BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.8 OF 2007

BETWEEN:

(1) NORGULF HOLDINGS LIMITED
(2) INCOMEBORTS LIMITED

Appellants

AND

MICHAEL WILSON & PARTNERS LIMITED

Respondent

Before:

The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal
The Hon. Ms. Ola-Mae Edwards — Justice of Appeal (Ag.]

Appearances:

Mr. John Jarvis, QC, with him Mr. Paul Dennis for the Appellants
Mr. James Drakes for the Respondent

2007: July 18;
October 29.

Company Law – receiverships – appointment of receivers – threshold test – discharge of receivership orders

The appellants are companies incorporated in the British Virgin Islands (BVI). The respondent, a firm of lawyers, is a company also incorporated in the BVI. The respondent alleges that the appellants are liable to the respondent as accessories in equity or for knowing assistance, in that they dishonestly assisted three of the respondent's then employees in their breaches of fiduciary and other duties, and in receiving and attempting to retain the proceeds of the breaches. The respondent therefore alleges that the

appellants are constructive trustees of the property for the respondent and are liable to it for equitable compensation. A judge of the High Court issued *ex parte* receivership orders over the entire assets, undertaking and shareholdings of the appellants, and continued the receiverships after the subsequent *inter partes* hearing. The appellant companies appealed on the grounds that the judge erred in that she incorrectly stated the threshold test for the appointment of a receiver and by finding that there was sufficient evidence on which to issue the receivership orders.

Held – Allowing the appeal, discharging the receiverships in their entirety and ordering the respondent to pay the expenses and charges of the Receiver and the costs of the appellants in this court and the court below:

(1) The minimum threshold test for the appointment of a receiver is "a good arguable case".

Dictum of Mustill J in Ninemia Maritime Corporation v Trave GmbH (The Niedersachsen), [1983] 1 WLR 1412, pages 1415-1417 applied.

(2) The evidence presented by the respondent at the *ex parte* and *inter partes* stages did not meet the required threshold to establish that there was a good arguable case, and further, the evidence did not show that the subject matter of the proceedings was in danger if left in the possession or under the control of the appellants until the trial, or that the respondents would have been in a worse position if the receivership orders were not made. In granting and continuing the receivership orders therefore, the judge had acted outside the generous ambit of her discretion within which reasonable disagreement is possible.

JUDGMENT

[1] RAWLINS, J.A.: The appellants, Norgulf and Incomeborts, appealed against the decision of a judge of the High Court, which was made in an order dated 22nd May

2007. The order provided for the continuation of the appointment of a receiver over the assets, undertakings and shareholdings of the appellants. The appellants challenged the judge's determination that as a matter of law the necessary threshold test was that which is set out in American Cyanamid v Ethicon Ltd.[1] They also challenged her finding of fact that the threshold test, on the evidence which was provided, was sufficient to merit the appointment of the receiver.

[2] The appellants further challenged the judge's finding that the cross undertaking in damages offered by Michael Wilson Partners (MWP), the claimant in the substantive action, but the respondent in this appeal, was sufficient to cover all possible loss that they (the appellants) might suffer. However, this issue does not arise for consideration in this judgment because this court issued an order on 20th August 2007 discharging the receiverships.

[3] The oral submissions in the appeal proceedings were heard on 18th July 2007. This court further read the written submissions, the Record of Appeal, the Supplementary Record of Appeal, and, in particular, the Orders of the High Court dated 29th March 2007 by which Mr. William Tacon of Kroll (BVI) Limited was first appointed Receiver of Norgulf Holdings Limited and Incomeborts Limited, after an *ex parte* hearing. We also considered the Orders of the High Court dated the 18th day of May 2007 and entered on the 31st day of May 2007, which continued the appointment of Mr. Tacon as Receiver over the Appellants. We decided that the need to discharge the receiverships was sufficiently urgent to issue the order of 20th August 2007, thereby allowing the appeal. We now provide the reasons for our decision in this judgment.

[4] The consequence of our decision was that the order of the High Court dated 29th March 2007 by which Mr. William Tacon was first appointed as Receiver over the appellants, and the order of the High Court dated the 18th day of May 2007 continuing his appointment, were set aside in their entirety. The receiverships

[1] [1975] AC 396.

ended from the date that the order of this court was served on the Receiver. This court also ordered the respondent, MWP, to pay the costs and expenses of the Receiver, as well as the appellants' costs in the appeal and in the High Court proceedings. Costs are to be assessed in accordance with rule 64.7 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000,[2] if not agreed.

[5] A brief background to the claim and to the proceedings to date will provide a helpful precursor to the reasons for the decision in this judgment.

Background

[6] Norgulf and Incomeborts, are incorporated in the British Virgin Islands ("BVI"). Their registered offices are in Road Town, BVI. Allegedly, they are ultimately owned by Mr. Garifolla Kachshapov, who had the benefit of 2 contracts to exploit oil in Kazakhstan. These contracts are known as the Block A & E and the East Alibek contracts. The contracts were owned by Horizon Services N.V., which seems ultimately to be beneficially owned by Mr. Kachshapov.

[7] The respondent, MWP, is also incorporated in the BVI. It is a firm of lawyers that is engaged, *inter alia*, in the business of providing legal services in Kazakhstan, Central Asia, the Caucasus, Russia and the Ukraine. The Managing Director of MWP is Mr. Michael Earl Wilson. He is admitted as a Solicitor in England and Wales, a Solicitor, Proctor and Attorney in New South Wales, and a Barrister and Solicitor in Victoria, Australia. MWP is the claimant in the substantial proceedings, and the appellants are 2 of 7 defendants. At the material time, MWP had 2 partners, Mr. Wilson and Mr. Emmott. Mr. Robert Nichols and Mr. David Slater were employed by MWP as assistant solicitors.

[8] MWP claims that Messrs Emmott, Nichols and Slater diverted work away from it, whilst employed by it. MWP also alleges that these 3 men caused clients to be underbilled and that they received reward in the form of shares for the services

[2] Hereinafter referred to as "CPR 2000".

they provided. MWP further alleges that Messrs Nichols and Slater formed the first and second defendants in the claim, Temujuin International Limited, and Temujuin Services Limited. Temujuin International is a law firm in Kazakhstan. MWP also alleges that Messrs Emmott, Nicholls and Slater, directly or indirectly, in breach of their fiduciary, contractual and other duties owed to MWP, took for their own benefit, shares in Max Petroleum plc on the flotation of that company, while they worked for MWP. MWP further alleges that the 3 men hid the shares from Max Petroleum in Norgulf and Incomeborts, respectively.

[9] Max Petroleum is an English company. It is allegedly a director of a large number of companies that hold significant percentages of the Max Petroleum shares. Those companies include Incomeborts and Norgulf which received 10 million shares and 5 million shares, respectively, in Max Petroleum in August 2005 for a non-cash contribution. These shares allegedly amount to about 8.07% of the issued share capital of Max Petroleum. According to MWP, the allocation of these shares to Norgulf and Incomeborts was not part of the process of making a public offering. MWP insists that the allocation resulted because the individuals behind these companies were "insiders" or persons close to the taking of Max Petroleum to the market. MWP further insists that the monetary price for these shares, (£0.01) per share, if paid at all, was but an infinitesimal fraction of the £0.35 per share paid on the public offering approximately 3 months later.

[10] MWP alleges that Mr. Kachshapov needed finance to exploit the oil in Kazakhstan and he obtained help from Mr. Tom Sinclair and Mr. David Rigoll. They suggested the flotation of a company on the Alternative Investment Market in London ("AIM"). The scheme was that 80% of the shares held in the 2 intermediate companies, which held the benefit of the oil contracts would be sold to Sokol Holdings Inc. Sokol Holdings then entered into back to back contracts with Max Petroleum to sell the shares to Max Petroleum. MWP was the law firm that acted for Sokol Holdings in the transaction. Messrs Emmott and Nichols worked on the transactions on behalf of MWP. As part of the transaction consideration, shares

were to be issued and allotted by Max Petroleum and delivered to persons at the direction of Sokol Holdings. It was thus that the 5 million shares were allotted to Norgulf and 10 million shares were allotted to Incomeborts. 14.75 million shares were also allotted to Eagle Trust, a Bahamian Trust, which is a family trust of Mr. Emmott and were allegedly issued to him as a "kickback". Mr. Emmott insists that he has no interest in the shares and that they are held in trust for Mr. Sinclair, the Managing Director of Sokol Holdings.

[11] MWP ultimately alleges that the benefits which Messrs Emmott, Nicholls and Slater received as a result of their work on the foregoing transactions included reward for the services which they rendered to clients as employees of MWP. MWP therefore insists that they received the benefits in breach of fiduciary, contractual and other duties and this amounted to a fraud against MWP of approximately US$30 million. As a consequence, MWP commenced several proceedings in Australia, London, Jersey, United States of America and the BVI against its 3 former employees, and companies that are allegedly their corporate and trust vehicles or nominees.

[12] In an amended statement of claim, MWP alleges that the Temujuin Companies conspired with each other, with Messrs Emmott, Nicholls and Slater, and the other defendants in the substantive claim, including Norgulf, Incomeborts and Tigerkhan and also with others, including Messrs Sinclair and Rigoll, to injure MWP, by unlawful means, thereby causing damage to MWP. MWP further alleges that Messrs Emmott, Nicholls and/or Slater and others conspired with the defendants in the claim and others to injure MWP by unlawful means. This was done, according to MWP, by fabricating and falsifying evidence with the object of concealing, and attempting to render judgment proof, assets belonging to Messrs Emmott, Nicholls, Slater, the 7 defendants and/or others or assets to which MWP might have a claim in equity.

[13] As far as liability is concerned, MWP alleges that Norgulf and Incomeborts are liable to it (MWP) as accessories in equity or for knowing assistance. These claims arise from the allegation that they dishonestly assisted Messrs Emmott, Nicholls and Slater in their breach of fiduciary and other duties, and in receiving and attempting to retain the proceeds of their breaches. MWP further alleges that Norgulf and Incomeborts are also liable to it because they received property, impressed with trusts in MWP's favour, otherwise than as bona fide purchasers for value without notice of MWP's interests. MWP alleges, alternatively, that Norgulf and Incomeborts unconscionably received trust property passed to it in breach of trust, or in breach of fiduciary duty (or knowing receipt), and, accordingly, such property, or its traceable proceeds, remains the property of MWP. Accordingly, MWP alleges, Norgulf and Incomeborts are constructive trustees of the property for MWP, and are therefore liable to MWP for equitable compensation. This was the background against which the judge issued the *ex parte* receivership order, and, subsequently, renewed the receiverships, with minor amendments to the *ex parte* orders.

The *ex parte* receivership orders

[14] The *ex parte* receivership orders were made in very wide terms. Mr. Tacon was appointed receiver, without security, over the entire assets, undertakings and shareholdings of Norgulf and Incomeborts. Security for the appointment of the Receiver was specifically dispensed with pursuant to Part 51.4(2) of the CPR 2000.[3] Without prejudice to the generality of his appointment, the orders specifically extended Mr. Tacon's appointment as Receiver over any of the assets, undertakings and shareholdings of Norgulf and Incomeborts, wherever situated, and whether or not held in the name of the companies or by others on their behalf, directly or indirectly, and whether allegedly held by them in some fiduciary or other capacity for others.

[3] See paragraph 11 of the orders.

[15] The assets affected by the receivership order included any shares, options, warrants or other rights in Max Petroleum, or their proceeds of sale or any assets into which such proceeds have been applied; any bank accounts or entitlement to receive monies from any third party, and the registers, books and accounting records, of the companies affected. They also included any documents of title to any property, and any documentary records of the appellant companies, including communications with third parties whether in a physical or electronic format.[4]

[16] The *ex parte* orders gave Norgulf and Incomeborts the right, under rule 11.16 of CPR 2000, to apply to the court to vary or discharge the orders and set down the applications for the appointment of the receiver for further hearing on 25th April 2007, the returnable date.[5] The order permitted the Receiver to take all steps, which he considered necessary or desirable, without limitation, to identify and secure the assets of Norgulf and Incomeborts; to transfer into his own name any of the assets, shares or any other rights of Norgulf and Incomeborts, including any shares or other rights in Max Petroleum or the proceeds of sale of such shares or any other asset into which they have been applied. The order also permitted the Receiver to apply for the cancellation and replacement of all share certificates or other documents of title of the 2 companies. It also empowered the Receiver to investigate the affairs of Norgulf and Incomeborts, and, for the purposes of the discharge of his duties, to secure the compliance of the companies with all orders made against them.[6]

[17] The receivership orders further empowered the Receiver to do all things necessary for the purpose of complying with it (the order). This included the power to manage the business and affairs of the companies; the power to require any director or officer or former director or officer of the companies to supply all information and documents to him, including those in electronic format, concerning all of the affairs of the companies, as well as their financial statements and books

[4] Contained in Schedule A of the receivership orders.
[5] In paragraphs 2 and 3 of the orders.
[6] In paragraph 4 of the orders.

of account. The order also empowered the Receiver to take control of all bank accounts and any other property included in assets of the companies; to supply to the MWP all information which the companies were ordered to give to it and any other information which the Receiver thought appropriate or expedient. The orders further permitted the Receiver to take custody of all share certificates of the companies.[7] The companies were also ordered, through their directors and officers, forthwith to deliver up and transfer to the Receivers any share certificates or other documents of title and their shareholders, directors, pledge holders and other registers, as well as all of their accounting and other books and records.[8]

[18] The *ex parte* orders authorized the Receiver to take such steps as seemed appropriate to get in, recover and preserve all of the assets of the companies and to retain independent legal advisors to assist him. He was also authorized to retain the services of Kroll (BVI) Limited and such overseas professionals as he considered reasonably necessary, and to enter any premises of the companies and have access to all documents and files. The order purported to secure for the Receiver the cooperation of all employees, agents, consultants, contractors, sub-contractors and Directors of the companies for the purpose of his investigations. They further empowered the Receiver to exercise all of the corporate powers of the companies which were vested in their Boards of Directors.[9] The Receiver and any party were given liberty to apply to a judge for directions concerning the conduct of the receiverships.[10]

[19] The receivership orders mandated the Receiver to report to the court and to MWP by 24th April 2007, detailing the assets held by the companies, the approximate values of the assets, their locality and any relevant securities or charges attached to them. In addition, the Receiver was required to address the movement of any assets held either jointly or individually by the companies, which were transferred

[7] In paragraph 5 of the orders.
[8] In paragraph 6 of the orders.
[9] In paragraph 7 of the orders.
[10] In paragraph 8 of the orders.

or contributed in-kind; to provide exact details of any consideration received, and provide to the court and to MWP all available information as to the identity and destination of any such assets.[11] Under the orders, the powers of the Receiver in relation to the assets of the companies were vested in the Receiver to the exclusion of the powers of their Boards of Directors and other officers.[12] MWP was given leave to file an amended claim form by 10th April 2007. The costs of the ex parte application were reserved until the return date.

The continuation order

[20] In the judgment in which the learned judge gave the reasons for continuing the receiverships, she concluded that in light of the materials that were presented, she was satisfied that MWP had established a good prima facie title, and that the shares in Norgulf and Incomeborts were in danger of dissipation if left until the trial in the possession or under the control of the directors of Norgulf and Incomeborts. According to the judge, the decision was made to continue the receivership because the duty of the court was to protect the property for the benefit of the person or persons to whom the court later finds that the property properly belongs, after the trial.[13]

[21] The judge however deleted paragraph 5(d) of the *ex parte* orders, by which the Receiver was empowered to provide MWP with all information which Norgulf and Incomeborts were ordered to give under the orders. She also amended paragraph 9 of the orders by deletions which in effect meant that the Receiver was no longer required to provide to MWP details and information of the movement and transfers of assets in which the companies have any interest and the consideration received therefor. She also ordered the Receiver to produce his report by 16 July 2007 and awarded costs to MWP to be assessed if not agreed.[14]

[11] In paragraph 9 of the orders.
[12] In paragraph 10 of the orders.
[13] See paragraphs 55 and 56 of the judgment.
[14] See paragraph 56 of the judgment.

The principles on the appointment of receivers

[22] In considering the applicable principles for the appointment of a receiver, the learned judge noted that Part 51 of CPR 2000, outlines the procedure by which such applications are to be made. She then referred to Audubon Holdings Limited v The Treasure Island Company Limited and others[15] and Spectrum International Holding Limited v Modern Perfect Developments Limited and Another[16] in which, relying on the learning from the authors of *Kerr on the Law and Practice as to Receivers and Administrators* (17th edition), I had stated that the main object for the appointment of a receiver is to safeguard or preserve property for the benefit of those who are entitled to it.[17] The learned judge then identified, on the bases of these authorities, the two classes of cases in which the court may appoint receivers. They are: (i) cases in which the applicant already has an existing right. In these cases, the appointment is usually made as a matter of course as soon as the applicant's right is established and there is no need to allege any danger to property and (ii) cases in which a receiver is appointed to preserve property to ensure its proper management pending litigation to decide the rights of the parties. In these cases, the applicant has to allege and prove some peril to the property. In the latter case, the court should cautiously exercise its discretion to appoint a receiver. She said that the present case undoubtedly fell in the latter category.[18]

[23] The learned judge then quoted[19] the following passage from the authors of *Kerr on the Law and Practice as to Receivers and Administrators*:

> "If the court is satisfied upon the materials it has before it that the party who makes the application has established a good prima facie title, and that the property, the subject matter of the proceedings will be in danger, if left until the trial in the possession or under the control of the party against whom the appointment of receiver is asked for, or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed, the

[15] BVIHCV2002/0227 - Judgment delivered on 17 March 2003
[16] BVIHCV2005/0071- Judgment delivered on 3 and 30 May 2005.
[17] See paragraph 44 of the judgment.
[18] See paragraph 45 of the judgment.
[19] At paragraph 46 of the judgment.

> appointment of a receiver is almost a matter of course. If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed. The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver, the court will not prejudice the action, or say what view it will take at trial. Indeed the court will not appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person whom the demand is made is fending off the claim."

[24] By reference to Audubon, the judge then noted[20] my statement that the tests for the appointment of receivers and for the grant of injunctive relief should be equated in one regard: that the applicant for the appointment of a receiver should also be required to show that there is a serious issue to be tried on the same rationale that was stated by Lord Diplock in American Cyanamid Co. v Ethicon Ltd.[21] She then further stated[22] that a court will not grant injunctive relief except when it is satisfied that it would be just and convenient in all the circumstances of the case to grant the relief sought. She concluded that, in practice, 2 key factors which should be considered are, first, whether the claimant has a good arguable case against the defendant, and, second, whether there is a real risk that judgment will go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by court order from disposing of them.

[25] In relation to the "good arguable case" test, the learned judge referred[23] to Rasu Maritima v Perusahaan Pertambangan[24] in which Lord Denning observed that this test was "in conformity with" the test for granting injunctions laid down by the House of Lords in American Cyanamid case. My statement of the threshold test in Audubon Holdings and in Spectrum International Holding was based on

[20] At paragraph 47 of the judgment.
[21] [1975] A.C. 396 at pages 407-408.
[22] At paragraph 48 of the judgment.
[23] At paragraph 49 of the judgment.
[24] [1978] Q.B. 644 at 661.

authority which had been overtaken by time because the judge then referred[25] to Ninemia Maritime Corporation v Trave GmbH (The Niedersachsen),[26] in which Mustill J stated that the threshold test was a "good arguable case". He described this test as "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success." The judge therefore concluded[27] that it therefore follows that the prerequisites for the appointment of receivers appear to be three-fold in nature namely (i) there is property to be preserved; (ii) there is sufficient evidence to show that there is a serious issue to be tried or a good arguable case and (iii) the claim or application is not frivolous or vexatious.

[26] Learned counsel for the appellants submitted that the learned judge erred in that although in the end she concluded, on the authority of the statement of Mustill J in Ninemia Maritime Corporation, that MWP was required to show that there was a good arguable case, it was clear that by also relying on the test stated in Audubon Holdings and in Spectrum International Holding cases, she equated the test of "a good arguable case" with that of "serious issue to be tried". Counsel submitted that a judge should always have clearly in mind that the threshold test to justify the appointment of a receiver should be at least equal to that which is required for obtaining a freezing injunction, or even a higher threshold.

[27] At the commencement of the trial this court indicated acceptance of the latter submissions set out in the foregoing paragraph. This was with particular reference to the statement in *Gee on Commercial Injunctions*[28] that the appointment of a receiver is more intrusive, more expensive, and less reversible than the grant of an injunction. I accept that the appointment of a receiver is usually more draconian than issuing a freezing order because of the expenses and inconvenience which often arise with that appointment. When a receiver is appointed a defendant no

[25] In paragraph 49 of the judgment.
[26] [1983] 1 WLR 1412, at pages 1415-1417.
[27] In paragraph 50 of the judgment.
[28] (5th ed., 2004), at paragraph 16.008.

longer has control of the assets of the company to continue its operations as a commercial concern. The business could sustain irreparable damage by the publicity that the receivership may bring. The minimum threshold test for appointing a receiver would require an applicant to have a good arguable case.

[28] Learned counsel for the appellants finally contended that whatever threshold test the judge applied, whether it required MWP to prove that there is a serious issue to be tried; a good and arguable case, or a seriously arguable case, MWP failed to satisfy any of these tests on the evidence that it presented. Counsel insisted that the judge therefore erred in exercising her discretion to appoint the receiver over the appellants because no reasonable judge could have concluded that MWP had satisfied any of these tests. It was therefore necessary to consider the evidence that was presented and the judge's assessment of that evidence.

The evidence presented at the *ex parte* hearing

[29] The learned judge stated in her judgment[29] that at the *ex parte* hearing she relied substantially upon the 6th affidavit of Mr. Michael Wilson, the Managing Director of MWP, to support her determination to appoint Mr. Tacon as the Receiver over the assets of Norgulf and Incomeborts. According to the judge, on the basis of the documents then available to MWP, it was believed that Norgulf and Incomeborts were owned directly or indirectly by Mr. Nicholls and/or Mr. Slater or, perhaps, by trusts or other companies controlled by them. She said that it was also believed that Norgulf and Incomeborts received shares in Max Petroleum; that the allocation of these shares was by way of reward to Messrs Emmott, Slater and Nicholls for services performed whilst working for MWP, and, accordingly, the holdings of Max Petroleum shares by Norgulf and Incomeborts belonged to MWP.

[29] At paragraph 9.

Mr. Wilson's 6th affidavit

[30] Mr. Wilson made this affidavit in support of MWP's application for the appointment of a receiver over the assets of Norgulf, Incomeborts and the 7th named defendant in the claim, Tigerkhan. In light of the judge's reliance on it, I think that it is important to set out in detail, insofar as it is relevant to Norgulf and Incomeborts because this sheds some light on whether there were reasonable grounds upon which the judge should have exercised her discretion to issue the receivership orders in the first place. It then showed whether there were reasonable grounds on which to continue the receiverships when considered with the evidence that was available for the *inter partes* hearing.

[31] In his 6th affidavit, Mr. Wilson referred the court to his previous affidavits, which provide the substance and history behind the dispute between the parties. He deposed that during the time that Messrs Emmott, Nicholls and Slater were employed with MWP, they diverted work away from MWP and failed to account to MWP for fees received. This, he stated, also included receiving reward for the services which they were rendering to clients, as employees of MWP. Mr. Wilson further deposed that the reward was in the form of shares in the ventures on which they were working for MWP's clients. According to Mr. Wilson, the 3 men offered, solicited and performed legal and advisory roles to existing clients who had contracts with MWP. These actions amounted to various breaches of fiduciary, contractual and other duties and amounted to a fraud against MWP of, on estimates previously made by him on the basis of what he had then discovered, approximately US$30 million. This sum had since their alleged fraudulent actions increased significantly. Proceedings against the 3 men and their various corporate and trust vehicles/nominees have been undertaken in London, Jersey and the United States and Australia.

[32] Mr. Wilson then stated[30] that he believed that the shares or assets of Norgulf and Incomeborts are owned, directly or indirectly, by Nicholls and/or Slater or, perhaps,

[30] In paragraph 4(a) of the affidavit.

by trusts or other companies controlled by them. He stated that Norgulf and Incomeborts received shares in Max Petroleum which he believed represented reward to Slater and Nicholls for services performed, whilst working for MWP, for which the client was not properly billed. He therefore believed that these holdings of Max Petroleum shares belonged to MWP. He urged the court to issue the receivership orders against the assets and undertakings of Incomeborts and Norgulf, forthwith, given the very special features which he mentioned in the affidavit, as the only realistic way in which these shares or their proceeds could be preserved pending trial.

[33] Mr. Wilson deposed that the 10 million and 5 million shares which Incomeborts and Norgulf were respectively allotted in Max Petroleum were issued in August 2005, before Max Petroleum re-registered as a public company. This, he stated, was clear from the Share Register of Max Petroleum.[31] He deposed, further, that this also indicated that the allocation of the shares was not part of making the public offering. Rather, he stated, it was a result of the individuals behind Incomeborts and Norgulf being what he thought can fairly be described as "insiders" or persons close to taking Max Petroleum to the market. Mr. Wilson stated that he also believed that the monetary price for these shares (£0.01 per share), if paid at all, was but a small fraction of the price paid on the public offering approximately 3 months later (£0.35 per share). He stated that he said "*if paid at all*" because the information supplied by Max Petroleum to the market was that advisers took shares, presumably in consideration of their services but the statutory returns of allotments in England did not make clear what the consideration was for the allotted shares and, additionally, the shares were nor valued as required on the conversion of Max Petroleum to a public company.

[34] Mr. Wilson then referred to his previous affidavits in which he detailed how Mr. Emmott received shares in Max Petroleum as recompense for work that he did in restructuring Max Petroleum and listing it on the AIM and related transactions,

[31] This was exhibited as MEW-6.

while he (Emmott) was a director of MWP. He deposed that Emmott received 14.75m shares through his Bahamian trust, Eagle Point. He recalled that he had pointed out that in earlier documentation that he had found that the number of shares that was proposed to be issued was 24 million and not 14.75 million. However, he (Mr. Wilson) had not identified at the date of signing the affidavit whether the additional shares were allotted or, if so, to whom.

[35] According to Mr. Wilson,[32] Mr. Nicholls was heavily involved in the Max Petroleum project during the time that he was employed with MWP until he left in March 2006. Mr. Slater joined MWP in September 2005 and left in January 2006. According to Mr. Wilson, he too became involved although his involvement was in the very late stages of the project flotation, and after the share allocations in August 2005 to Norgulf and Incomeborts. Mr. Slater was also heavily involved in work for an immediately post float transaction for Max Petroleum, which involved the acquisition of a further oilfield for cash and options to acquire shares in Max Petroleum.

[36] Mr. Wilson referred to a number of emails sent by Mr. Slater to various parties.[33] According to Mr. Wilson, the thrust of the emails showed an attempt by Slater to raise finance from the Macquarie Bank of Australia against the security of the 15 million shares held by Norgulf and Incomeborts in Max Petroleum. Mr. Wilson referred to an email from Slater to Louisa Kerr of Macquarie Bank dated 5th April 2005,[34] entitled *"$10 million facility-Temujuin International Limited."* Mr. Wilson stated that this seems the clearest possible indication that the loan was sought to be borrowed by Temujuin, then a newly incorporated company, which had no trading history enabling it to service such a loan, so that the security being offered was plainly critical. He said that the correspondence showed that Slater attempted to use the 15 million shares in Max Petroleum as security.[35]

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[32] At paragraphs 6-7 of the affidavit.
[33] There were attached and exhibited to his affidavit at MEW-6, pages 30-33.
[34] Exhibited at page 30 of MEW-6.
[35] See paragraphs 7 and 8 of the affidavit.

[37] Commenting on this email, Mr. Wilson opined that he found it impossible to see how Mr. Slater could be sensibly offering shares which he, or one of his co-participants in that company, did not own as security for a loan to his companies. Mr. Wilson thought that it was inconceivable that a third party would be offering shares with a market value of more than £20m as security for a loan to a start up company such as Temujuin, on an arms' length basis. Mr. Wilson noted that while Mr. Slater referred in the email "*to clients*", he did not divulge who his clients are, as would be expected in this type of transaction. Mr. Wilson said that from the heading of the emails, which referred to a US$10,000,000 facility to Temujuin, he inferred that it must be them (apparently "the clients"), or possibly Norgulf and Incomeborts, or perhaps Nicholls, who were providing that security. It is noteworthy that these critical allegations were based on Mr. Wilson's own beliefs and inferences which he drew on facts which were uncertain and insufficient.

[38] Mr. Wilson further deposed that, in an email from Nicholls to Slater dated 19th April 2005[36] Nicholls stated that it would make more sense for the loan to be made in Sterling given that its intended use was in an equity investment. According to Mr. Wilson, without any trace of consultation with a client or, seemingly, without an opportunity to consult, Slater the next day reported back to the bank that the "…*client …was also happy to borrow the sum in UK Pounds sterling*…". There is no other reference to a client for instructions and the very strong indication is that the "client" was actually Nicholls and Slater, and that Norgulf and Incomeborts are vehicles holding their shares in Max Petroleum. He noted that it was not clear from the correspondence whether the finance was received. The problem, he stated, was that the bank required unencumbered shares for the deal to go through, but that the Incomeborts and Norgulf's shares were the subject of a Lock-In Agreement entered into at the time of the listing. According to Mr. Wilson, the investment appears to have been an investment in Chillisai Phosphate Project.

[36] Exhibited at page 33 of MEW-6.

The beliefs and the inferences which Mr. Wilson draws from facts that are not given are again apparent.

[39] According to Mr. Wilson, at this stage, Mr. Emmott was still a Director of MWP. Email correspondence, dated 14th April 2005, passed between him, Nicholls and Slater in relation to the Chillisai phosphate project.[37] In that email Emmott advised Nicholls and Slater on a "*Purchaser Accession Agreement*", which was a project on which Emmott worked, during his time at MWP. Subsequently, Nicholls and Slater continued to work on the project at Temujuin International after they left MWP. Mr. Wilson inferred from this scenario a very strong indication that Slater and Nicholls were raising money to make an equity investment in the project, and, further, that Mr. Emmott's involvement at that stage, giving advice and assistance to Messrs Slater and Nicholls on this matter, could not have been proper. Mr. Wilson then opined that the only sensible view, which he formed from the foregoing was that the shares in Incomeborts and Norgulf were directly or indirectly the property of Nicholls, Slater or possibly Emmott. He asked the court to note that although Messrs Nicholls and Emmott disclaimed any interest in Temujuin beyond being consultants, invoices issued refer to them by the description "*partner*". The critical part which Mr. Wilson's opinions and beliefs play in these assertions is evident from these statements.

[40] Finally, Mr. Wilson urged the court to issue the receivership orders against Norgulf and Incomeborts because he had no confidence that Messrs Nicholls, Slater and Emmott would have complied with the disclosure order that the court made. He asked the court to note that, to date, disclosure by Norgulf and Incomeborts was quite inadequate. He insisted that there had been non-compliance with disclosure ordered by the court particularly with the disclosure orders against Temujuin, which required disclosure to be made specifically with regard to any interests that the company had in both the Chillisai Project and Max Petroleum. He insisted that

[37] See attached at MW-6 pages 34-37.

the level of disclosure provided by Mr. Slater in relation to these latter companies was non existent because he had only denied any interest in them.

Considering the evidence

[41] The foregoing was the evidence on which the receivership orders were first issued against Norgulf and Incomeborts. Noteworthily, in considering the 4 emails, which passed between Messrs Emmott, Nichols and Slater, as well as between Mr. Slater and Louisa Kerr of the Macquarie Bank, the learned judge noted[38] MWP's allegation that the inference that could reasonably be drawn from them was that Emmott, Nichols and Slater are the beneficial owners of Norgulf and Incomeborts and also of the shares in Max Petroleum. In examining the emails, the judge merely noted the submissions which learned counsel for MWP made, with apparent acceptance. However, those submissions essentially mirrored the assertions made by Mr. Wilson.[39] In the final statement on the emails, the learned judge noted, with apparent acceptance, the submission of learned counsel that the sensible view that MWP formed of them was that the shares in Incomeborts and Norgulf were directly or indirectly the property of Messrs Nichols and Slater, and/or possibly Mr. Emmott.

[42] Critically, however, MWP sought the receivership orders against Norgulf and Incomeborts on the ground that these companies are beneficially owned by Messrs Slater and Nichols; that these companies are liable to it (MWP) as accessories in equity or for knowing assistance, in that they dishonestly assisted Messrs Emmott, Nicholls and Slater in their breach of fiduciary and other duties to MWP, and in receiving and attempting to retain the proceeds of their breaches. Alternatively, MWP's claim is that Norgulf and Incomeborts are liable to it (MWP) for equitable compensation because these companies received trust property passed to them in breach of trust, or in breach of fiduciary duty (or knowing

[38] At paragraph 13 of the judgment.
[39] See paragraph 14 and 15 of the judgment.

receipt). In sum, the claim is that the shares in these companies are beneficially held by them as constructive trustees for MWP.

[43] In my view, the evidence contained in Mr. Wilson's 6th affidavit does not show that Norgulf and Incomeborts are beneficially owned by Messrs Slater and Nichols, or perhaps by Emmott. The evidence, in my view, is at best a litany of speculative assertions, from which MWP drew certain inferences, which the court was invited to accept. My view is that the deponent, Mr. Wilson, drew those inferences from facts which were insufficient to found the inferences. Moreover, the evidence was sparse on any detail relating to the risk of the dissipation of the assets of the 2 companies. To use the words of the authors of *Kerr on the Law and Practice as to Receivers and Administrators*,[40] the evidence did not show that the subject matter of the proceedings would have been in danger, if left until the trial in the possession or under the control of the party against whom the appointment of receiver was asked for. The evidence did not show, in my view, at least, that there was reason to apprehend that the party who made the applications would have been in a worse situation were the receivership orders not made.

[44] In the premises, therefore, I think that MWP provided insufficient evidence at the *ex parte* hearing upon which the court should have exercised it's discretion to appoint receivers, in the first place, over the entire assets, undertakings and shareholdings of Norgulf and Incomeborts, particularly with the wide powers that those orders entrusted to the receiver.

[45] The critical question, then, was whether the evidence that was presented at the time of the hearing on the return date changed the circumstances that warranted the maintenance of the receiverships.

[40] Reproduced at paragraph 23 of this judgment.

The evidence at the return date

[46] The learned judge set out the evidence that was available on the return date and the submissions that counsel for the parties made before her in very helpful detail in her judgment.[41] She considered the affidavit that was deposed on behalf of Norgulf, Incomeborts and Mr. Kachshapov by Keith Edward Oliver, an English solicitor. She noted that Mr. Oliver took issue with the view formed by MWP from the e-mail,[42] headed *"USD 10 million facility – Temujuin International Limited"*, that Messrs Slater and Nicholls are the beneficial owners of the shares being offered as security for the loan. The judge further noted that, contrary to the view expressed by Mr. Wilson that in these types of transactions it is surprising that the clients' names were not divulged, Mr. Oliver stated that from his professional experience, the client's name would not necessarily be revealed in this type of transaction.[43]

[47] The learned judge further noted Mr. Oliver's assertions that Incomeborts was incorporated on 5 November 2004 in the BVI. The company issued 50,000 bearer shares. The share certificate was in Mr. Kachshapov's office in Almaty and steps were being taken to produce it. One Mr. Ian Taylor of Vanuatu was the nominee director of Incomeborts. A Power of Attorney was given by Incomeborts to Mr. Kachshapov on 5 November 2004, when Incomeborts was incorporated. Norgulf was incorporated on 15 July 2005 in the BVI. Its shares are owned by Commonwealth Services (Belize) Limited. Mr. Taylor was the nominee director of Norgulf. Norgulf gave a Power of Attorney to Mr. Kachshapov on 15 July 2006.[44]

[48] Additionally, the learned judge referred to the submissions by learned counsel for Norgulf and Incomeborts, that Max Petroleum substantially acquired its assets from companies in which Mr. Kachshapov had a substantial interest and that Mr. Kachshapov was issued with 15 million Max Petroleum shares, which he decided

[41] From paragraph 17-43 of the judgment.
[42] Page 30 of exhibits to Mr. Wilson's 6th affidavit
[43] See paragraph 18 of the judgment.
[44] See paragraphs 19 of the judgment.

to hold in the names of Norgulf and Incomeborts; companies which he already beneficially owned and continues to own beneficially.[45]

[49] The learned judge then noted Mr. Oliver's assertions that Mr. Kachshapov has been the ultimate beneficial owner of the shares in Norgulf and Incomeborts at all material times; the Macquarie Bank US$10 million loan facility to Temujuin International was contemplated because Mr. Kachshapov considered making an investment in a project to construct a bitumen plant near Moscow; and that Messrs Slater and Nicholls were assisting Mr. Kachshapov to raise funds for this project by way of a loan secured on the Max Petroleum shares held by Norgulf and Incomeborts.[46] The learned judge further noted the comment by learned counsel for MWP that Norgulf and Incomeborts did not produce any document to support these assertions, and, in particular, that they produced no document relating to the bitumen plant investment in Moscow or relating to the engagement of Messrs Slater and Nicholls by Mr. Kachshapov to provide "assistance."[47] The judge agreed[48] with learned counsel for MWP that this evidence given by Mr. Oliver is diametrically opposed to that given by Mr. Slater who stated that he was engaged by Shaikenov & Partners and is unaware of the identity of the directors and shareholders of Norgulf and Incomeborts.[49]

[50] The judge continued by noting the concerns which MWP expressed with the fact that the Power of Attorney that Incomeborts gave to Mr. Kachshapov was dated the same date on which Incomeborts was incorporated. She correctly thought that there was no significance in this. She referred to MWP's assertion that the Registers of Directors, as well as the Registers of Members for Norgulf and Incomeborts, were outdated and that they were not certified by the registered agent as representing the current position. She noted MWP's assertion that unless these companies were formed for Mr. Kachshapov, it was difficult to see

[45] See paragraph 20 of the judgment.
[46] See paragraph 21 of the judgment.
[47] See paragraph 22 of the judgment.
[48] At paragraph 23 of the judgment.
[49] See paragraphs 27 -29 of Mr. Slater's sixth affidavit sworn to on 10 April 2007.

how the registers could be accurate given that there would be initial subscribers/members who would have resigned and transferred their shares to the purchasers. The judge referred to the submission by counsel for MWP that, barring the various uncertainties surrounding the corporate records disclosed thus far, there was no rational explanation of the various matters raised in the correspondence relating to the role played by Mr. Kachshapov and Horizon in this dispute.[50]

[51] The judge referred, on the other hand, to the submission by learned counsel for Norgulf and Incomeborts that at all times these companies were owned by Mr. Kachshapov and that documentary evidence was now supplied which conclusively establishes that Messrs Emmott, Nicholls and Slater have no legal or beneficial interest in them. In this regard the judge noted[51] that letters of indemnity given by Mr. Kachshapov as beneficial owner of the companies to the nominee director of the companies and the general powers of attorney granted to Mr. Kachshapov which were exhibited to Mr. Oliver's affidavit. She further noted that learned counsel for the respondents submitted that Commonwealth Trust Limited, the Registered Agent for Norgulf and Incomeborts, had issued Certificates which certified that Mr. Kachshapov was and is the beneficial owner of Norgulf and Incomeborts. The Certificates also verified, according to Mr. Oliver, that Messrs Emmott, Nicholls and Slater did not have any beneficial interest in, and did not own, the shares in the 2 companies, which put the issue of ownership beyond doubt.[52]

[52] The learned judge concluded that the documents exhibited to Mr. Oliver's affidavit provided helpful information, *inter alia*, that the registered holder of the Norgulf shares is Commonwealth Services (Belize) Limited. She noted that Mr. Kachshapov signed the indemnity to Nominee Director for both Norgulf and Incomeborts as beneficial owner, and that that document stated that the Nominee

[50] See paragraphs 24 to 28 of the judgment.
[51] At note 12 of the judgment.
[52] See paragraph 29 of the judgment.

Director should take written instructions and directions from Mr. Kachshapov, the beneficial owner of the Company or other person properly authorized by him from time to time. She also noted that the Lawful Purposes Declaration and Authority to Act [53] for both companies were signed by Mr. Kachshapov.[54] The learned judge stated that it appeared from the documents which were exhibited to Mr. Oliver's affidavit that Mr. Kachshapov is the beneficial owner of Norgulf and Incomeborts. This was, in my view, sufficient ground on which to put the receiverships in these companies at an end. This was particularly so since MWP brought no new evidence to the inter partes hearing, which provided sufficient evidence that these 2 companies are owned directly or indirectly by Messrs Nicholls and Slater. Neither did MWP bring any evidence upon which the court could have held that the assets of the companies needed to be preserved because they could possibly be dissipated.

[53] In effect, the learned judge still accepted MWP's concerns that were based on the opinions and beliefs, which Mr. Wilson deposed and from which he had drawn what, in my view, were speculative inferences. She thought that the Certificates, though useful, were not of much assistance in determining the critical issue of the ultimate beneficial ownership of these companies. In fact, the question was whether MWP provided sufficient evidence to satisfy the court that there was at least a good arguable case that Messrs Nicholls and Slater, and possibly Mr. Emmott, are the beneficial owners of Norgulf and Incomeborts in the circumstances and the possible consequence that MWP could possibly obtain the relief that it seeks in its claim. She accepted the suggestions by counsel for MWP that the contents of the 4 emails pointed to something more, and, it appears, perhaps to an inference of the beneficial ownership of Norgulf and Incomeborts by the 3 men by means that make them constructive trustees for MWP.

[53] See Tab 11, 12 and 13 of Trial Bundle.
[54] See paragraphs 30 and 31 of the judgment

[54] The judge noted that MWP was troubled about the ownership of the Max Petroleum shares held by Norgulf and Incomeborts because Mr. Kachshapov was the ultimate beneficial owner of Horizon, the vendor to Sokol and onward to Max Petroleum of 80% of the company's interests in the Block A&E and East Alibek contracts. She also noted that MWP was concerned that there appeared to be a fundamental paradox between what MWP was told by Mr. Oliver as to the beneficial ownership of Incomeborts and Norgulf and the disclosures to the market in the AIM admission document for Max Petroleum, and what the Max Petroleum 2006 Annual Report seems to suggest.[55]

[55] The judge further noted that MWP had discovered, by way of documents produced on subpoena in New South Wales, that a number of sizeable payments were made by Horizon into the Australian bank account of Mr. David Slater. The documents indicated that Horizon paid $59,594, $134,838 and $66,839 into his account in January, February and April 2006, respectively. She noted that neither Horizon nor Mr. Kachshapov had supplied any explanation for these payments although numerous requests were made of them for explanations. She further noted that Mr. Slater now said that the payments represented interest free loans to Temujuin International for which Messrs Emmott, Nicholls and Slater are responsible for repayment of one-third each. The judge concluded that this meant that these "loans" were made at a time when Messrs Emmott and Nicholls were employed with MWP and owed contractual and fiduciary duties to MWP.[56] She noted the statement by MWP that the reason that Slater gave for the loans was mind-boggling, particularly in the face of total silence from Horizon and Kachshapov on them. She further noted the insistence by learned counsel for MWP that Horizon and/or Mr. Kachshapov should have provided justification and explanation as to these payments and why they were made to 2 senior employees of MWP, as well as to a third who had recently left MWP's employment.[57]

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[55] See paragraphs 36-37 of the judgment.
[56] See paragraphs 38-39 of the judgment.
[57] See paragraphs 40-41 of the judgment.

[56] The learned judge then noted, on the invitation of counsel for MWP, the statements by Mr. Emmott and others that Mr. Kachshapov made generous gifts to him (Mr. Emmott), as well as to Mr. Rigoll and Mr. Sinclair "as a mark of Mr. Kachshapov's personal gratitude" for their involvement on the Sokol transaction because he (Mr. Kachshapov), as vendor, was so pleased with their performance that he made substantial gifts to them totalling $950,000, notwithstanding that they acted for the buyer.[58] She referred to the submission by counsel for MWP that on the face of Mr. Emmott's explanation it appears that there is every reason to believe that these "loans" by Horizon or Mr. Kachshapov to Temujuin International are of the same class and are, in reality, benefits received by Messrs Slater and Nicholls for their performance in providing MWP services to Horizon. She entirely agreed with all of these submissions canvassed on behalf of MWP and adopted them.

[57] It is my view that by adopting the submissions that counsel for MWP made, the learned judge erred in 3 respects, which I think put her decision to appoint the Receiver and to continue that appointment outwith the plentitude of her discretion to make the appointment. First, she adopted the inferences on which MWP urged the court to find that it had a good arguable claim, when the evidence which MWP presented at the *ex parte* stage did not provide sufficient facts from which to draw those inferences. In the second place, at the *inter partes* stage, she adopted the reasoning by counsel for MWP, which in the main sought to cast doubt on the documentary evidence and explanations given on behalf of Norgulf and Incomeborts as to the ownership of their shareholdings. It is my view that while learned counsel's arguments may be capable of raising serious issues to be tried, they could not amount to a good arguable case in the face of the evidence that Norgulf and Incomeborts produced.

[58] In the third place, the judge did not ensure that the evidence showed that the subject matter of the proceedings would have been in danger, if left until the trial in

[58] See paragraph 47 of the judgment.

the possession or under the control of Norgulf and Incomeborts, the parties against whom the appointment of receiver was asked for. She did not ensure, alternatively, at least, that there was reason to apprehend that MWP, the party who made the application, would have been in a worse situation were the receivership orders not made. In my view, the judge thereby, on the principles stated in Charles Osenton & Co. v Johnston,[59] Bellenden (formerly Satterthwaite v Satterthwaite),[60] and G v G,[61] as accepted and applied in Michel Dufour and Others v Helenair Corporation Ltd.[62] and applied by this court in David Shimeld and Others v Doubloon Beach Club Limited,[63] disregarded principle and/or misapprehended the facts. She accordingly acted outside of the generous ambit of her discretion within which reasonable disagreement is possible. This, in my view, required this court to intervene and set aside her decision and discharge the receiverships because the evidence presented by the respondent did not meet the threshold test for the appointment of a receiver.

[59] It was in the foregoing premises that this court intervened, allowed the appeal, and ordered MWP to pay the expenses and charges of the Receiver, as well as the costs of Norgulf and Incomeborts in this court and in the High Court.

[60] I hasten to add that this does not mean that MWP will fail in its claim. That would be determined after the trial. No doubt the facts upon which the claim is based would be clarified and elaborated and strengthened by that time.

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[59] [1941] 2 All E.R 245 at 250, per Viscount Simon LC.
[60] [1948] 1 All E.R. 343 at 345, Asquith LJ.
[61] [1985] 2 All E.R. 225 [H.L.].
[62] Civil Appeal No. 4 of 1995 (12th February 1996.), per Sir Vincent Floissac CJ.
[63] St. Lucia Civil Appeal No. 33 of 2006, Rawlins JA.

I do not think that the present facts show that there was a good arguable case that merited the appointment of the receiver or the continuation of the receivership orders.

Hugh A. Rawlins
Justice of Appeal

I concur

Denys Barrow, SC
Justice of Appeal

I concur

Ola-Mae Edwards
Justice of Appeal [Ag.]