell at a wholesale salvage value)[47] and the judge also held that the insurance claim for a sum in the region of $900,000 to $950,000 was 'properly settled'[48] for $725,000 with a consultant's help.

[46] The Court of Appeal[49] fully accepted the trial judge's findings of primary facts and correctly stated[50] that it could only draw its 'own inferences of fact where there is clear and convincing error by the judge in coming to factual conclusions based on those findings of primary facts.' Earlier[51] it had correctly accepted that in questions of mixed law and fact it also could only draw its own inferences where there was a clear and convincing error by the trial judge.

[47] We are not burdening this judgment with a detailed examination of the Company's claims that is now unnecessary, but wish to make two points in the context of this case.

[46] *Canadian Imperial Bank of Commerce* (n 1) [191].
[47] Record of Appeal 666-667.
[48] *Canadian Imperial Bank of Commerce* (n 1) [194].
[49] *Gypsy International and Beepat* (n 2) [45] and [109].
[50] ibid [108] reinforcing [43].
[51] ibid [44].

[48] The Court of Appeal needs to heed the above requirement to find a clear and convincing error by the trial judge.[52] Appellate judges are not entitled to accept primary findings of fact from the court below and then draw inferences that are clearly opposed to those findings of fact, while any departure from any inference drawn by a trial judge needs clear justification.

[49] Chandler J had found that the Company's insurance policy had been assigned to the Barbados Development Bank, whose interest in the proceeds therefore ranked *pari passu* with the Bank's, and those proceeds were payable to those banks and not the Company. The judge further held that the Receiver had acted properly in paying for a consultant's assistance and settling the insurance claim for $725,000 less stamp duty. The Court of Appeal, without giving any reasons for disagreeing with the judge, simply stated as follows:[53]

> There was a policy of insurance over the building in the sum of $1.5m. The claim was in the region of $900,000 to $950,000.00. The evidence of the receiver is that the insurance claim was compromised at $725,000.00. We accept Gypsy's claim to be entitled to recover the full proceeds of the policy, less stamp duty of $9,000.00 payable on the same which amounts to $881,000.00

[50] Moreover, the trial judge, accepting the Receiver's evidence,[54] found that the impact of the fire, smoke and water damage was not minor but substantial and found the Respondents' claims were based on pre-fire estimates not taking account of the damage caused by the fire. The Court of Appeal, however, found the impact of the fire to be minor and assessed damages on that basis, particularly taking account of the principle 'that in assessing damages every reasonable presumption may be made'[55] against the wrongdoer, relying on *Wilson v Northampton and Banbury Junction Railway Co.*[56] That case concerned a defendant that had deliberately broken its contract by not erecting a railway station at the agreed location, but had built it on land two miles away.

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[52] Further recent guidance is provided by the Privy Council in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21 [11]-[18], [2014] 4 All ER 418, 423-425.
[53] *Gypsy International and Beepat* (n 2) [114].
[54] *Canadian Imperial Bank of Commerce* (n 1) [85] and [92].
[55] *Gypsy International and Beepat* (n 2) [105].
[56] (1874) 9 Ch App 279.

[51] The *Wilson* principle of making every reasonable presumption against a wrongdoer, however, has been explained by the Supreme Court of Canada[57] as being confined to the situation where a person commits a wrong designed to make, and making, the exact ascertainment of damages impossible or extremely difficult and embarrassing. It is therefore inapposite in the current circumstances where it is the fire which has made assessment of damages difficult, coupled with the slowness of the Respondents to take steps to have their claim heard with due expedition.

Conclusions

[52] The Appellant's appointment of a Receiver on April 10th 1984 was valid, but even if it had been invalid, the conduct of the Respondents in encouraging the Appellant to believe the receivership to be valid estopped them from asserting the invalidity of the receivership. Moreover, whether the receivership had been valid or invalid, the Appellant on the evidence could not have been responsible for the conduct of the Receiver. Thus Mr Beepat is liable under his guarantee of November 24th 1982, clause (3) of which made it clear 'that the Bank shall not be bound to exhaust its recourse against the customer or other parties or the securities it may hold before being entitled to payment from the Guarantor under this guarantee.'

[53] The appeal is allowed, so the Order of the Court of Appeal is reversed and the order of Chandler J restored as requested by the Appellant. It follows that:

1. Judgment be entered for the Appellant against the Second Respondent, Mr Beepat for the claimed sum of $109, 969.18 and interest of $214,091.60.

2. The Appellant's claim against the First Respondent stands dismissed.

3. The Respondents' cross-appeal is dismissed and the counterclaim is dismissed.

4 The Second Respondent is ordered to pay the Appellant's costs here and in the Court of Appeal, to be taxed if not agreed.

[57] *Kohler v Thorold Natural Gas Co* 1916 CanLII 3 (SCC), (1916) 52 SCR 514, 530.

5. It is further ordered that paragraphs 4, 5 and 6 of the Consent order of Chandler J dated June 11th 2012 do stand:

> '4. The Second Defendant do pay the Claimant's costs of the action as agreed or assessed, to include all costs by reason of there being two defendants.
>
> 5. The Second Defendant do pay to the First Defendant its costs to be subject to a detailed assessment.
>
> 6. The Second Defendant do pay to the Claimant contracted interest at the rate of 12.75% per annum on the sum of $109,969.18 in accordance with the debenture dated 23rd February 1983 made between the First Defendant and the Plaintiff from the 11th day of June 2012 until payment.'

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee