GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.1 OF 2007

IN THE MATTER OF BANK CROZIER LIMITED (In Liquidation)

AND

IN THE MATTER OF THE OFFSHORE BANKING ACT, 1996, NO. 39

AND

IN THE MATTER OF THE COMPANIES ACT, 1994, NO. 35

AND

IN THE MATTER OF THE INTERNATIONAL COMPANIES ACT, CAP. 152

BETWEEN:

DARYL SANDS CONTROLLER OF BANK CROZIER LIMITED

Appellant

and

GARVEY LOUISON LIQUIDATOR OF BANK CROZIER LIMITED (In Liquidation)

First Respondent

and

PETER FOSTER LIQUIDATOR OF BANK CROZIER INTERNATIONAL LIMITED

Intervener/ Second Respondent

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Mrs. Dancia Penn-Sallah, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Seenath Jairam, SC, and Mr. Steven Singh for the Appellant
Mr. C.E. Lashley, QC, and Mr. Sean Lewis for the First Respondent

Mr. Anthony Astaphan, SC, Ms. Celia Edwards and Ms. Renee St. Rose for the Second Respondent
Mr. Derek Ali holding a watching brief for sundry creditors

2007: June 20;
November 26.

Banking – offshore banking -- appointment of Controller – appointment by the Minister – terms of appointment – right to indemnification – security – priority

The appellant was appointed controller of an offshore bank by the minister responsible pursuant to the provisions of section 20 of the Offshore Banking Act (*set out in paragraph 2 of the judgment*). By that provision, the minister appointed the appellant as controller at the expense of the Bank and "with like power of a receiver appointed under the Bankruptcy Act". During the appellant's controllership the Bank froze the accounts of its depositors and refused to permit withdrawals. A depositor brought a claim against the appellant alleging negligence and breach of fiduciary duty. The Bank went into liquidation while the appellant was controller. The appellant applied to the High Court for a determination of the question whether he was entitled to be indemnified out of the assets of the Bank in priority to the general body of creditors, like a court appointed receiver, for all costs and expenses arising from his function as controller, including contingent liabilities. Over the objection of the appellant, a judge in chambers gave leave to intervene to the second respondent, who was the liquidator in another liquidation, and heard him, along with the liquidator of the Bank, in opposition to the appellant's application. The judge decided that the appellant was not entitled to an indemnity secured by the assets of the Bank. The controller appealed against the grant of leave to intervene and the denial of an indemnity.

Held, dismissing the appeal:

(1) the decision of the judge to hear the application for leave to intervene on the same occasion as the application concerning the right to an indemnity was entirely a matter of discretion for the judge and the appellant advanced no basis for saying the judge wrongly exercised his discretion;

(2) the court had an inherent jurisdiction to grant leave to intervene to a person having sufficient interest in the proceedings and the appellant had advanced no basis for holding that the judge was wrong to exercise his discretion in favour of hearing the second respondent;

Deloitte & Touche AG v Johnson [1999] 1 WLR 1605 and Dufour v Helen Air Civ. App. No. 4 of 1995 followed.

(3) the conferring on a controller of 'like power of a receiver under the Bankruptcy Act ' gave the controller the power of such a receiver, which was largely to realize the assets of the estate, but a receiver had no power to confer on himself an indemnity or a lien on the assets of an estate or priority over other creditors;

(4) the indemnity, lien and priority that receivers enjoyed were enjoyed by court appointed receivers, including receivers appointed pursuant to statute, who were appointed by the court. It was by virtue of the court's order appointing a receiver, its control of the assets in a receivership and its control of the receiver whom it appointed and who remained its officer that the receiver enjoyed those incidents; he did not enjoy them simply by virtue of holding the status of receiver.

Capewell v. Her Majesty's Revenue and Customs & Another [2007] 1 WLR 386; [2007] UKHL 2 considered.

(5) The power given to the minister by section 20 of the Offshore Banking Act to appoint a controller at the expense of the licensee gave the minister the right to recover the expenses of the controller from the licensee and that right amounted to an indemnity, using the word indemnity in the sense of a right to be indemnified or protected or relieved against a burden or obligation – in this case, the obligation to meet the expenses of the controller. However, it was a bare indemnity because the Act made no provision for securing the indemnity by the assets of the estate or for the payment of indemnification in priority to payments to the general body of creditors;

(6) Insolvency practitioners and others who accept appointment as receivers or controllers should see, before accepting appointment, that satisfactory provisions exist to remunerate and indemnify them. If prospective appointees do not do so, that is entirely their fault and they must not look to the court to relieve against their imprudence;

> Dictum of Simon Brown LJ in Hughes v Customs and Excise Commissioners [2003] 1 WLR 177 at paragraph 35 citing with approval dictum of Ward LJ in In re Andrews [1999] 1 WLR 1236 at 1243 considered.

(7) Prescribed costs of the appeal and costs of the application in the court below were awarded to the liquidator to be assessed, if not agreed within 21 days. The second respondent would not be awarded costs because, while his intervention was helpful to the court and may have been a prudent course to take for the benefit of the estate of which he was liquidator, the appellant should not be made to bear the costs of a party that the appellant did not make a party to the proceedings and whose interests were adequately represented by the liquidator and, therefore, strictly called for no separate representation.

JUDGMENT

[1] BARROW, J.A.: This is the judgment of the court. The principal issue on this appeal is whether a Controller, appointed pursuant to the Offshore Banking Act[1] (the Act), "with like power of a receiver appointed under the Bankruptcy Act"[2], to control the affairs of an offshore bank that subsequently went into liquidation, is entitled to be indemnified like a court appointed receiver, for all costs and expenses arising from his function as controller, including contingent liabilities, out of the funds of the bank in priority to the general body of creditors. In a judgment dated 20th December 2006[3] Baptiste J said the Controller was not so entitled. It is

[1] No..39 of 1996
[2] Chapter 27, 1990 Laws of Grenada
[3] Daryl Sands v Garvey Louison GDAHCV 2003/0255 (Grenada)

against that decision, and the decision to allow the second respondent to intervene and be added as a party to the proceedings in which that issue was to be determined, that the Controller appeals.

The appointment as Controller

[2] On July 31, 2002 the Minister of Finance of Grenada appointed the appellant, Daryl Sands, Controller of the affairs of Bank Crozier Limited (the Bank) pursuant to the provisions of Section 20 of the Act because the Minister was of opinion that the Bank was carrying on business in a manner detrimental to the interest of the public, its depositors and Grenada as an offshore banking centre. Section 20 of the Act states:

> "20 (1) Whenever the Minister is of the opinion that a licensee –
>
> …
>
> (b) is carrying on business in a manner detrimental to the public interest or the interest of its depositors or of the beneficiaries of any trust or its creditors;
>
> ….
>
> (e) is carrying on offshore banking business in such a manner which will affect Grenada adversely as an offshore banking centre;
>
> …
>
> he may forthwith do all or any of the following:
>
> …
>
> (v) at the expense of the licensee appoint a person to make a special examination under conditions of secrecy or to assume control over the affairs of the licensee … with like power of a receiver appointed under the Bankruptcy Act; …"

[3] The appointment was extended a number of times and ultimately to August 14, 2003. In the notice of the Controller's appointment which was published in the

Gazette the Minister stated that in accordance with section 20 of the Act the Bank would be responsible for settling all costs, fees, charges and expenses incurred by the Controller. The appellant deposed that he accepted the appointment on those terms and that he has been advised by counsel that as such he is entitled to an indemnity for all costs and expenses out of the assets of the Bank in priority to the general body of creditors, subject to any prior secured interests.[4] The second respondent makes the point that the appellant has consistently refused to disclose the terms contained in the letter of appointment, which it is commonly accepted, the Minister issued.

[4] On April 22 2003 the appellant learned that one of the Bank's most significant assets had been placed into administration outside of Grenada and he was advised that the Bank did not stand to recover anything from this investment. The appellant had not been informed before of this situation, which went to the very solvency of the Bank. On April 24, 2003 the appellant reported these matters to the Grenada International Financial Services Authority (GIFSA) which then reported matters to the Minister of Finance.

[5] In anticipation that a Notice of Intention to revoke the Bank's licence would forthwith be issued, the Appellant froze all accounts at the Bank with effect from April 22, 2003. Persons who had deposited funds prior to April 22 with the Bank who attempted to withdraw funds were refused. The Controller took the view that it would constitute a fraudulent preference to allow any of these depositors to do so and that by refusing to permit withdrawals he was acting in the best interests of the Bank and its general body of creditors.

The lawsuits against the Controller

[6] On May 21st, 2003 Carla Bella Ltd., a depositor whose withdrawal had been refused, commenced a claim against the Bank, the appellant and the Minister of

[4] Paragraph 14, appellant's affidavit sworn 29th July 2003, tab 1 Record of Appeal

Finance asserting a claim to priority of payment from the funds on deposit at the Bank, alleging misconduct on the part of the Minister of Finance and the appellant and alleging negligence on the part of the appellant. Carla Bella discontinued that claim in Grenada, but Carla Bella filed another claim against the appellant in April 2005 in the Province of Alberta, Canada, alleging negligence and breach of fiduciary duty on the part of the appellant. Carla Bella claims general damages of Cdn.$2,216,606 and special damages of Cdn.$9, 476,220.

[7] In addition, Grenville Winslow Phillips, Controller of Bank Crozier International Ltd. (BCIL), commenced a separate claim against the appellant on May 30, 2003. He obtained an injunction prohibiting the appellant from removing from the jurisdiction US$3,500,000 of the Bank's assets under his charge. The appellant filed defences in both the Carla Bella and BCIL claims.

Appointment of liquidator and claim to indemnity

[8] On July 24, 2003 an Order for winding up Bank Crozier Limited was issued and Mr. Garvey Louison was appointed as liquidator of the Bank. The appellant accepted that the effect of the appointment of the liquidator was to end the appellant's control of the Bank and, in handing over to the liquidator, he advised the liquidator on the nature of the lawsuits and that he had a continuing indemnity and resulting security over all the Bank's assets. The liquidator advised the appellant that it was beyond the liquidator's authority to make any decision on the matter and that the appellant should seek the assistance of the court. As a result, the appellant applied to the court for directions and orders on, among other things, his entitlement to indemnification by the estate of the Bank and his security interest in the assets of the Bank in support of such indemnity. The appellant indicated that he has incurred significant costs and continues to incur costs on an ongoing basis in defending the lawsuits brought against him in relation to his actions while he was controller.

[9] It is important, we think, to settle at the outset that the issue that this court has been asked to determine on appeal is whether the Controller was appointed on terms that he was entitled to a right of indemnification out of the assets of the Bank in priority to all claims other than the claims of secured creditors. The issue, therefore, was as to the terms of the Controller's appointment. The issue was not whether the liquidator should honour the Controller's claim. Mr. Lashley Q.C., counsel for the liquidator, stated in his written submissions in the court below[5] that despite filing 4 affidavits in 2003 the Controller never once itemised any alleged expenses in support of a claim for indemnity and it was long after the Controller's application was filed in July 2003 that the Controller's agent, in January 2006, notified the liquidator of certain expenses for the years 2004 to 2005 so, it seems clear to us, a claim for the payment of expenses incurred by the Controller was not the footing for the Controller's application.[6] As counsel further submitted, an assertion of a claim for an unquantified sum for litigation expenses already incurred and a claim for as yet unincurred expenses are not claims in the liquidation.

[10] Mr. Lashley Q.C, in his written submissions before this court, identified an additional reason why the court must limit itself to a determination of the rights incident to the appointment of the Controller as distinct from whether the Controller should be indemnified against the costs of the lawsuits and that is the fact that even a court appointed receiver is not entitled to an indemnity in respect of liability for negligence or default in the performance of his duties: see R.A. Price Securities Limited v Henderson.[7] The Carla Bella claim alleges negligence on the part of the Controller so a claim for indemnification in respect of that lawsuit would need to be specifically examined by the court below, when it is made (or, if it has already been made, when it is considered) before a decision can be made on it and before the issue can reach this court. The need for specific examination of a

[5] Record of Appeal, tab 22, at paragraph 16

[6] The affidavit of the Controller's agent, David Holukoff, sworn 24th March 2006 confirms that the agent submitted a proof of debt to the liquidator in January 2006.

[7] [1989] 2 NZLR 257. See also Kerr & Hunter On Receivers and Administrators, 18th edition, London (Sweet and Maxwell) 2005 at 9-20 and 9-23

claim for indemnification in respect of the Carla Bella claim is made stronger by the submission of Mr. Astaphan S.C., counsel for the second respondent, that even a court appointed receiver must first obtain the court's approval before he defends a claim, to be able to recover his costs of litigation. It is said that the Controller did not obtain court approval to defend the Carla Bella claim.

[11] In this regard it should be noted that when the Controller first made his application to the court below for its decision on his entitlement to an indemnity he did so in a notice of application that, one deduces from what was stated in the affidavit in support,[8] sought orders and directions on a number of matters including a direction that the Controller be at liberty in conjunction with the liquidator to continue to defend the (Grenada) Carla Bella claim and a direction as to the Controller's entitlement to indemnification by the estate of the Bank and a security interest in the assets of the Bank in support of such indemnity. However, Pemberton J dismissed this application as premature, on 17th November 2003, and the issue of the Carla Bella claim was never decided. When this court allowed an appeal against that decision on 24th February 2006 by its order allowing the appeal this court remitted to the High Court the issue as we have earlier stated it, namely, whether the appellant is entitled to indemnification out of the assets of the Bank in priority to other claims. That is the issue that Baptiste J decided and the issue that is being appealed. The consideration that we propose to give, therefore, will address only the issue whether the Controller was appointed on the basis that he is entitled to a right of indemnification from, and secured by the assets of, the Bank, in priority to other creditors.

Leave to intervene

[12] The second respondent, Peter I. Foster, applied to be added as a party to the remitted application of Daryl Sands claiming an indemnity. The second respondent

[8] Sworn 29th July 2003; tab 1 Record of Appeal. The notice of application did not form part of the record of appeal.

is the liquidator of BCIL, whose Controller, Gregory Winslow Phillips, had brought the claim and obtained the injunction above mentioned. The two liquidators, of the Bank and of BCIL, compromised the BCIL claim and obtained court approval to a settlement that resulted in a judgment of the High Court in Grenada against the Bank for a compromise figure of US$ 2 million. The second respondent seeks to be paid from the assets of the Bank as the liquidator has agreed to do. The second respondent, in applying for leave to intervene, claimed to be a person interested in the liquidation of the Bank and that he will be adversely affected by an order for indemnification in favour of the appellant.

[13] Over the vigorous opposition of the appellant, Baptiste J gave the second respondent leave to intervene and to make representations on the indemnification application. On the appeal against that limb of the decision of Baptiste J, the appellant presented a number of grounds that counsel developed at some length in his written submissions. We need give only curt treatment to the argument, and its derivatives, that the judge acted improperly, unfairly and/or prejudiced the rights of the appellant by deciding to hear the second respondent's application along with the appellant's application for an indemnity. The appellant has failed to advance any basis for this court to interfere with what was a clear exercise of discretion; that is, a decision as to the order in which to hear two related applications. The judge could hardly have decided that he would hear the application for leave to intervene after he had heard the application in which the intervention was sought.

[14] The substantial grounds of appeal against the judge's decision to allow the intervention were contained in the contention that the liquidator represented the interests of all creditors, including the second respondent who was simply another unsecured creditor, and the second respondent therefore had no particular right or standing to be heard. Although Mr. Jairam S.C., counsel for the appellant, contended in one part of his written submissions that the "judge had no jurisdiction under the inherent jurisdiction of the court" to permit the second respondent to

intervene, an examination of the submissions reveals that counsel accepted that the court has an inherent jurisdiction to hear a party with sufficient interest. That this is so is clearly stated in Deloitte & Touche AG v Johnson.[9]

[15] Counsel's submissions, expressed in a number of different formulations, are represented in the following passage from his written submissions:

> "It is respectfully submitted that the learned Judge erred at law, since the aforementioned facts [that the second respondent has the benefit of a consent order for US$2 million] only established that the Intervener/Second Respondent had an interest in the outcome of the indemnification application. In coming to the conclusion that there was a legitimate interest (of which there was no evidence in the affidavit of Peter I Foster and in particular any reason why the Liquidator could not have adequately represented his [Foster's] interest), it was incumbent on the learned Judge to rebut the generally accepted principle in liquidation proceedings, that a Liquidator when sued represents all the creditors and no other party is a necessary party. In Re Youngs, Doggett v. Revett[10] it was held that leave cannot be given to a residuary legatee to appeal from a decree made against the executor at the suit of the creditor as the executor completely represents the estate for the purposes of such suit."

[16] The case of In re Youngs is of no assistance in the present case because it concerned a person who was not a party to proceedings in the court below seeking leave to appeal from a decree that the defendant in the court below firmly did not wish to appeal. The decision, therefore, concerned the court's refusal to allow a non-party to intervene at the level of the appeal court to make an appeal contrary to the wish of the party against whom the decree was pronounced. That is vastly different to this case where the intervener joins with the liquidator, in first instance proceedings, in resisting an application by a party to whom they are both adverse. The reason that existed in In re Youngs for refusing leave to intervene, as the sole appellant, does not exist in this case, where the application was to intervene as a second defendant.

[9] [1999] 1 WLR 1605 at 1611
[10] [1885] 3 Ch d 421

[17] Once it is recognized that the court has an inherent jurisdiction to allow a person with sufficient interest to intervene and, further, to hear any person that the court considers may assist the court, the court's decision to do either again boils down to the exercise of discretion. The statement of Floissac CJ in Dufour v Helen Air[11] as to the limited bases upon which the appellate court will interfere with the exercise of discretion by a judge should be too well known to need exposition. It is sufficient to state that the appellant has simply failed to show any basis for interfering with the judge's exercise of discretion. The appellant's further challenge, that the judge erred in law in the further findings he made, that various statutory provisions recognize or permit the second respondent to intervene notwithstanding that the liquidator had conduct of the proceedings, calls for no discussion because even if the judge was wrong on those findings, that error cannot affect our finding that the judge's exercise of discretion under the inherent jurisdiction of the court cannot be disturbed. Accordingly, we would dismiss the appeal against the judge's decision to allow the second respondent to intervene.

No right to an indemnity

[18] The findings that the judge made in arriving at his conclusion that the appellant was not entitled to indemnification out of the assets of the Bank were summarized in the very full written submissions by counsel for the appellant. Counsel submitted that the judge erred in law, having referred to section 20 (1) (v) of the Act which stipulates that the Controller is appointed at the expense of the licensee and is empowered with like powers of a receiver appointed under the Bankruptcy Act, in failing to conclude that this section created a statutory basis for a controller's right of indemnity from the estate for all reasonably incurred expenses. Counsel further submitted that the judge erred in law in finding that such a conclusion could only be arrived at "…. by putting undue and unreasonable strain on the clear language of the section." Counsel also submitted that the judge erred in law in finding that "these words cannot be used to import the quite different and additional burden of

[11]Civ. App. No. 4 of 1995 (Saint Lucia)

an indemnity over all the assets of the Bank to cover all alleged costs and potential costs and expenses."

[19] Counsel urged that the judge was wrong, as well, to conclude that it was for the Minister and the appellant to agree on the terms of appointment including remuneration and indemnity and that it was solely for the Minister to determine the Controller's terms and conditions, including any indemnity.

[20] A further ground of appeal was that the judge erred "at law in finding that there is a clear difference between a Court appointed receiver who is entitled to equitable protection and therefore an indemnity and a Controller/receiver appointed outside the Court e.g. by statute. It is a well established principle that "when the Court appoints a receiver, the receiver is an officer of the Court, not the agent of any party in the proceedings". Similarly, the appellant argued, "the judge erred at law in finding that the texts and authorities relied on "…. concerned receivers or trustees appointed by the Court and not under statutory powers"."

The appellant's case

[21] The essence of the appellant's case, which is summarized with counsel's emphases, is that Section 20(1)(v) of the Act dictates that the appointment of a Controller is made at the expense of the entity being controlled. Counsel regarded these last words as the statutory basis of a controller's right of indemnity from the estate for all reasonably incurred expenses, and argued that in addition it is plain that the Act contemplates that Controllers are to exercise powers analogous to those of receivers appointed under the *Bankruptcy Act*. Specifically, counsel noted, the legislation provides that whenever the Minister is of opinion that the affairs of a licensee so requires he may, "(v) at the expense of the licensee[12] appoint a person to make a special examination under conditions of secrecy or to

[12] see Capewell v. Her Majesty's Revenue and Customs & anor. [2007] 1 WIR 386; [2007] UKHL 2

assume control over the affairs of the licensee … with like power of a receiver appointed under the Bankruptcy Act; …"

[22] The language of the legislation expressly establishes the comparison between a controller and a receiver, counsel argued, and the two should be considered on the same footing. The submissions continued, "At law, a receiver or trustee of an estate is entitled to full indemnification from the assets over which it was appointed receiver for all expenses reasonably incurred in the exercise of his or her duties. The law has historically recognized that this indemnity extends to defence costs associated with defending claims against a receiver raised in relation to the receiver's actions in that capacity."

[23] After drawing attention to the public interest that is the sole basis for the Minister exercising the power to appoint a controller, counsel submitted that in light of the objects of the Act and the basis on which the Minister appointed the appellant, the provision "*with like power of a receiver appointed under the Bankruptcy Act*" ought to be interpreted in a manner which is "liberally inclusive" as opposed to "restrictively exclusive". This would be consistent with the purposes of the Act, it was argued, which include the desire on the part of the legislature to clothe a Controller with broad powers, at the expense of the licensee being controlled.

[24] Counsel further urged that on a proper interpretation of the section under which the appellant was appointed controller, the following is clear and evident on a plain reading of the statute:-

(a) A controller is appointed at the expense of the licensee;

(b) A controller is appointed to assume control over the affairs of the licensee; and,

(c) A controller is also endowed with "*like power of a receiver appointed under the Bankruptcy Act*".

[25] The appellant submitted that the section must be read cumulatively and that it gives wide powers to the Controller. It expressly provides in unambiguous language that the controller's expense is that of the licensee, that he is appointed to take full control of the affairs of the licensee and that he has the power of a receiver appointed under the Bankruptcy Act. Counsel noted that the Bankruptcy Act provides that the Receiver shall be an officer of the court and submitted that by extension a Controller has the like powers of a court appointed receiver.

[26] In support of those submissions counsel for the appellant expounded on the law, relying on the treatment in a number of leading textbooks, as to the right of a receiver to remuneration, priority, indemnity and a lien on the assets. At the risk of quoting too extensively from the submissions of counsel for the appellants we reproduce, verbatim and with counsel's emphases, the following five paragraphs from counsel's submissions (paragraphs [27] to [32], inclusive).

[27] "The analysis below will demonstrate that Commonwealth jurisprudence is replete with authorities supporting the Appellant's contention as opposed to the Respondent's. At law, a receiver or trustee of an estate is entitled to full indemnification from the assets over which it was appointed receiver for all remuneration, expenses and liabilities reasonably incurred in the exercise of his duties. This indemnification constitutes a first lien against the estate under his or her administration, which ranks first in priority above the claims of the general body of creditors.

[28] "The principles of law which have been summarized thus far are adequately supported by authority, Picarda, *THE LAW RELATING TO RECEIVERS, MANAGERS AND RECEIVERS* 3rd ed., (Butterworths, 2000) Chapter 32 at page 477 when speaking of the general rules as to entitlement states:-

> *"A receiver whether appointed to preserve property or by way of equitable execution is allowed such proper remuneration, if any, as may be fixed by the court. His right is limited to the assets and in the case of shortfall cannot be enforced against the plaintiff or the parties personally."*

[29] "At page 483 of his work Picarda discusses "Priority"

> *"A receiver's right to payment of his remuneration is limited to the assets over which he is appointed. But he is entitled to such payment even though the assets may be insufficient to meet all claims made upon them. As an officer of the court he 'has his remuneration provided for in front, as far as possible, of every other payment to be made out of the assets of which the court has assumed control'.*

[30] "At page 486 under the heading "INDEMNITY" the learned author comments:-

> "Running in tandem with his personal answerability for liabilities incurred in the course of his receivership is the right of a court appointed receiver and manager to be indemnified from the assets covered by his appointment.
>
> The rule can be simply stated: in the absence of any express direction in the order itself a receiver manager is entitled to be indemnified against all liabilities which he properly incurs, in carrying on a business, but the indemnity is limited to the assets….
>
> A receiver *simpliciter* is entitled to be allowed all costs, charges and expenses and to be indemnified against all liabilities properly incurred in the protection and preservation of the property committed to his charge, or otherwise in the course of his duties even though they result in a loss."

[31] "In BENNET ON RECEIVERSHIPS (2nd ed. 1999 (Carswell, 1999 at page 464 the author under the heading REMUNERATION OF RECEIVER AND MANAGER posits the Canadian approach as follows:-

> "As the court-appointed receiver is neither the agent of the debtor nor of the security holder, the receiver must look to the assets under its control for its remuneration. The term remuneration includes fees or salary together with the costs, charges and expenses properly incurred. Usually a lien is granted where the receivership is invoked by an unsecured creditor or by a government authority in protecting the public" (our words hence the reason for the draughtsman expressly providing for it first in the Offshore Banking Act) If a lien is granted, the lien ranks the receiver as a secured creditor under the Bankruptcy and Insolvency Act if the debtor is placed into bankruptcy, and in the proper case, the court may also provide that the receiver's remuneration extend to trust assets.

[32] "In Australia the position is highlighted in the statement made by O'Donovan in *Company Receivers and Managers* (1981) at p. 429 as recited in Re Central Commodities Services Pty Ltd & Ors (1984) 8 ACLR 801:-

> "A receiver's right to remuneration is not dependent upon the ability of the estate to answer all claims made upon it. As an officer of the court a receiver is considered to be appointed on behalf of all parties interested in the company's property. The court will, therefore, ensure, that his remuneration takes precedence as far as possible over every other payment to be made out of the assets under its control.
>
> It seems clear in my opinion that where a receiver is appointed by the court he can look to the assets of the company of which he is a receiver to meet his proper remuneration and the liabilities properly incurred. He has an indemnity over the assets and as such is entitled to a lien, and that lien, as established by Bernard v Davies (1863) 32 U LJ Eq 41 at p 43, covers not only his remuneration but also his properly incurred expenses." [Emphasis added.]"

[33] In addition to these sources the appellant relied on passages from the leading English decisions on the matter of indemnity for receivers. In Capewell v. Revenue and Customs Commissioners and Another[13] the House of Lords dealt with the issue of indemnity for a management receiver under the Criminal Justice Act 1988. In delivering the main opinion Lord Walker of Gestingthorpe referred to the statement of Simon Brown LJ in the Hughes v Customs and Excise Commissioners[14] with approval:-

> "Statutory receivers are to be treated precisely as their common law counterparts, save to the extent that the legislation expressly provides otherwise. The statute is not to be regarded as an entirely self contained code incorporating nothing from the common law".[15]

[34] In Hughes Simon Brown LJ also stated:

> "It is not apparently disputed that a receiver appointed under the CJA [1988 Criminal Justice Act] despite the statute's silence on the matter will have the right, for example, to bring an action or to sell property. Why then, unless the statute expressly so provides, should he be denied the other ordinary consequences of his receivership, including not the least

[13] [2007] 1WLR 386, [2007] UKHL 2
[14] [2003] 1WLR 177 at paragraph 18
[15] Counsel noted that the decision of the House of Lords in Capewell was not published at the time the proceedings were before Davidson Baptiste J but the principles discussed have been long established.

> the right (indeed the requirement) to recover the costs of the receivership from the assets under his control?"[16]

Appointment by the court

[35] The reason for burdening this judgment with the extensive quotes from the submissions of counsel for the appellant was to demonstrate, and not simply state the bare conclusion, that in every single instance the statements as to a receiver's right to an indemnity were made about a court appointed receiver. In both Hughes and Capewell the power to appoint was created by a particular statute but it was a power conferred upon the court and not upon a minister or other member of the executive. The pronouncement in Hughes from which counsel drew encouragement as to the entitlement of statutory receivers was directed to statutory receivers appointed by the court.

[36] Mr. Astaphan S.C. rested his entire case opposing the indemnification for which the appellant contended on the difference between a court appointed receiver and a receiver appointed by parties or by an official. It was on this distinction that Baptiste J based his decision, relying on the following extract from Kerr *The Law and Practice as to Receivers*[17] :-

> "There are many cases which the appointment of a receiver or a … manager is [effected] without resort to the Courts. Such appointments are made (i) under an agreement between persons interested in the property over which the appointment is made or (ii) under the provisions of a statute. A receiver so appointed is the agent of the parties or one of them according to the terms of the agreement or statute under which the appointment was made."

Mr. Jairam S.C., leading counsel for the appellant, argued that this statement was made only for the purposes of making the distinction between a receiver as an officer of the court and a receiver as an agent of the party so appointing him. Counsel submitted that this statement in no way precluded the existence of the right of indemnity from the assets.

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[16] Paragraph 45
[17] 15th edition, p 279

[37] The merits of these fundamentally different views are revealed when placed against the backdrop of the history of the receiver outlined by Lord Walker in Capewell as follows:

> 19 The court's power to appoint a receiver, as part of its auxiliary equitable jurisdiction, is of very ancient origin. It was described in Hopkins v Worcester and Birmingham Canal Proprietors (1868) LR 6 Eq 437, 447, as one of the oldest remedies in the Court of Chancery. It was used in a wide variety of situations in which there was a need for the interim protection of property (and the income of property), including disputes about partnerships, sales or mortgages of land, and administration of estates. Receivers could also be appointed by way of equitable execution. The receiver, being appointed by the court, was an officer of the court. His duty was to act impartially, and in accordance with the directions of the court, in administering the property to which the receivership extended.
>
> 20 **393* In short, the appointment of a receiver was in many cases the most effective way of "holding the ring" between warring litigants until the disputed issues could be finally determined. Because it is a useful procedure, Parliament has from time to time extended the range of situations in which a receiver or manager could be appointed-for instance, in order to enforce the repairing obligations of the absentee landlord of a block of flats: see the Landlord and Tenant Act 1987, section 21 . The provisions of section 77(8) of the 1988 Act, section 26(7) of the 1994 Act and section 48 of the 2002 Act are a further important extension of the situations in which the court has a statutory power to appoint a receiver. Sections 48, 50 and 52 of the 2002 Act provide for three types of receivers (management receivers, enforcement receivers and director's receivers, the latter appointed by the Director of the Assets Recovery Agency) but it is unnecessary to go into those details on this appeal.
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> 21 It has always been a basic principle of receivership that the receiver is entitled to be indemnified in respect of his costs and expenses, and his remuneration if he is entitled to be remunerated, out of the assets in his hands as receiver. Warrington J stated the principle in a well known passage in Boehm v Goodall [1911] 1 Ch 155, 161:
>
> > "Such a receiver and manager [that is, one appointed by the court] is not the agent of the parties, he is not a trustee for them, and they cannot control him. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter. I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of

> the court. The court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control."

[38] From the last paragraph it is clear that Lord Walker was directing attention specifically to receivers appointed by the court and he took the pain to insert the words in square brackets into the quote from Warrington J in Boehm v Goodall to make understanding certain that Warrington J was speaking of indemnity for court appointed receivers. The quote from Boehm v Goodall also explains the source of the receiver's indemnity. It is the court, as the appointing body, that gives the receiver his indemnity. The court grants the indemnity out of the assets that the receiver gets in because "The court itself cannot indemnify receivers …" As the sentence that precedes the foregoing words indicates, the assets which the receiver gets in are under the control of the court; and, as seen above, the receiver is an officer of the court and under the control of the court.

[39] It must not be overlooked that a receiver is usually expressly given an indemnity by the order of the court by which he is appointed, which order will usually also establish the other terms of his appointment, including the amount of his remuneration; see CPR 51.5.[18] It is a mistake to assume that it is by virtue of the fact that he is appointed receiver that a receiver possesses an indemnity. He obtains it by the order of the court.[19]

[40] This important detail is seen in the facts of Capewell v Revenue and Customs Commissioners in which the respondent (Capewell) was charged with conspiracy to cheat the public revenue. A judge made a restraint order in respect of his assets. Later, on the application of the Customs and Excise Commissioners, another judge appointed a receiver in respect of the respondent's realisable

[18] It is not axiomatic that the receiver will be remunerated, as the passage from paragraph 21 of Capewell, quoted in paragraph [33], above, indicates.)

[19] when the order omits to expressly confer the indemnity the order is treated as implicitly conferring it; see the second paragraph in the extract from Picarda cited at paragraph [30], above

assets, pursuant to a section in the Criminal Justice Act 1988. The receiver's costs, remuneration and expenses were to be costs in the receivership. Consequent on the discharge of the receivership order an issue arose whether the Commissioners should be responsible for the receiver's remuneration from a certain date and this focused attention on the terms of the receiver's appointment.

[41] In relating the facts of the case Lord Walker stated[20] that the order appointing the receiver was made under section 77(8) of the 1988 Act and that paragraph (3) of the order provided:

> "The costs of the receivership shall be paid in the receivership in accordance with the letter of agreement as exhibited to the witness statement of Colin Jones made on this the 23rd day of January 2003."

His Lordship stated:

> "7 The letter in question (dated 21 November 2002, and sent to Mr Sinclair [the receiver] by Mr Colin Jones of Customs' Asset Forfeiture Unit) contained (in para 6, headed "Remuneration") provisions about the receiver's remuneration and expenses. Para 6(a) was the basic provision:
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> > "It is proposed to seek an order from the court that your costs in this matter should be costs in the receivership, i e your costs, should be paid out of the moneys you bring in during the course of this receivership."
>
> Para 6(d) contained a limited indemnity given to the receiver by Customs."

[42] Mr. Astaphan S.C.'s objection that the appellant has consistently refused to disclose the terms of his letter of appointment gains considerable weight from this exposition; it is unacceptable for the court to be asked to confirm what would be a fundamental term of the Controller's appointment without being told the terms he agreed with his appointer. For present purposes, however, the points to note are, firstly, that in Capewell the Commissioners did not appoint the receiver, it was the court that did so on the application of the Commissioners, thus making the receiver the court's receiver and not the Commissioners' receiver. Secondly, the indemnity secured by the assets that the receiver was given, was given by order of

[20] [2007] 1 WLR 386 at 388

the court and was a separate indemnity from the limited indemnity given by customs. It seems a fair inference that the Commissioners had no power to grant an indemnity over the assets of the receivership otherwise they would not have needed to seek an order of the court granting an indemnity.

Like power of a receiver …

[43] Does it make a difference that in this case the Act conferred on the Controller "like power of a receiver appointed under the Bankruptcy Act"? That question raises the further question: what are the powers of such a receiver? The short answer is that the powers of a receiver under that Act are to realize and distribute the bankrupt's property and to take certain actions in that regard, including (with permission) bringing, instituting or defending legal proceedings relating to the property of the bankrupt.[21] The receiver's powers do not include fixing his own remuneration; this must be fixed by the creditors or by the court.[22] Neither do his powers include giving an indemnity to himself over the assets of the estate; the court must give this.[23]

[44] That conclusion that a receiver (or a controller) has no power to confer an indemnity on himself brings us to the ultimate question: can the Minister give the Controller an indemnity secured, as a matter of priority, by the assets of the Bank? A minister has no inherent power to do so and the Act does not give him that power. Section 20 of the Act gives the Minister power to appoint a controller at the expense of the licensee. Neither in that section nor anywhere else in the Act is there provision as to how to recover such expense from the licensee. It is easy to imagine how such expense will be recovered in the normal course, while the licensee is solvent and carrying on business: the licensee will pay it as an expense. The problem, as this case shows, arises when the licensee goes into liquidation. The expense remains that of the licensee and the Minister remains

[21] sections 47 to 64 of the Bankruptcy Act, Cap 27
[22] ibid, section 12
[23] See Capewell at paragraph 19

entitled to recover it from the licensee. But there is nothing in the Act or in any other source that has been brought to this court's attention that enables the Minister or the Controller to recover the expense of the controllership from the assets of the licensee other than as an ordinary debt in the liquidation.

[45] The Controller's claim for indemnification can stand in no better position than his claim to recover expenses. Assuming for present purposes that the Controller is entitled to indemnification, it is a claim that has no priority, by virtue of the fact of, or the law surrounding, his appointment, over the claims of other creditors in the liquidation. We are inclined to the view that the Act, by providing that the Minister may appoint a controller at the expense of the Bank, gave the Minister (not the Controller) an indemnity, using the word indemnity in the sense of a right to be indemnified or relieved or protected from a burden or obligation – in this case, the obligation to meet the expense of the Controller. But it was a bare indemnity; a bare right to be indemnified. The Act conferred no lien or other security over the assets. And it conferred no right to priority of payment. Because the Controller was purely a creature of statute and not an officer of the court he had no right beyond that which the Act conferred; and the Act conferred no priority.

[46] Any misgiving that the Controller is treated unkindly by this conclusion is diminished upon consideration of the reality to which Ward LJ[24] pointed in the following passage, quoted by Simon Brown LJ in Hughes:[25]

> "So much appears to be settled. The ordinary rule is that receivers should not accept their appointment unless satisfied that the receivable assets shall be sufficient to meet their claim for costs and for remuneration or that they would be otherwise indemnified, by contract or by order of the court, by the party responsible for their appointment. In this case there was an agreement between the receiver and HM Customs and Excise that Customs and Excise would indemnify the receiver if she were unable to bring in sufficient assets to meet her costs. That did no more than replicate the statutory provision [under section 88(2) of the CJA] ..."

[24] In re Andrews [1999] 1 WLR 1236 at 1243
[25] At paragraph 35

[47] Insolvency practitioners and others who accept appointment as receivers or controllers should see, before accepting appointment, that satisfactory provisions exist to remunerate and indemnify them. If prospective appointees do not do so, that is entirely their fault and they must not look to the court to relieve against their imprudence. It is hoped that the Controller's letter of engagement, which he has steadfastly refused to disclose, contained terms adequate to protect him.

Result

[48] We dismiss the appeal with prescribed costs to the liquidator, to be agreed within 21 days or to be assessed. In the course of his reply on the hearing of the appeal Mr. Jairam S.C. properly accepted that the liquidator should have been awarded his costs in the court below, thereby conceding the liquidator's cross-appeal against the order of Baptiste J that each party should bear his own costs. We therefore allow the cross-appeal and vary the order of the court below to award costs below to the liquidator, to be agreed within 21 days or to be assessed.

[49] Costs in relation to the second respondent require closer consideration. The second respondent became a party of his own motion and not because he was made a party by the Controller. One understands why the second respondent thought it prudent to make his own submissions on this issue and the estate in which the second respondent acts as liquidator was undoubtedly well served by the second respondent's decision to intervene. This court, no doubt, benefited from the usual helpful submissions of Mr. Astaphan S.C., counsel for the second respondent. But we do not see that the Controller should be required to bear the costs of any other than the party against whom he claimed, that is, the liquidator. There is no suggestion that the liquidator would have done other than a proper job – as he has done – of resisting the claim for indemnification and priority. In the circumstances, while grateful for the intervention of the second respondent, we think the justice of the situation requires that he should seek to recover his costs out of the estate that he administers.

[50] Finally, we discharge, at the expiration of 14 days from the date of this judgment, the conservatory order this court made on 20th February 2006.