EASTERN CARRIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2016/0009 & 0010

BETWEEN:

THE BANK OF NOVA SCOTIA TRUST COMPANY (BAHAMAS) LIMITED
(in its capacity as trustee of the Southampton Trust)

Appellant

and

[1] THE REGISTRAR OF COMPANIES
[2] WEMBLEY, LIMITED
[3] THE BANK OF NOVA SCOTIA TRUST COMPANY (BAHAMAS) LIMITED
(in its capacity as trustee of the Portsmouth Trust)

Respondent

AND BETWEEN:

THE BANK OF NOVA SCOTIA TRUST COMPANY (BAHAMAS) LIMITED
(in its capacity as trustee of the Battersea Trust)

Appellant

and

[1] THE REGISTRAR OF COMPANIES
[2] SUTTON, LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Douglas Mendes, SC	Justice of Appeal [Ag.]

Appearances:

Mr Michael Black, QC with him, Sara-Jane Knock for the Appellants
Mr. George Bompas, QC with him, Ms Dian Fahie and Mr. Stephen Grayson for the Registrar of Companies

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2017: January 30;
2018: October 10.

Civil Appeal – Redemption of bearer shares after transition date – Paragraphs 35, 36 and 37 of Division V of Schedule 2 of the BVI Business Companies Act – Whether the Court of Appeal has power to appoint a receiver to exercise a company's power to redeem bearer shares under paragraph 36 – Whether it would be contrary to the policy of the BVI Business Companies Act, 2004 to grant any relief which would result in the redemption of the appellant's shares – Whether the power of redemption is exercisable after the transition date under paragraph 36 of The BVI Business Companies Act

Both Sutton, Limited ("Sutton") and Wembley, Limited ("Wembley") are International Business Companies which were duly incorporated under the provisions of the International Business Companies Act, 1984 ("the International Business Companies Act") and were automatically re-registered as BVI Business Companies under the BVI Business Companies Act, 2004 ("the Act"), pursuant to section 248, Schedule 2 paragraph 6(1)(a) of the Act. Both Sutton and Wembley had issued only bearer shares, with Sutton issuing 1 such share and Wembley issuing 100. A bearer share is defined by section 2 of the Act as "a share represented by a certificate which states that the bearer of the certificate is the owner of the share…". The appellant is the bearer of the certificates of all the bearer shares issued by Wembley and Sutton.

Sutton and Wembley are 'grandfathered bearer shares companies' as defined in paragraph 9(b) of the Schedule of the Act with the result that Division 5 of Schedule 2 to the Act applied to both companies. The effect of paragraphs 35, 36 and 37 of Division 5 of Schedule 2 of the Act was that the appellant, as the bearer of the certificates for the Sutton and Wembley bearer shares, was required, before 31st December 2009 ("the transition date"), to deposit its bearer share certificates with a custodian who had agreed to hold the shares, or to convert the bearer shares to, or exchange them for, registered shares. The appellant failed to do any of these things before the transition date and as a consequence, the Sutton and Wembley bearer shares became 'disabled' as at 31st December 2009 in accordance with section 70(1) of the Act, which meant that they ceased to carry any of the entitlements which they would otherwise carry, including, the entitlement to vote, the entitlement to a distribution and the entitlement to a share in the assets of the companies on any winding up or dissolution, and any transfer or purported transfer of any interest in them was deemed to be void and of no effect – section 68(1)&(2). Further, because Sutton and Wembley continued after the transition date to have one or more existing bearer shares which had not been deposited with a custodian, the Financial Services Commission ("the Commission") established under the Financial Services Commission Act, 2001 became entitled to apply to the High Court for the appointment of a liquidator of the companies under the Insolvency Act, 2003 – paragraph 37. Because the Sutton and Wembley bearer shares had been disabled, the appellant would not have been entitled to a share of the assets of the companies in any such liquidation, and the assets of the companies, it was not disputed, would go to the state as bona vacantia. However, no steps had been taken by the Commission to apply to the court for the appointment of a liquidator and the Commission's position was that it would not do so until after the determination of the proceedings.

Before the High Court, it was the agreed position that despite the failure of the appellant to deposit the bearer shares with a custodian or to convert or exchange them for registered shares on or before the transition date, the shares could still be redeemed under paragraph

36 at any time before the Commission obtained an order appointing a liquidator under paragraph 37. However, neither company was in a position to do so because the last remaining director of both companies, Mr. E. Lysk Wyckoff, who was their only director since 14th September 2004, died on 26th November 2012, without the companies having taken any steps to regularise the bearer shares in the ways provided, or to redeem them. And because, under Sutton and Wembley's Articles of Association, a vacancy in the board of directors could only be filled by a resolution of a majority of the remaining directors, of which there were none, or by resolution of the 'members' of the companies, namely the appellant, who had been deprived of its right to vote its bearer shares by operation of section 70, it was not possible to constitute a board to exercise the companies' power of redemption. The appellant therefore had no choice but to apply to the High Court for an order appointing someone to exercise whatever powers of redemption the companies may have had. This the appellant did in proceedings commenced more than three years after Mr. Wyckoff's death, in which the appellant sought and pursuant to section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act for the appointment of a receiver with directions to redeem the appellant's shares.

The trial judge dismissed the claim. Although she was satisfied that under section 24(1) she could only make an interlocutory, not a final order, appointing a receiver, she did not go on to determine whether the order sought was indeed interlocutory as the appellant argued, or final, as the Registrar of Companies argued. Taking the view that the jurisdiction to appoint a receiver was “equitable in origin”, she considered the remedy to be one to be granted in her discretion, which she determined was not to be exercised in the appellant’s favour for three main reasons. Firstly, she thought that the appointment of a receiver, to redeem the appellant’s bearer shares and to replace them with registered shares,I would undermine the policy of the Act. The “practical effect” of the relief sought, she concluded, would be “to circumvent the consequences which the legislature has dictated must follow where there has been a failure to comply with statutory directives mandating immobilization.” Secondly, the learned judge felt that “the protracted and unexplained delay” in applying for the appointment of a receiver for nearly three years after the death of the last director, coming as it did after “the contumelious failure” to deposit the shares with a custodian and the failure to seek redemption of the shares within the lifetime of the directors, militated against the making of the order. Thirdly, in considering whether it was just and convenient to appoint a receiver, she took account of i) the fact that the appellant was a professional trustee and the former directors of the companies were professional directors “who must be presumed to have known the law, or at the very least have access to legal advice"; and ii) the fact that “throughout the transition period there was an available director and yet no steps were taken to deal with the bearer shares.”

The appellant appealed.

At the hearing of the appeal, the Registrar of Companies resiled from the concession made in the court below and argued that the power of redemption could not be exercised after the transition date. The Registrar argued further that the High Court had no jurisdiction to appoint a receiver to redeem the appellant's shares because i) the appellant is not entitled as of right to have the bearer shares redeemed; ii) the power to appoint a receiver under section 24(1) is restricted to the appointment of a receiver over the property of a company

but what the appellant was seeking was in effect the appointment of a director of the companies who would take steps to exercise the companies' power of redemption; and iii) under section 24(1) only interlocutory orders can be made and what the appellant was seeking was a final order. In any event, the Registrar contended, the appointment of a receiver to redeem the appellant's bearer shares would be inconsistent with the policy of the Act.

Held: Allowing the appeal and ordering that a receiver be appointed jointly by the appellant and the Registrar to consider whether to exercise the companies power to redeem the appellant's bearer shares, that:

1. Under paragraph 36, a grandfathered bearer share company's power to redeem an existing bearer share is expressed to arise where an existing bearer share "is not deposited with a custodian who has agreed to hold the share on or before the transition date." The company will not know whether it can proceed with redemption until after the transition date since the bearer of a bearer share certificate has until the very last minute of the transition date to deposit the bearer share with a custodian. The power of redemption can therefore only arise after the transition date.

2. While paragraph 36 does not compel a grandfathered bearer share company to redeem existing bearer shares which have not been deposited with a custodian on or before the transition date, but merely empowers it to do so, the failure to redeem any existing bearer share would expose the company to an application by the Commission under paragraph 37 for the appointment of a liquidator. If a liquidator were to be appointed, bearer shareholders would lose their property to the state because disablement would have deprived them of the right to a share in the assets of the company upon dissolution. As such, bearer shareholders have an interest in the exercise of the company's power of redemption, and given that the exercise of that power is the last and only remaining vehicle through which they may have their constitutional right not to be deprived of their property without compensation recognised and secured, the company is at the very least duty bound to consider whether the power ought to be exercised. While therefore it would be right to refuse any order which would oblige the companies to redeem the shares, there was a strong case to compel the companies to consider exercising their power of redemption in the appellant's favour.

3. Under section 24(1), the court has power to appoint receivers in circumstances where no receiver would have been appointed before the passage of the West Indies Associated States Supreme Court (Virgin Islands) Act and the demands of justice are the overriding consideration in considering the scope of the court's jurisdiction. The court's power to appoint a receiver is not restricted to cases where the receiver is to be the custodian of property and may be exercised in relation to companies which for one reason or another have become immobilised. Indeed, CPR 43.6(1), which is premised upon the existence of a power in the Supreme Court to appoint someone to carry its orders into effect where the party ordered to do the act does not comply, applies in relation to any order requiring a party to do any act and is not limited to orders for the payment of money or otherwise for the preservations of assets. The appointment of a receiver to consider exercising the companies' power of redemption is but an

incremental development of the jurisdiction of the court under section 24(1) to meet the peculiar circumstances of this case.

Tasarruf Mevduati Sigorta Fonu v Merril Lynch Bank and Trust Co (Cayman) Ltd [2012] 1 WLR 1721; Kyrgyz Mobil Tech Limited et al v Fellowes International Holdings Limited CA No. 25 of 2005 delivered 24th April 2006, unreported and Trade Auxiliary Company v Vickers (1873) LR 16 EQ 303, applied.

4. The court is not limited under section 24(1) to the making of interlocutory orders but may also exercise the power of appointment of a receiver at trial.

   Beddow v Beddow (1878) 9 Ch. D. 89; North London Ry Co v Great Northern Ry Co (1883) 11 QBD 30 considered.

5. The appointment of a receiver with power to redeem the appellant's bearer shares is not inconsistent with the policy of the Act. In the absence of an application by the Commission under paragraph 37, there is no time limit on the exercise of the power to redeem after the transition date and there was nothing in the Act which prevented the companies from exercising the power of redemption under paragraph 36 even up to the time these proceedings were commenced. It would not have been unlawful for them to do so. The learned trial judge was wrong in law to find otherwise.

6. It was just and convenient to appoint a receiver to consider exercising the companies' power to redeem the appellant's bearer shares. Upon the expiration of the transition date, the appellant became entitled to have the companies consider redeeming their shares. It would have been a travesty of justice if the High Court were unable to assist the appellant if, through no fault of its own, the last remaining director, Mr. Wyckoff, had died immediately after the transition date. The appellant has a constitutional right to be paid compensation for the compulsory acquisition of or possession of its shares. The power of redemption under paragraph 36 is the avenue through which the appellant's right to compensation may be satisfied in the event, as happened, they chose not to exercise the options available under paragraph 35. There was no obstacle in principle to making such orders as may have been necessary in those circumstances to ensure that the appellant received the redemption price or fair value for its shares. It made no difference in principle that Mr. Wyckoff died some three years after the transition date without exercising the power of redemption or that it took the appellant another three years to apply for a receivership order. The Act put no time limit on the exercise of the power of redemption, except that imposed by the diligent exercise of the Commission's power to apply for the appointment of a liquidator, a power which the Commission did not exercise. There was no evidence that the delay in the exercise of the power of redemption or in applying for a receivership order caused anyone any prejudice. The demands of justice are the overriding consideration in determining the scope of the jurisdiction under section 24(1) and justice demands the appointment of a receiver to consider exercising the companies' power of redemption, and in so doing to give effect to the appellant's right not to have its property taken away without compensation.

JUDGMENT

[1] MENDES JA [AG.]: Sutton, Limited ("Sutton") and Wembley, Limited ("Wembley") are both International Business Companies duly incorporated under the provisions of the International Business Companies Act, 1984[1] ("the International Business Companies Act"). They were both so incorporated on 16th August 1985 and were automatically re-registered as BVI Business Companies under the BVI Business Companies Act, 2004[2] ("the Act") – see section 248, Schedule 2, paragraph 6(1)(a) of the Act.

[2] Neither Sutton nor Wembley has issued any shares other than bearer shares. A bearer share is defined by section 2 of the Act as "a share represented by a certificate which states that the bearer of the certificate is the owner of the share…". Wembley issued 100 bearer shares, while Sutton issued only 1. The Bank of Nova Scotia Trust Company (Bahamas) Limited, the appellant, is the bearer of the certificates of all the bearer shares issued by Wembley and Sutton. It is the bearer of the certificate of the Sutton bearer share in its capacity as the trustee of the Battersea Trust. It is the bearer of the certificate of 50 of the Wembley bearer shares in its capacity as trustee of the Southampton Trust and of the other 50 as trustee of the Portsmouth Trust.

[3] The passage of the Act in 2004 brought about a seismic shift in the law's treatment of bearer shares in the British Virgin Islands.

[4] It is not disputed that Sutton and Wembley are "grandfathered bearer share" companies as defined in paragraph 9(b) of Schedule 1 to the Act because: i) as at 31st December 2004, they were on the Register of International Business Companies maintained under the International Business Companies Act; ii) their memoranda, as at 31st December 2004, did not prohibit them from issuing bearer

[1] Cap. 291, Revised Laws of the Virgin Islands 1984.
[2] Act 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

shares; iii) they were re-registered automatically under Part III of Schedule 2 to the Act; iv) a notice to dis-apply Part IV of Schedule 2 to the Act had not been registered; and v) their memoranda had not, at any time since 31st December 2004, been amended to prohibit them from issuing bearer shares, converting registered shares to bearer shares or exchanging registered shares for bearer shares. As a result, Division 5 of Schedule 2 to the Act applied to both companies.

[5] The following paragraphs of Division 5 are of particular relevance:

> "35. (1) Every existing bearer share of a grandfathered bearer share company shall, on or before the transition date
>
> (a) be deposited with a custodian who has agreed to hold the share; or
> (b) be converted to, or exchanged for, a registered share.
>
> (2) Subparagraph (1) does not apply to a bearer share that, before the transition date
>
> (a) is cancelled; or
> (b) is redeemed, purchased or otherwise acquired by the company as a treasury share.
>
> (3) An existing bearer share in a grandfathered bearer share company is deemed not to have been deposited with a custodian for the purposes of subparagraph (1) until the registered agent of the company has received
>
> (a) in the case of a bearer share deposited with an authorised custodian, notification of the deposit from the authorised custodian in accordance with section 72(1); or
>
> (b) in the case of a bearer share deposited with a recognised custodian, the proof of the deposit of the share and the notice required to be sent by section 71(3).
>
> (4) The Court may, on the application of the company or of a person interested in a bearer share, extend the period specified in subparagraph (1) by such further period or periods not exceeding one year in total as it considers fit.
>
> (5) On an existing bearer share being deposited with a custodian in accordance with subparagraphs (1)(a) and (3), it shall for all purposes of this Division cease to be regarded as an existing

bearer share and shall thereafter be treated as if it had been issued after the effective date.

(6) Section 70(1) shall not have effect with respect to an existing bearer share until after the transition date...

36.(1) Where an existing bearer share in a grandfathered bearer share company is not with a custodian who has agreed to hold the share on or before the transition date, the company may, notwithstanding sections 59 to 62 or any provision in the memorandum or articles, in any shareholder's agreement or in any other agreement, redeem the share.

(2) Subject to sub-paragraph (3), sections 176(3) and 179 apply to the redemption of bearer shares under sub-paragraph (1).

(3) Where a grandfathered bearer share company is unable, on making reasonable enquires, to ascertain the identity or address of the holder of a bearer share –

(a) it is not required to give the member notice under section 176(3); and

(b) the company shall hold the proceeds of redemption on trust for the owner of the bearer share.

37. Where, after the transition date, a company to which this Part applies has one or more existing bearer shares that have not been deposited with a custodian in accordance with this Division, the Commission may apply to the Court for the appointment of a liquidator of the company under the Insolvency Act, 2003."

[6] The transition date referred to in paragraphs 35 to 37 is 31st December 2009.

[7] The relevant parts of sections 70(1), 176(3) and 179 of the Act, referred to in paragraphs 35(6) and 36(2), provide as follows:

"70. (1) Subject to subsections (2) and (3), a bearer share in a company is disabled for any period during which it is held by a person other than a custodian.

176.(3) The company shall give written notice to each member whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to be effected.

179.(1) A member of a company is entitled to payment of the fair value of his shares upon dissenting from ...

(d) a redemption of his shares by the company pursuant to section 176 ...

(8) Within seven days immediately following the date of the expiration of the period within which members may give their notices of election to dissent, or within seven days immediately following the date on which the proposed action is put into effect, whichever is later, the company or, in the case of a merger or consolidation, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for his shares, the company shall pay to the member the amount in money upon the surrender of the certificates representing his shares.

(9) If the company and a dissenting member fail, within the period of thirty days referred to in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period of thirty days expires, the following shall apply:

(a) the company and the dissenting member shall each designate an appraiser;

(b) the two designated appraisers together shall designate an appraiser;

(c) the three appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes; and

(d) the company shall pay to the member the amount in money upon the surrender by him of the certificates representing his shares.

> (10) Shares acquired by the company pursuant to subsection (8) or (9) shall be cancelled but if the shares are shares of a surviving company, they shall be available for reissue.
>
> (11) The enforcement by a member of his entitlement under this section excludes the enforcement by the member of a right to which he might otherwise be entitled by virtue of his holding shares, except that this section does not exclude the right of the member to institute proceedings to obtain relief on the ground that the action is illegal
>
> (12) Only subsections (1) and (8) to (11) shall apply in the case of a redemption of shares by a company pursuant to the provisions of section 176 and in such case the written offer to be made to the dissenting member pursuant to subsection (8) shall be made within seven days immediately following the direction given to a company pursuant to section 176 to redeem its shares."

[8] Section 68(1) and (2) of the Act set out what the disablement of a bearer share for the purposes of section 70(1) entails.

> "68. (1) During the period in which a bearer share is disabled, that share does not carry any of the entitlements which it would otherwise carry and, subject to subsection (3), any transfer or purported transfer of an interest in the bearer share is void and of no effect.
>
> (2) Without limiting subsection (1), "entitlement" includes an entitlement to vote, an entitlement to a distribution and an entitlement to a share in the assets of the company on its winding up or on its dissolution."

[9] The effect of these provisions on the Sutton and Wembley bearer shares was as follows. Firstly, the appellant, as the bearer of the certificates for the Sutton and Wembley bearer shares, was required, before 31st December 2009, to deposit the Sutton and Wembley bearer share certificates with a custodian who had agreed to hold the shares, or to convert the bearer shares to, or exchange them for, registered shares – paragraph 35(1). The deadline date for the deposit, conversion or exchange could be extended by the High Court for a further period not exceeding one year in total, on an application by Sutton or Wembley, or the appellant – paragraph 35(4).

[10] It is not in dispute that the appellant never deposited the Sutton or Wembley bearer shares with a custodian or converted or exchanged them for registered shares before the transition date and did not apply for any extension of time to do so.

[11] Secondly, as a consequence of the appellant's inaction, the Sutton and Wembley bearer shares became 'disabled' as at 31st December 2009 – section 70(1) of the Act – which meant that they ceased to carry any of the entitlements which they would otherwise carry, including, the entitlement to vote, the entitlement to a distribution and the entitlement to a share in the assets of the companies on any winding up or dissolution – section 68(1) and (2). Further, any transfer or purported transfer of any interest in Sutton or Wembley bearer shares was deemed to be void and of no effect – section 68(1).

[12] Thirdly, because Sutton and Wembley continued after 31st December 2009 to have one or more existing bearer shares, which had not been deposited with a custodian, the Financial Services Commission ("the Commission") established under the Financial Services Commission Act, 2001[3] became entitled to apply to the High Court for the appointment of a liquidator of the companies under the Insolvency Act, 2003[4] – paragraph 37. Further, because the Sutton and Wembley bearer shares had been disabled as aforesaid, the appellant would not have been entitled to a share of the assets of the companies in any such liquidation, and the assets of the companies, it is not disputed, would go to the state as *bona vacantia*.

[13] However, no steps have yet been taken by the Commission to apply to the court for the appointment of a liquidator and we were told that it would not do so until after the determination of this appeal.

[14] In the court below, it was the agreed position that despite the failure of the appellant to deposit the bearer shares with a custodian or to convert or exchange them for

[3] Act No. 12 of 2001, Laws of the Virgin Islands.
[4] Act No. 5 of 2003, Laws of the Virgin Islands.

registered shares on or before 31st December 2009, the shares could still be redeemed under paragraph 36 in accordance with sections 176(3) and 179.

[15] Construed mutatis mantadis, section 176(3) requires a company to give written notice to each bearer shareholder whose shares are to be redeemed, stating the redemption price and the manner in which redemption is to be effected. There is no provision which guides the company in determining what price to offer or in prescribing the manner of redemption, whether by cash or otherwise. The effect of section 179(1)(d) is that the bearer shareholder who dissents from the redemption of his or her shares is entitled to payment of the fair value of his or her shares. I imagine that in this context, such dissent would occur where the redemption price offered or the manner of redemption is not acceptable to the bearer shareholder.

[16] Section 179(8) permits the company to make an offer at a specified price which the company determines to be the fair value of the shares, which, if accepted by the bearer shareholder, is to be paid in money upon the surrender of the share certificates. If the company and the bearer shareholder fail to agree on the fair value, section 179(9) provides that they must each designate an appraiser who together will designate a third appraiser, the three of whom would fix the fair value of the shares. The fair value so fixed is binding on the company and the shareholder for all purposes. As before, the fair value is to be paid in money.

[17] In accordance with the position which was agreed in the court below, there is no time limit placed upon a company's power to redeem bearer shares under paragraph 36(1) and, more particularly, there is no prohibition against the exercise of the power of redemption after the transition date. Sutton and Wembley were accordingly free to redeem the appellant's bearer shares at their convenience, at any time before the Commission obtained an order appointing a liquidator under paragraph 37, if they were indeed in a position to exercise their redemption powers.

[18] The problem was that they were not in a position to do so because the last remaining director of both companies, Mr. E. Lysk Wyckoff, who was their only director since 14th September 2004, died on 26th November 2012. Before he died, the companies had taken no steps to regularise the bearer shares in the ways provided, or to redeem them. And because under Sutton and Wembley's Articles of Association a vacancy in the board of directors could only be filled by a resolution of a majority of the remaining directors, of which there were none, or by resolution of the 'members' of the companies, namely the appellant, who had been deprived of its right to vote its bearer shares by operation of section 70, it was not possible to constitute a board to exercise the companies' power of redemption. The appellant therefore found itself in a quandary. It wanted to redeem its bearer shares but the companies were effectively immobilised. It therefore had no choice but to seek the High Court's assistance to appoint an appropriate person who would exercise whatever powers of redemption the companies may have had.

The proceedings in the court below

[19] Accordingly, by separate Fixed Date Claim Forms filed on 8th October 2015, the appellant sought orders requiring the holding of a meeting of the companies' membership at which the appellant would be entitled to vote solely on the issue of the appointment of new directors. Alternatively, the appellant asked that two named persons be appointed as directors of the companies under the inherent jurisdiction of the court. The appellant's intention no doubt was that the directors so elected or appointed would then be in a position to exercise the companies' power to redeem the shares.

[20] The first proposed order was clearly a non-starter since it required the court to grant the appellant an opportunity to vote at a general meeting, but this was an entitlement which the legislature had deliberately taken away because of the appellant's failure to take steps to regularise the bearer shares under paragraph 35 before the transition date. No doubt appreciating this difficulty, the appellant abandoned its claim for any such order and the relief claimed metamorphosed over time.

[21] In what it intituled its Supplemental Case Summary dated 30th November 2015, the appellant asked for an order pursuant to section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act[5] ("the Supreme Court Act") appointing a receiver for the sole purpose of redeeming the bearer shares and issuing replacement registered shares, in the event the court was not minded to order the appointment of directors of Wembley and Sutton under its inherent jurisdiction. Then, in what it called its Consolidated Case Summary filed on 18th December 2015, the appellant indicated that it would no longer pursue either remedy claimed in the Fixed Date Claim Forms and would pursue instead only the appointment of a receiver for the purposes previously indicated. Although the appellant continued to rely on section 24(1) of the Supreme Court Act, it nevertheless did contend that the court had an inherent jurisdiction to appoint a receiver and manager of property where the circumstances warranted it.

[22] After the respondent Registrar of Companies filed its response to the appellant's Consolidated Case Summary contending, inter alia, that the appointment of a receiver under section 24(1) could only be made by interlocutory order, whereas what the appellant was seeking was a final order appointing a receiver, the appellant responded on 19th February 2016, arguing, inter alia, that its primary cause of action against the companies 'might' include a declaration that each company was obliged to redeem the appellant's shares and a mandatory order directing each of them to do so. These were final orders, it was claimed, and since the companies were both non-functional, the Court could then exercise its powers under rule 43.6(1) of the Civil Procedure Rules 2000 ("CPR") to direct that "some person appointed by the court" should redeem the shares. It followed, it was argued, that an order appointing a receiver was not a final order, but rather was interlocutory to be issued in support of declaratory relief and mandatory orders. In this light, the appellant expressed its willingness, as a condition of the grant of relief, to undertake to amend its Fixed Date Claim Forms to delete all relief previously sought and to claim instead orders that:

> "1. the Court declares that Wembley Ltd. (and Sutton) is obliged to redeem

[5] Cap. 80, Revised Laws of the Virgin Islands 1991.

all bearer shares held by the Claimant ("Bearer Shares");

2. an Order directing and enjoining Wembley Ltd (and Sutton) forthwith to redeem the Bearer Shares;

3. further or other relief, including all appropriate interlocutory relief."

[23] Proposed Amended Fixed Date Claim Forms were later submitted to the Court, but not filed, reflecting the suggested alterations.

[24] Even though the Registrar took no objection to the appellant's proposed amendments, the trial judge, Ellis J, was not at all happy with the appellant's failure to follow proper procedure. The proposed amended Fixed Date Claim Form, she observed, "was not sealed, filed and did not comply with the requirements of Part 8 of the CPR", was "irregular and improper", was "wholly inconsistent with the overriding objective", and accordingly "could not be regarded by the Court".

[25] She noted that the appellant had made it clear that it intended to proceed with "the claim for relief dictated in the case summary, with the cusp of the claim centring on the Court's jurisdiction to appoint a Receiver under section 24(1) of the West Indies Associated States Supreme Court Act." That required consideration of CPR Parts 17 and 51, she held, because section 24(1) contemplated the appointment of a receiver by interlocutory order. But again, since the appellant sought relief "via legal submissions in the form of a case summary", the claims were "procedurally irregular", she declared.

[26] Nevertheless, Ellis J did consider whether to grant the declaratory relief claimed but rejected it out of hand as being of "little utility because on the facts as pleaded, the companies simply have no means to act".

[27] She also considered whether the appellant had made out a case for the appointment of a receiver. She was satisfied that under section 24(1) she could only make an interlocutory, not a final order, appointing a receiver. However, she did not go on to

determine whether the order sought was indeed interlocutory as the appellant argued, or final, as the Registrar argued, and therefore did not deny relief on the basis of the nature of the order sought. Rather, taking the view that the jurisdiction to appoint a receiver was "equitable in origin", she considered the remedy to be one to be granted in her discretion, which she determined was not to be exercised in the appellant's favour for three main reasons.

[28] Firstly, she thought that the appointment of a receiver to redeem the appellant's bearer shares and to replace them with registered shares would undermine the policy of the Act. Noting that a bearer share regime was conducive to illegal activities, including money laundering, because of the cloak of anonymity with which the owner of the bearer shares is clothed, she perceived that the amendments to the Act were designed to bring BVI law into conformity with international trends by requiring bearer shares to be either deposited with a custodian or exchanged for registered shares within a stipulated period of time, failing which the shares became immobilised and the bearer was deprived of the normal entitlements attaching to such shares. The "practical effect" of the relief sought, she concluded, would be "to circumvent the consequences which the legislature has dictated must follow where there has been a failure to comply with statutory directives mandating immobilization."

[29] Secondly, the learned judge felt that "the protracted and unexplained delay" in applying for the appointment of a receiver for nearly three years after the death of the last director, coming as it did after "the contumelious failure" to deposit the shares with a custodian and the failure to seek redemption of the shares within the lifetime of the directors, militated against the making of the order.

[30] Thirdly, in considering whether it was just and convenient to appoint a receiver, she took account of i) the fact that the appellant was a professional trustee and the former directors of the companies were professional directors "who must be presumed to have known the law, or at the very least have access to legal advice";

and ii) the fact that "throughout the transition period there was an available director and yet no steps were taken to deal with the bearer shares."

[31] For all of these reasons, the learned judge refused the relief sought and dismissed the Fixed Date Claim Forms, with costs to be paid to the Registrar in the global sum of $1,500.00.

The appeal

[32] Two broad issues arise for determination on this appeal. The first is whether the High Court has any power to appoint a receiver to exercise the companies' power to redeem the appellant's bearer shares. The second is whether it would be contrary to the policy of the Act to grant any relief which would result in the redemption of the appellant's shares. The Registrar has taken no issue with the procedural glitches which so troubled Ellis J.

[33] The appellant's main criticism of the trial judge's finding that the relief sought, if granted, would circumvent the provisions of the Act, is that the Act itself provides for the redemption of bearer shares after the transition date, that is to say, even after the bearer of a certificate of bearer shares has failed to avail himself or herself of the ample opportunity given by the Act to deposit the shares with a custodian or to replace them with registered shares. As noted, in the court below and indeed in the written submissions filed on this appeal, the Registrar of Companies accepted that redemption after the transition date was available. However, on the date the appeal was heard, Mr. Bompas, QC who appeared for the Registrar, sought to withdraw the concession and to argue instead that the power of redemption ended on the transition date. Of course, if that is indeed the correct position, the entire proceedings would have been misconceived and the appeal would accordingly fail.

[34] Mr. Black, QC for the appellant objected to the Registrar's proposed change of course. What Mr. Bompas, QC was proposing, he submitted, was not merely the

withdrawal of a concession previously made, but a challenge to a specific finding of law made by the trial judge which could only be overturned on a respondent's notice.

[35] Having considered the parties' respective submissions, the Court ruled that we would determine separately the question whether the power of redemption is exercisable after the transition date. There was no finding of law as such on this point by Ellis J who proceeded on the then undisputed premise that the companies were empowered to redeem bearer shares after the transition date. If that premise is indeed false, as the Registrar now contend, it would not be right to resolve the issues raised in this case other than on that basis. Mr Black, QC did not contend that it would be unfair to allow the Registrar to resile from its prior concession. What is involved is a strict point of law, no additional facts are needed to resolve the dispute and the appellant has been heard fully on the issue. I will therefore proceed now to determine whether the power under paragraph 36 is indeed exercisable after the transition date.

Is the power of redemption under paragraph 36 exercisable after the transition date?

[36] Mr. Bompas, QC contends that it is plain from the provisions of the Act, and from the mischief which they were designed to address, that the power under paragraph 36 could be exercised only up until the transition date, and not thereafter, for the following reasons:

i) The power of the Commission to apply to the Court for the appointment of a liquidator under paragraph 37 is expressed to come into being "after the transition date." Similar words are not used in paragraphs 35 and 36 and it is therefore to be inferred that the duties imposed and the powers bestowed thereunder are to performed or exercised before the transition date.

ii) Because the owner of bearer shares is the person currently in possession of the bearer share certificate, it is not possible at any point in time to determine the true owner of the shares. The bearer share regime accordingly provided a maximum degree of anonymity and reduced the

amount of information accessible by law enforcement and regulatory bodies in the event of an investigation. As a consequence, bearer shares are vulnerable to misuse and are particularly susceptible to use for nefarious purposes such as money laundering, tax evasion and fraud. The sole purpose of the Act was to bring an end to or at least to control bearer share ownership. This was to be achieved in relation to grandfathered bearer share companies, such as Sutton and Wembley, by requiring bearer shareholders to deposit or convert their shares before the transition date or within such additional period of time, not exceeding one year, as the court may allow. A construction of paragraph 36 which empowered a grandfathered bearer shares company to redeem bearer shares after the transition date would defeat the purpose of paragraph 35 and allow the mischief of anonymity to continue indefinitely.

iii) Paragraphs 35(1) and (2) permit the deposit of bearer shares with a custodian, the conversion or exchange of bearer shares for registered shares, the cancellation of bearer shares and the redemption, purchase or other acquisition of bearer shares by the company, but all before the transition date. After the transition date, bearer shares are disabled by section 70(1) which does not provide any free standing exception permitting redemption. As such, paragraph 36 is to be construed as supplementing paragraph 35 as a means of forcing the redemption of bearer shares before the transition date and providing the company with the machinery to ensure that on the transition date there are no bearer shares remaining.

[37] As attractive as that version of the raison d'etre of paragraph 36 was made to sound, it flounders on the natural and ordinary meaning of the words used in paragraph 36. A grandfathered bearer share company's power to redeem an existing bearer share is expressed to arise where an existing bearer share "is not deposited with a custodian who has agreed to hold the share on or before the transition date." The company will accordingly not know whether it can proceed with redemption until

after the transition date since the bearer of a bearer share certificate has until the very last minute of the transition date to deposit the bearer share with a custodian. The power of redemption can therefore only arise thereafter.

[38] Moreover, while the provision of a certain cut-off date by which all bearer shares are to be deposited, converted, exchanged, cancelled, redeemed, repurchased or acquired by the grandfathered bearer share company would no doubt have conduced more definitively to the eradication of the mischief of bearer shares, there is nothing irrational, unreasonable or illogical in a construction of the Act which restricts the consequences of the failure to comply with paragraph 35(1) by the transition date to the immediate disablement of the shares, with the longstop provision of redemption in accordance with sections 176(3) and 179 as the only other available option. It is not unreasonable to ascribe to the legislature the judgment that such measures were a sufficient incentive to existing bearer shareholders to abandon their anonymity.

[39] Furthermore, the legislature provided further incentive in paragraph 37 by empowering the Commission to apply to the court for the appointment of a liquidator where after the transition date a grandfathered bearer share company has one or more existing bearer shares that has not been deposited with a custodian. It is not hard to discern that the intention was that the threat of such an application would compel a company to exercise its power of redemption in order to avoid liquidation.

[40] There is yet another reason why construing the BVI Business Companies Act as vesting the power of redemption in the company after the transition date is to be preferred. Section 115(1) of the Virgin Islands Constitution Order 2007[6] **("**the Constitution Order**")** which came into force on 15th June 2007 provides that existing law "shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution." The BVI Business Companies Act is an existing law and accordingly must be construed in such a way

[6] S.I. No 1678 of 2007.

as to make it conform, inter alia, with section 25 of the Constitution Order which prohibits the taking possession or compulsory acquisition of property except where, inter alia, provision is made for the prompt payment of compensation.

[41] The effect of section 70(1) and paragraph 35 is to deprive the holder of a bearer share certificate of any entitlement which the bearer share would otherwise carry. Paragraph 37 empowers the Commission to apply to wind up a company which continues to have one or more bearer shares, with the result that the proceeds of liquidation which would otherwise have been distributed to the holder of the bearer share, goes to the state *bona vacantia*. A construction of paragraph 36 which permits redemption after the transition date ensures that, despite disablement, the holder of the bearer shares may receive payment of the redemption price or the fair value of his or her shares as the case may be in accordance with sections 176(3) and 179 of the Act, if the power of redemption is exercised before a liquidator is appointed under paragraph 37. Such a construction ensures that paragraph 36 conforms to section 25 of the Constitution Order. A construction which effectively vests the fair value of the shares in the state where the options under paragraph 35 are not exercised before the transition date is inconsistent with section 25 because it results in compulsory acquisition of bearer shares without the payment of compensation.

Would the appointment of a receiver undermine the policy of the Act?

[42] Turning next to the question whether the appointment of a receiver to exercise the companies' power of redemption would undermine the policy of the Act, I must say straightaway that I have some sympathy with the concerns expressed by the learned trial judge having regard to the terms of the order which the appellant was asking her to make. That order, it will be recalled, entailed the appointment of a receiver specifically to redeem the shares and to replace them with registered shares. It seems clear that any such order, if intended to bind the receiver to that particular result, would conflict with the express terms of paragraph 35(1) which requires every existing bearer share to be deposited with a custodian or converted to or exchanged

for a registered share "on or before the transition date." It could hardly have been the intention of the legislature to visit disablement upon the holder of a bearer share for failure to exchange a bearer share for a registered share before the transition date, but nevertheless to permit that to happen under the guise of redemption after the transition date.

[43] I agree with Mr. Bompas, QC that the conversion or exchange of a bearer share for a registered share is conceptually different from the redemption of a bearer share. As he submitted, sections 176(3) and 179 speak to the compulsory purchase of a bearer share at a redemption price or fair value and are inconsistent with the notion of exchange or conversion. It is not necessary for me to develop this point further since in the course of his oral submissions before us, Mr. Black, QC expressly abandoned any claim to have the receiver issue replacement registered shares for the bearer shares the appellant holds. He now wishes only that the receiver be appointed for the purpose of accepting the bearer shares and redeeming them. The fact is however that the order he sought from the learned trial judge was not limited in this way.

[44] It is noteworthy, however, that the learned judge herself appeared not to appreciate that the replacement of the bearer shares with registered shares was not encompassed in the power of redemption vested in the company under paragraph 36. As noted, it was common ground in the court below that the power of redemption could be exercised after the transition date and the learned judge proceeded on that understanding. She also does not record any dispute over the question whether a bearer share could be redeemed by replacing it with a registered share. Rather, it appears that her major concern was with making an order which would facilitate what she considered to be contumelious behaviour on the part of the appellant in failing to deposit the shares with a custodian or to convert or exchange them for registered shares before the transition date, "with no reasonable explanation for its flagrant failure." Furthermore, she was troubled by the appellant's failure to provide any "reasonable explanation … to explain the failure to redeem the shares at any

time while there were officers ready and available to do so", or to provide any reasonable explanation for the delay of nearly three years in applying to the court for the order sought after the death of the last remaining director. The effect of all of this was that the holders of the bearer share certificates were able to maintain their anonymity for almost six years after the expiry of the period permitted by the Act to regularise their status. It was this more than anything else which undermined the policy of the Act whose aim was to eliminate the opportunity for wrongdoing which the anonymity of bearer shares facilitated. As Mr. Bompas, QC put it, the aim of the Act was to restrict and regulate the use of bearer shares such that, where they continued in existence, they are held in such a way that the policing of beneficial ownership is possible. That way, the opportunity for money laundering and the concealment of assets were greatly reduced. Facilitating the redemption of the appellant's bearer shares so long after the transition date created the possibility that the very activity which the new regime of bearer share regulation was designed to eradicate would have been implicitly sanctioned.

[45] Again, the learned trial judge's reasoning, buttressed by Mr. Bompas' considerable advocacy, was made to appear attractive. But it contained a fatal flaw, namely, the failure to fully appreciate that no time limit was placed by the legislature on the exercise of the companies' power of redemption under paragraph 36.

[46] It must first be appreciated that the issue and holding of bearer shares was explicitly sanctioned by the International Business Companies Act. It was accordingly perfectly lawful for Sutton and Wembley to issue bearer shares and for the appellant or whomsoever to hold the certificates in relation to them. Under the Act, Sutton and Wembley were automatically re-registered as BVI Business Companies. The holding of bearer shares in Sutton and Wembley was not made unlawful by that Act. Rather, the shares became subject to a scheme designed to lead to their immobilisation. The holders of bearer shares were given the option to deposit their shares with a custodian or exchange them for or convert them to registered shares. This had to be done during a stipulated period of time. The consequence of a failure

to do so, however, was not the imposition of a criminal sanction or declaring the holding of such shares to be illegal. The consequence was disablement, along with the sole remaining option of redemption to obtain the redemption price or the fair value of the disabled shares. No time limit was placed on such redemption, which meant that the Act necessarily contemplated the continuation of anonymity for an unspecified period of time. The only limit on the period of time during which the anonymity of ownership would continue was the making of an application by the Commission for the appointment of a liquidator under paragraph 37. This necessarily meant that the potential for money laundering and the concealment of assets continued after the expiry of the transition period. But, apart from the disablement of the shares, which would have made any further dealing in the shares unattractive, the Act put no further impediment in the way of continued anonymity. In any event, it would be wrong to factor into any exercise of discretion whether to render assistance to the holder of a bearer share seeking redemption, the possibility that anonymity was being used to camouflage wrongdoing, in the absence of any evidence that such wrongdoing has in fact occurred. It would also be wrong, as Mr. Bompas, QC has urged us to do, to penalise the appellants for failing to explain when or how it came to obtain possession of the bearer share certificates, or where those certificates are, or to give evidence of the Trusts on whose behalves they are being held, or the identity of the true beneficiary of the shares (although the appellant has offered to make that information available to the court). The anonymity of holding bearer shares was lawful under both the International Business Companies Act and the Act permitted that anonymity to continue at most up until the shares were made the subject of a redemption exercise.

[47] The learned judge, in other words, failed to take account of the full implications of the fact that, in the absence any application by the Commission under paragraph 37, there was nothing in the Act which prevented the companies from exercising the power of redemption under paragraph 36 even up to the time these proceedings were commenced, and it would not have been unlawful for them to do so. It therefore plainly would not undermine the policy of the Act if this Court made an

order which made that result achievable, and Ellis J was wrong in law to find otherwise.

[48] Against this backdrop, what this case is really about is whether this Court has the power to assist the appellant in its quest to redeem its bearer shares in circumstances where redemption would have been possible without the court's assistance if the companies had directors, but the reason why redemption is not now possible is because of the untimely death of the last remaining director after the transition date and the disablement of the shares. The same question would have arisen if the last remaining director had died immediately after the transition date. Put differently, there being no legal impediment to the redemption of the bearer shares after the transition date, the question is whether this Court is powerless to prevent the compulsory acquisition of the appellant's property by the state simply because of Mr Wyckoff's death. I am prepared to render any assistance which this Court is able to give. The real question in this case therefore is whether the Court has the power to do so.

[49] Before considering that question, however, two further related points which Mr. Bompas, QC raised must be considered. First of all, Mr. Bompas, QC noted that under the Act a company must have at least one member – section 79. A 'member' is defined in section 2 as a shareholder, a guarantee member or a member of an unlimited company who is not a shareholder, each of which is defined in section 78 as a person whose name is entered in the register of members. The holder of a bearer share certificate is not a member because his or her name is, by the very nature of the bearer share, not entered in the register of members. The result in this case is that neither Sutton nor Wembley has any members, a state of affairs which the appellant and the companies have allowed to continue for many years after the transition date, contrary to the requirement under section 79 that a company must have at least one member. This is a factor, Mr. Bompas, QC says, which we ought to take into account.

[50] Secondly, he says, because Sutton and Wembley only have bearer shares, the consequence of redemption under section 36 would be to leave the companies not only without members, but without the possibility of the appointment of any director who could issue shares to satisfy the requirement that there must be at least one member. As a result, redemption would lead inevitably to the liquidation of the companies but the consequence of disablement under section 70(1) is that the holder of a bearer share is deprived of the entitlement to a share in the assets of the company on its winding up or dissolution. Accordingly, even if redemption was generally permissible in any other case so long after the expiry of the transition period, it was not permissible in a case such as this where the company only has bearer shares.

[51] I am not persuaded that either of these two points is a bar to relief in this case.

[52] Under the International Business Companies Act a 'member' is defined as "a person who holds shares in a company" (section 2(1)). A company incorporated under that Act was empowered to issue registered shares or shares issued to bearer or both (section 9(1)) and was required to include in its memorandum a statement of the number of shares to be issued as registered shares and the number of shares to be issued as shares issued to bearer (section 12(1)(i)). In the case of shares issued to bearer, the company was required to record in its share register the total number of each class and series of such shares, the identifying number of each certificate of shares issued to bearer, and the date of issue of the certificate (section 28(e) & (f)). There was no requirement to note the name of the bearer of the shares. A share issued to bearer was transferrable by delivery of the certificate relating to the share (section 31).

[53] It is clear that the holder of a share issued to bearer was considered a member of the company (see sections 62A. (1), 64(1)(b) and 64(2)). There is no provision in the International Business Companies Act, and we have not been referred to any provision in the memoranda of Sutton or Wembley, which limited the number of

bearer shares which could be issued or prohibited the issue of bearer shares only. It is to be assumed therefore that there was nothing unlawful in the fact that both Sutton and Wembley had issued only bearer shares.

[54] As noted, Sutton and Wembley were deemed to be re-registered under the BVI Business Companies Act with effect from 1st January 2007. It must be assumed to have been within the contemplation of the legislature that there may have been companies registered under the International Business Companies Act which only had shares issued to bearer. The fact that section 79 of the BVI Business Companies Act requires a company to have at least one member whose name was entered in the register of shares, accordingly could not affect the deemed re-registration of Sutton and Wembley.

[55] Likewise, it must be assumed to have been within the contemplation of the legislature that the power of redemption under paragraph 36, which was exercisable after the transition date, would be exercised by a company which only had shares issued to bearer. If therefore the consequence of redemption of all the bearer shares of a grandfathered bearer share company is the liquidation of the company in order to fund the payment of the redemption price or the fair value of the shares to the holder, this probably unique circumstance must be considered by necessary implication to be an exception to the rule under section 70(1) that disabled bearer shareholders do not enjoy the entitlement to a share of the assets of a company upon winding up or dissolution.

[56] In my judgment, this is a construction of the Act which is reasonably available and is to be preferred because it is consistent with the prohibition in section 25 of the Constitution Order against compulsory acquisition without compensation. In any event, if necessary, I would have been minded to adapt or modify section 70(1) to make it conform to section 25 in the peculiar circumstances of the case of a grandfathered bearer share company, deemed to be re-registered under the BVI

Business Companies Act, which only has bearer shares which have not been immobilised before the transition date.

Does the court have the power to appoint a receiver in the circumstances of this case?

[57] When the hearing of this appeal began, the appellant was seeking a declaration that Sutton and Wembley were obliged to redeem the bearer shares held by the appellant, an order requiring Sutton and Wembley to redeem the bearer shares, and an order that Ms. Nilani Perrera be appointed as a receiver of Sutton and Wembley for the purpose of accepting the bearer shares, redeeming them and issuing registered shares to the appellant. As noted, in the course of the hearing, the appellant refashioned the orders it sought, primarily by removing all reference to the receiver issuing replacement shares to the appellant. The final order sought reads as follows:

> "Upon the (appellant) through its attorney undertaking that it will return all the existing bearer shares it holds in the Company for redemption as soon as reasonably practicable after a Receiver over the Company has been appointed to office
>
> IT IS ORDERED THAT:
>
> 1. Nilani Perrera of Burelli Walsh be appointed as Receiver of Wembley Ltd (the Company) pursuant to s. 24(1) of the West Indies Associated States Supreme Court Ordinance Cap 80 of the Laws of the British Virgin Islands for the purpose of:
>
>   1.1 accepting the bearer shares in the Company held by the (appellant) (the Bearer Shares);
>   1.2 redeeming the Bearer Shares.
>
> 2. The appointment of Ms. Perrera as Receiver of the Company shall take effect at this date of the Order.
>
> 3. Ms. Perrera be given all powers necessary to effect the redemption of the Bearer Shares.
>
> 4. The costs and expenses recovered by Ms. Perrera, in her role as Receiver of the Company be paid by the (appellant).

5. Ms. Perrera's term as Receiver of the Company shall cease following the redemption of the bearer shares.

6. Liberty to apply."

[58] Mr. Bompas, QC put forward three main reasons why we do not have jurisdiction to make the orders sought. The first is that the appellant is not entitled as a right to have the bearer shares redeemed. The bearer shares have been disabled and they no longer enjoy their normal entitlements. All the appellant has is a hope that its shares might be redeemed in the exercise of the companies' remaining powers of redemption. Paragraph 36 does not place any obligation on the companies to redeem the appellant's shares. The companies are merely empowered to do so.

[59] Mr. Bompas, QC is right up to a point. Paragraph 36 does not compel a grandfathered bearer share company to redeem existing bearer shares which have not been deposited with a custodian on or before the transition date. It merely empowers it to do so. I imagine that there may be circumstances which would make redemption inappropriate. But those circumstances would have to be compelling because failure to redeem any existing bearer share would expose the company to an application by the Commission under paragraph 37 for the appointment of a liquidator. If that were to happen, apart from the usual consequences of liquidation, the bearer shareholders would lose their property to the state because disablement would have deprived them of the right to a share in the assets of the company upon dissolution.

[60] As such, bearer shareholders have an interest in the exercise of the company's power of redemption, and given that the exercise of that power is the last and only remaining vehicle through which they may have their constitutional right not to be deprived of their property without compensation recognised and secured, it is plain that the company is at the very least duty bound to consider whether the power ought to be exercised. I can therefore conceive of circumstances where a company can be compelled to consider exercising their power of redemption, and if they

decide not to do so for reasons which do not stand rational scrutiny, to redeem the existing shares.

[61] I therefore think Mr. Bompas, QC was right in inviting us to reject any order which would oblige the companies to redeem the shares at this stage. However, there is a strong case to compel the companies to consider exercising their power of redemption in the appellant's favour given that any request by the appellant to the companies to exercise such power will fall on no ears at all because there *is* no living director who can do so. It is precisely for this reason that the appellant asks for the appointment of a receiver.

[62] Secondly, Mr. Bompas, QC submits that the power to appoint a receiver under section 24(1) of the Supreme Court Act is restricted to the appointment of a receiver over the property of the company, as contemplated in CPR Part 51, for example to preserve the property of the company pending the outcome of a dispute or as a means of satisfying a judgment debt by way of equitable execution. What the appellant is seeking however is in effect the appointment of a director of the companies who would take steps to exercise the companies' power of redemption.

[63] Mr. Black, QC considered this a mischaracterisation of the relief sought. What the appellant seeks, he submits, was the appointment of a receiver over the companies' power of redemption, which he submits is tantamount to property. For this proposition, he relied on the decision of the Privy Council in Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd[7].. In that case, the claimant brought proceedings in Turkey against the defendant and obtained judgment *in personam* against him in the sum of US$30m. The defendant failed to satisfy the judgment debt and was made bankrupt in Turkey. The claimant subsequently discovered that the defendant had established two discretionary trusts in the Cayman Islands with assets of over US$24m. The beneficiaries of the trusts were the defendant and his wife and the defendant had power of revocation of the

[7] [2012] 1 WLR 1721.

trusts. The claimant commenced proceedings in the Cayman Islands seeking the appointment of a receiver by way of equitable execution over the power to revoke the trusts and an order that the defendant assign or delegate his power of revocation to the receiver. The judge dismissed the claimant's application on the grounds that the power to appoint a receiver was limited to property; that making the order sought would involve setting aside the longstanding common law distinction between powers and the property they affected; and that where it was desirable to treat powers of appointment as property that had been achieved by legislation.

[64] The Privy Council held that there was no invariable rule that a power was distinct from ownership and that in the circumstances of the case where the defendant owed no fiduciary duties in relation to the trust and his only discretion was whether to exercise his powers in his own favour, the powers of revocation were such that in equity they were tantamount to ownership. Their Lordships therefore ordered that the defendant should delegate his powers of revocation to the receivers so that they could exercise them to enforce the Turkish judgment.

[65] I agree with Mr. Bompas, QC that this case is distinguishable on the facts. The exercise of the power of redemption would result in the payment of a sum of money to the appellant. It would not result in the vesting of any property in the companies. Indeed, it would result in a diminution of the companies' property equivalent to the redemption price or the fair value which it would be required to pay to the appellant. The power of redemption is accordingly not tantamount to ownership of anything.

[66] The significance of Tasarruf to these proceedings, however, is in the Privy Council's endorsement of the findings made by the Court of Appeal in Masri v Consolidated Contractors International (UK) Limited No. (2)[8] in relation to the Court's power under section 37(1) of the Senior Courts Act 1981 (formerly the Supreme Court Act 1981), the modern version of section 24(1)), which Lord Collins summarised in the following passage (at para 56):

[8] [2009] QB 450.

> "The jurisdiction could be exercised to apply old principles to new situations. *Masri (No 2)* confirms or establishes the following principles: (1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under section 37(1); (2) the court has power to grant injunctions and appoint receivers in circumstances where no injunction would have been granted or receiver appointed before 1873; (3) a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amenable to execution at law; and (4) the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations."

[67] However, Lord Collins was quick to confirm Masri (No. 2)'s finding that section 37(1) does not confer an unfettered power and was in fact circumscribed by judicial authority dating back many years.

[68] In JSC VTB Bank v Skurikhin & Others[9], Christopher Butcher QC, sitting as a Deputy High Court Judge, accepted the following distillation of the principles applicable to the appointment of a receiver by way of equitable execution, as per Males J in Cruz City 1 Mauritius Holdings v Unitech Ltd[10]:

> "a) The overriding consideration in determining the scope of the court's jurisdiction is the demands of justice. Those demands include the promotion of the policy of English law that judgments of the English court and English arbitration awards should be complied with and, if necessary, enforced.
>
> b) Nevertheless, the jurisdiction is not unfettered. It must be exercised in accordance with established principles, though it is capable of being developed incrementally. It is not limited to situations where equity would have appointed a receiver before the fusion of law and equity pursuant to the 1873 Judicature Acts. Specifically, in modern conditions where business is increasingly global in nature, the jurisdiction is 'unconstrained by rigid expressions of principle and responsive to the demands of justice in the contemporary context'.
>
> c) The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution,

[9] [2015] EWHC 2131.
[10] [2014] EWHC 3131.

> but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by dicta which speak of the need for 'special circumstances' ...
>
> d) As the statutory source of the court's power to appoint a receiver speaks of what is 'just and convenient', it is impossible to say that convenience is not at least a relevant consideration (albeit not the only one).
>
> e) A receiver will not be appointed if the court is satisfied that the appointment would be fruitless, for example because there is no property which can be reached either in law or equity. That is an aspect of the maxim that equity does not act in vain. However, a receiver may be appointed if there is a reasonable prospect that the appointment will assist in the enforcement of a judgment or award. It is unnecessary, and will generally be pointless, for the court to attempt to decide hypothetical questions as to the likely effectiveness of any order. That applies with even greater force where such questions involve disputed issues of foreign law. It is sufficient that there is a real prospect that the appointment of receivers will serve a useful purpose."

[69] These principles were developed in relation to the appointment of a receiver in order to ensure that the judgments of a court were complied with and that a judgment creditor may receive the benefit of his or her judgment debt. Naturally therefore the question in each case is whether the thing over which the receiver is to be appointed is property in respect of which equitable execution is to be levied. This however is not a case of equitable execution. The appellant does not yet have judgment against the companies for the payment of the redemption price or the fair value of its bearer shares. We are at a stage before any such judgment where the most which has been established is the appellant's right to have the companies consider the exercise of the power of redemption in the appellant's favour. If, therefore, the power to appoint a receiver under section 24(1) is restricted to equitable execution, or is otherwise exercisable only where the receiver is to be the custodian of property, the fact that the receiver in this case is not to be appointed over property is determinative of these proceedings.

[70] There is strong authority, however, for the proposition that the court's power is not so restricted. In Kyrgyz Mobil Tech Limited et al v Fellowes International Holdings Limited[11], the High Court enjoined the respondent from bringing any suits or proceedings to enforce the rights under a certain agreement, from enforcing or seeking to enforce any judgment or order obtained from any court or tribunal on the basis that it was or became entitled to exercise any rights or perform any obligations under the said agreement, and in particular a judgment obtained from the Bishkek Inter-district Court, and from registering itself as the owner of shares in a particular company, or from effecting any change on the company's register reflecting such ownership pursuant to any such order or judgment. By a further order made some months later, a receiver was appointed of the respondent company for the limited purpose of ensuring compliance with the previous orders, with power to manage and administer the legal and other procedures regarding ownership or re-registration of the shares, there being evidence to the court's satisfaction that the respondent had failed to comply with the orders by enforcing or attempting to enforce the judgment of the Bishkek Inter-District Court. The receivership order was later discharged on the basis that the appointment of a receiver to manage and administer legal and other procedures in foreign countries offended the rules of international comity, in that it was an unjustified interference with the suit before the Kyrgyz Republic Court. The appellant appealed against this order and the respondent cross-appealed seeking to support the judge's decision inter alia on the ground that it was in any event inappropriate to appoint a receiver where there were no assets within the scope of the receivership. Gordon JA rejected this argument. He said (at paragraph 13):

> "… I … know of no precedent for the appointing of a receiver in the circumstances of this case, but nor do I know of any authority that forbids it. I would require strong authority to persuade me that a court should limit a jurisdiction it clearly has in such a way as to make its injunctive orders have the force of a toothless tiger. In the circumstances, I hold there is nothing legally or intrinsically wrong in appointing a receiver where there are no assets within the scope of the receivership."

[11] CA No. 25 of 2005 delivered 24th April 2006, unreported.

[71] In his submissions in the court below and before us, Mr. Black, QC sought to draw inspiration for the orders he asked to be issued from CPR 43.6(1), which provides that:

> "43.6(1)If –
> (a) the court orders a party to do on act; and
> (b) that party does not do it;
> the judgment creditor may apply for an order that –
> (i) the judgment creditor; or
> (ii) some person appointed by the court;
> may do the act."

[72] CPR 43.6(1) is premised upon the existence of a power in the Supreme Court to appoint someone to carry its orders into effect where the party ordered to do the act does not comply. It applies in relation to any order requiring a party to do any act and is not limited to orders for the payment of money or otherwise for the preservations of assets. The presumption therefore is that the power to appoint a person to do the act which the court ordered the party to do is not limited to cases of equitable execution or to other cases where assets are within in the scope of the appointee's remit.

[73] There is also long established authority for the intervention of the court in relation to companies which for one reason or another have become immobilised. In Trade Auxiliary Company v Vickers[12], Sir R Malins, VC appointed a receiver of a company to give time to have the register of shareholders corrected and to have a meeting of members to appoint directors. He considered it to be well-settled that (at p. 305):

> "… the Court will not interfere with the internal affairs of joint stock companies unless they are in a condition in which there is no property constituted governing body, or there are such dissentions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the Court will interfere, but only for a limited time and to as small an extent as possible."

[12] (1873) LR 16 EQ 303.

[74] I have already stated my view that the companies are obliged to give consideration to the exercise of the power of redemption under paragraph 36. I would be prepared to make an order reflecting this obligation. However, it would not be possible to carry any such order into effect without more because there is no properly constituted governing body which could carry out the order and there is no internal mechanism whereby such a body may be constituted. There is therefore no point to making an order requiring the companies to consider exercising the power of redemption in the appellant's favour. It is necessary also to appoint someone empowered to act on behalf of the companies so that any such order would not be futile.

[75] I am in no doubt that it is just and convenient to make such an order. Upon the expiration of the transition date, the appellant became entitled to have the companies consider redeeming their shares. It would clearly have been a travesty of justice if this Court were unable to assist the appellant if, through no fault of its own, Mr. Wyckoff had died immediately after the transition date. The appellant has a constitutional right to be paid compensation for the compulsory acquisition of or possession of its shares. The power of redemption under paragraph 36 is the avenue through which the appellant's right to compensation may be satisfied in the event, as happened, they chose not to exercise the options available under paragraph 35. I can see no obstacle in principle to making such orders as may have been necessary in those circumstances to ensure that the appellant received the redemption price or fair value for its shares. It makes no difference in principle that Mr Wyckoff died some three years after the transition date without exercising the power of redemption or that it took the appellant another three years to apply for a receivership order. The Act put no time limit on the exercise of the power of redemption, except that imposed by the diligent exercise of the Commission's power to apply for the appointment of a liquidator, a power which the Commission did not exercise. There is no evidence that the delay in the exercise of the power of redemption or in applying for a receivership order has caused anyone any prejudice. The fact that the state may be deprived of a windfall or may otherwise have a good

case for the appointment of a liquidator is no basis for refusing the order. Although there is no authority for the exercise of the power to appoint a receiver in the particular circumstances of this case, there is likewise no authority cited against it. The demands of justice are the overriding consideration in determining the scope of the jurisdiction under section 24(1) of the Supreme Court Act and I am quite satisfied that justice demands the appointment of a receiver to consider exercising the companies' power of redemption, and in so doing to give effect to the appellant's right not to have its property taken away without compensation. If it were necessary, I would have been prepared to adapt or modify section 24(1) of the Supreme Court Act in compliance with section 115(1) of the Constitution Order to give the Supreme Court the power to appoint a receiver for the specified purpose in order to give effect to the appellant's constitutional right. But I consider that the order which I propose to make is but an incremental development of the jurisdiction of the court under section 24(1) to meet the peculiar circumstances of this case. The Privy Council made it clear in Tasarruf that the court has power to appoint receivers in circumstances where no receiver would have been appointed before 1873. It is plain that the appellant is entitled to an order requiring the companies to consider exercising their power of redemption. It would have been a travesty if this Court was rendered a toothless tiger by the absence of any power to ensure that that order was carried out.

Interlocutory or final order

[76] Lastly, Mr. Bompas, QC says that under section 24(1) of the Supreme Court Act only interlocutory orders can be made and what the appellant seeks is a final order. It is true that section 24(1) speaks of the making of interlocutory orders. But it is instructive to consider the terms of section 24(2). Section 24 of the Supreme Court Act provides as follows:

> "(1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and condition as the court or judge thinks just.

(2) If an injunction is prayed for, either before or at, or after the hearing of a cause or matter to prevent a threatened or apprehended waste or trespass, the injunction may be granted, if the High Court or a Judge of the High Court thinks fit –

(a) whether the person against whom the injunction is sought –

(i) is or is not in possession under a claim or title or otherwise, or

(ii) if out of possession, does not claim a right to do the act sought to be restrained under any colour of title, and

(b) whether the estates claimed by both or by either of the parties are legal or equitable."

[77] It is plain that section 24 contemplates that an injunction to prevent a threatened or apprehended waste or trespass may be made at or after the hearing of a cause or matter and may therefore be issued either as a final order in and of itself, or in aid of a final order. But it is also plain that the High Court has always had the power to issue these and other types of injunctions as final orders. The power granted by section 24(1) therefore cannot be interpreted as being restricted to interlocutory orders only. Otherwise, it would have severely circumscribed the court's powers when the Privy Council has made it clear in Tasarruf that the intention was to expand those powers. Although section 24(1) speaks of the making of interlocutory orders, section 24(2) makes it clear that the court's power was intended to be exercised at trial as well. It could not have been the legislature's intention that the power to make final orders was to be limited to injunctions to prevent a threatened or apprehended waste or trespass

[78] This in fact was the view taken of section 25(8) of the English Judicature Act 1873, which section 24(1) of the Supreme Court Act is patterned after. In Beddow v Beddow[13], at p. 93, Jessel MR said:

"Now I rely upon those provisions, because they seem to me to explain the 25th section (sub-sect. 8) of the *Judicature Act*, 1873, which says, "A mandamus or an injunction may be granted or a receiver appointed by an

[13] (1878) 9 Ch. D. 89.

> interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient." If this can be done by interlocutory application *à fortiori* it can be done at the trial of the action, on the principle of *"omne majus continet in se minus.*""

[79] Similarly, in North London Ry Co v Great Northern Ry Co[14], Cotton LJ, speaking of the power to appoint a receiver under section 25(8) of the Judicature Act, said (at page 39):

> "It is said if it can be done by interlocutory order, of course it can be done by a final order at the hearing of the cause or judgment: no doubt that is true."

[80] In the premises, I do not think there is anything preventing this Court from making an order appointing a receiver at this point in the proceedings.

The disposition of the appeal

[81] Although the appellant has asked for a specific person to be appointed receiver, Mr Black, QC indicated in argument that the appellant would not object to someone else being appointed. I think that is the better course. Since the order which I think should be made is that the companies must consider exercising their power of redemption in favour of the appellant, it is best that someone not already primed to redeem the shares should be appointed. I would therefore make the following order:

> Upon the appellant through its attorney undertaking that it will return all the existing bearer shares it holds in Sutton Limited and Wembley Limited ("the companies") for consideration of redemption as soon as reasonably practicable after a receiver over the companies has been appointed to office
>
> IT IS ORDERED THAT:
>
> (1) Sutton Limited and Wembley Limited do consider exercising their power of redemption of the appellant's bearer shares under paragraph 36 of Division 5 of Schedule 2 to the BVI Business Companies Act.

[14] (1883) 11 QBD 30.

(2) A receiver of the companies be appointed pursuant to section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act for the purpose of:

i) accepting the bearer shares in the companies held by the appellant (the Bearer Shares); and

ii) determining whether the Bearer Shares should be redeemed under paragraph 36 of Division 5 of Schedule 2 to the BVI Business Companies Act.

(3) The appellant and the Registrar of Companies do jointly select the person who is to be appointed receiver within 28 days of the date of this order, failing which the Registrar of the Supreme Court shall appoint an appropriate person within 28 days thereafter.

(4) The appointment of the receiver shall take effect on the date the parties notify the Registrar of the Supreme of Court of their joint selection or on the date the Registrar of the Supreme Court notifies the parties of her selection, as the case may be.

(5) The receiver be given all powers necessary to effect the redemption of the Bearer Shares if he or she decides to do so.

(6) The fees, costs and expenses of the receiver be paid by the appellant.

(7) The receiver's term as receiver of the Companies shall cease following a decision not to redeem the Bearer Shares or the redemption of the Bearer Shares, as the case may be.

(8) Liberty to apply.

[82] Because the order which I would issue differs in material respects from that sought by the appellant, and the appellant's position has shifted somewhat during the course of these proceedings, I would invite the parties to address the court in writing within 21 days on the question of costs.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar