

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-03258

BETWEEN

SONOMED HOLDINGS LIMITED

THE ARIMA DIAGNOSTIC CLINIC LIMITED

COLLEGE OF HEALTH SERVICES AND TECHNOLOGY (CHST) LTD

Claimants

AND

RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED

First Defendant

MARIA DANIEL

Second Defendant

ZACK NADUR

Third Defendant

INDAR MAHASE

Fourth Defendant

Before the Honourable Mme. Justice Jacqueline Wilson QC

Date of Delivery: March 5, 2021

APPEARANCES:

Mr. Riaz Seecharan and Mr. Donald Seecharan Attorneys at law for the Claimant

Mr. Colin Kangaloo instructed by Ms. Danielle Inglefield Attorneys at law for the Second and Third Defendants

Mr. Christopher Sieuchand instructed by Ms. Sashi Indarsingh Attorneys at law for the First and Fourth Defendants

DECISION

1. On 18 December 2020 I gave an oral decision dismissing the claimants' application for interim relief. The written reasons are now provided.
2. The claimants are companies whose directors and shareholders are Mr. Benjamin Alleyne, Mrs. Helen Alleyne and their four adult children. The first claimant, Sonomed Holdings Limited (Sonomed), alleges that the first defendant, RBC Royal Bank (Trinidad and Tobago) Limited (RBC), acted in breach of its fiduciary duty in dealing with funds that were deposited to Sonomed's deferred income account and in the appointment of the second and third defendants as receivers (the Receivers.)
3. RBC appointed the Receivers in the exercise of powers under a number of mortgage agreements in which properties known as Nos. 24, 25 and 28 Hollis Avenue, Arima, and 9A Lopez Street, Arima (the Properties) were used as security for the payment of advances to Sonomed. Sonomed defaulted in its payments under the mortgage agreements and, in January 2019, RBC gave notice of its intention to enforce the security. RBC appointed the Receivers on 22 February 2019.
4. On 11 March 2019, the Receivers published notice of their appointment in the newspapers. Between March and July 2019, Mr. Benjamin Alleyne explored arrangements with them to discharge the mortgage debt. His efforts yielded no success and, in July 2019, the Receivers advertised the Properties for sale. They accepted the highest offer that was made to them and served notices on the second and third claimants, as occupiers, to vacate the Properties.
5. On 13 September 2019, the Receivers entered into an agreement for sale of the Properties in the sum of \$17,800,000.00. Prior thereto, on 4 August 2019, the claimants applied to the court for an interim injunction to prevent the sale. The claimants alleged that the defendants' actions were not commercially reasonable and adversely affected the interests of third parties with whom they had a contractual relationship.

6. The claimants did not pursue the injunction application with any degree of urgency until the sale of the Properties was imminent. The application came on for hearing before me on 4 December 2019, when I made an order dismissing it on the ground that the claimants did not satisfy the requirements for the grant of an interim injunction. There was no appeal by the claimants against the order of dismissal.
7. On 11 December 2019, the claimants filed a further application for interim relief with a certificate of urgency. The claimants challenged the validity of the appointment of the third defendant as receiver on the ground that he was not licensed as a trustee under the Bankruptcy and Insolvency Act. They alleged that the agreement for sale of the Properties was, thereby, null and void.
8. The application came on for hearing on 13 December 2019. There was some dispute whether the Receivers had been served with the application and, in their absence, I heard arguments by Counsel for the claimants and RBC. I reserved my decision to 19 December 2019. In light of representations by Counsel for the claimants that the sale of the Properties was imminent, I made an order to preserve the status quo.
9. At the hearing on 19 December 2019, Counsel for the Receivers indicated that the Receivers had not been served with the application and wished to be heard on it. I informed the parties that, having reviewed the application and the evidence filed by the claimants, the alleged invalidity of the Receivers' appointment was not be established as there was no evidence of the Mortgage Deeds that allowed for their appointment. I gave directions for the claimants to file a supplemental affidavit with copies of the Mortgage Deeds attached as exhibits and for the defendants to file affidavits in response. I gave further directions for the parties to file written submissions on the application and reserved my decision. I also discharged the order that was made on 13 December 2019, as there was no legal basis to justify its continuation.

10. The timelines given in the directions were extended on several occasions, ending in December 2020. The Receivers sold the Properties on 3 January 2020.
11. Notwithstanding the myriad of issues raised in the written submissions, the sole question for determination on the application was whether the appointment of the third defendant as receiver was lawful and valid. The material factors for consideration were (i) the terms of the Mortgage Deeds providing for RBC's power to appoint a receiver; (ii) the terms of the instrument under which the Receivers were appointed; and (iii) the statutory provisions that govern the appointment, powers and functions of the Receivers.

THE MORTGAGE AGREEMENTS

12. Between 2000 and 2008, Nos. 24, 25 and 28 Hollis Avenue were each subject to a mortgage agreement with Republic Bank Limited under which it was used as security for the payment of advances to Sonomed. Mr. and Mrs. Alleyne were parties to the Deed of Mortgage of No. 25 Hollis Avenue where they were named as "the Owner," Sonomed as "the Borrower" and Republic Bank Limited as the lender. They were not parties to the Deeds of Mortgage of Nos. 24 and 28, Hollis Avenue, where Sonomed was "the Borrower" and Republic Bank Limited, the lender.
13. Thereafter, upon RBC's discharge of Sonomed's indebtedness to Republic Bank Limited in the sum of \$15,030,928.45, the mortgages were transferred to RBC by deed of mortgage dated 17 December 2010 (the Transfer Mortgage). The parties to the Transfer Mortgage were Mr. and Mrs. Alleyne as "the Owner," Sonomed as "the Borrower" and RBC as lender.
14. Under the Transfer Mortgage, RBC was subject to the same covenants, powers, rights and remedies as Republic Bank Limited under the earlier mortgage agreements. Under

the earlier agreements, the mortgagee's power of sale and power to appoint a receiver were stated in the following terms:

“The Statutory Power of Sale conferred upon mortgagees by the Conveyancing and Law of Property Ordinance Chapter 27 Number 12 shall apply to this security but without the restrictions therein contained as to giving notice or otherwise and so that for the purpose of exercising the said power of sale the moneys and liabilities hereby secured shall be deemed to have become due and payable immediately upon the execution of these presents. As between the Bank and the Borrower the Bank shall not exercise the said power of sale until payment of such moneys and liabilities has been demanded and default has been made in paying the same but this proviso is for the protection only of the Borrower and shall not affect a purchaser or put him upon enquiry as to whether such default has been made. [Emphasis added.]

The statutory power to appoint a Receiver may be exercised by the Bank at any time after payment of the moneys and liabilities hereby secured has been demanded and default has been made in paying the same.”

15. The Transfer Mortgage establishes that RBC's power of sale and power to appoint a receiver were conferred by the mortgage agreement and the Conveyancing and Law of Property Act and were exercisable at any time after RBC had made a demand for payment to Sonomed it had failed to comply.

16. By Collateral Deed of Mortgage dated 14 August 2015, No. 9A Lopez Street, Arima, was used as collateral to a debenture to secure advances to Sonomed by RBC (the Lopez Street Mortgage). The parties to the Lopez Street Mortgage were Sonomed as “the Borrower”, Mr. and Mrs. Benjamin Alleyne as “the Owner” and “the Surety” and RBC as lender.
17. Under the Lopez Street Mortgage, RBC’s power of sale was in similar, although not identical, terms as under the earlier mortgage agreements. There were, however, more detailed provisions regarding the appointment of a receiver, as follows:

“8. ENFORCEMENT NOTICE

At any time after the issue of an Enforcement Notice the Bank may exercise without further notice and without the restrictions contained in Section 41 of the CLPA and whether or not it shall have appointed a receiver all the powers conferred on mortgagees by the CLPA as hereby varied or extended and all the powers and discretions hereby conferred either expressly or by reference on a receiver appointed hereunder.

9. ENFORCEMENT

9.1 Sections 41 and 47(1) of the CLPA shall not apply to this Mortgage and the statutory powers of sale and appointing a Receiver under Sections 39 and 47 of the CLPA (as varied and extended under this Mortgage) shall arise on the execution of this Mortgage and shall become immediately exercisable without the restrictions contained in the CLPA as to the giving of notice or otherwise at any time after the issue of an Enforcement Notice.

9.2 The statutory power of sale conferred on the Bank shall be extended so as to authorise the Bank to carry such sale into effect either:

9.2.1 in the case of such of the Property as is freehold by a demise thereof or by demises of parts thereof; or

9.2.2 in the case of such of the Property as is leasehold by a sub-demise thereof or sub-demises or parts thereof;

for such term or terms and at such rent or rents with our without payment of a line or premium as the Bank shall think fit and also to sell the freehold or leasehold reversion or reversions so created.

9.2.3 The statutory power of sale is hereby modified so that any sale by the Bank may be in such form as to the manner

thereof as to the method of payment of the purchase price and otherwise as the Bank may think fit.

10. APPOINTMENT AND POWERS OF RECEIVER

10.1 At any time after the issue of an Enforcement Notice the Bank may appoint by writing any person or persons (whether an officer of the Bank or not) to be a Receiver of all or any part of the Property and where more than one Receiver is appointed they may be given power to act either jointly or severally.

10.2 The Bank may from time to time determine the remuneration of the Receiver and may remove the Receiver and appoint another in his place.

10.3 The Receiver shall (so far as the law permits) be the agent of the Owner (who shall alone be personally liable for his acts, defaults, omissions and remuneration) and shall have and be entitled to exercise all powers conferred by the CLPA and/or the Companies Act Chap:81:01 in the same way as if the Receiver had been duly appointed thereunder and in particular by way of addition to, but without limiting any general powers referred to above (and without prejudice to any of the Bank's powers) the Receiver shall have power in the name of the Owner or otherwise to do the following things namely:

- (a) to take possession of collect and get in all or any part of the Property and for that purpose to take any proceedings as he shall think fit;
- (b) to commence and/or complete any building operations on the Property and to apply for and obtain any planning permissions, building regulation approvals and any other permissions, consents or licences in each case as he may in his absolute discretion think fit;
- (c) for the purpose of exercising any of the rights, powers, authorities and discretion conferred on him by or pursuant to this Mortgage or for any other purpose to borrow moneys from the Bank or others on the security of the Property or otherwise on such terms as he may in his absolute discretion think fit;
- (d) to provide such facilities and services for tenants and generally to manage the Property in such a manner as he shall think fit;
- (e) to make any arrangements or compromise which the Bank or he shall think fit whether in relation to any lease of the Property or to any covenants, conditions or restrictions relating to the Property or without limitation otherwise;
- (f) to enter into bonds, covenants, commitments, guarantees, indemnities and like matters and to make all payments needed to effect,

maintain or satisfy the same in relation to the Property;

- (g) to settle adjust refer to arbitration compromise and arrange any claims, accounts, disputes, questions and demands with or by any person who is or claims to be a creditor of the Owner or relating in any way to the Property;
- (h) to appoint managers officers contractors and agents for the aforesaid purposes upon such terms as to remuneration or otherwise as she may determine;

10.3.1 if the Property is leasehold to vary the terms of or surrender any lease and/or to take a new lease of it or of any part of it on such terms as he shall think fit and so that any such new lease shall ipso facto become charged to the Bank on the terms of this Mortgage so far as applicable and to execute a formal legal Mortgage over any such new lease in favour of the Bank in such form as the Bank may reasonably require;

10.3.2 to sell, transfer, assign, let or lease or concur in selling, letting or leasing the Property or any part of it and the grant of any rights over the Property (either by public auction or private contract or otherwise) on such terms and conditions and for such consideration including without limitation shares, securities (of any company) or other investments payable at such time or times as he may in his absolute discretion think fit;

10.3.3 to vary the terms of, terminate, grant renewals of or accept surrenders of leases or tenancies of the Property or any part of it in such manner and for such terms with or without a premium or other compensation or consideration including the payment of money to a lessee or tenant on a surrender with such rights relating to other parts of the Property and containing such covenants on the part of the Owner or otherwise and generally on such terms and conditions as in his absolute discretion he shall think fit;

10.3.4 to make and effect all repairs and improvements;

10.3.5 to effect such insurance of or in connection with the Property as he shall in his absolute discretion think fit;

10.3.6 to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which he lawfully may or can do.

Provided nevertheless that the Receiver shall not be authorized to exercise any of the above powers if and insofar and so long as the Bank shall in writing exclude the same whether in or at the time of their appointment or subsequently.

10.4 Any moneys received by the receiver in the exercise of his powers under this Mortgage and under general law shall be (so far as the law permits) applied by him as follows:

10.4.1 in payment of the costs, charges and expenses of and incidental to his appointment and the exercise of all or any of his powers;

10.4.2 in payment of his remuneration;

10.4.3 in payment to the Bank of the Secured Liabilities whether for principal, interest or otherwise in arrears or accruing due under this Mortgage;

AND any balance shall be paid to the person or persons next entitled to it.”

18. The Lopez Street Mortgage establishes that RBC’s power to appoint a receiver was governed by the mortgage agreement, the Conveyancing and Law of Property Act and the Companies Act and could be exercised at any time after RBC had issued an Enforcement Notice. Clauses 8 and 9 of the Lopez Street Mortgage do not expressly state whether an Enforcement Notice was to be served on the Borrower, or the Owner/ Surety, or both. However, Clause 10 provides that a receiver acts as agent of the Owner, the Owner being previously described as Mr. and Mrs. Benjamin Alleyne.

THE DEED OF APPOINTMENT

19. The Receivers were appointed under a Deed of Appointment dated 22 February 2019. The opening paragraphs of the Deed refer to the history of mortgages of the Properties and to RBC’s power to appoint a receiver “at any time after payment of the moneys and liabilities thereby secured has been demanded and default has been made in paying the same.” The Deed of Appointment cites the Borrower’s default in payment under the Transfer Mortgage, RBC’s demand for payment to the Borrower and the Owner by letters dated 11 December 2018 and 8 January 2019, respectively, and the failure of the Borrower and Owner to settle the sums that were due.
20. The Deed of Appointment identifies the specific clauses of the mortgage agreements under which the Receivers were appointed and states that their powers and functions are to:

- a) Take possession of collect and get in all or any part or the 25 Hollis Avenue Property, the 28 Hollis Avenue Property and the 24 Hollis Avenue and 9A Lopez Street, Arima Property (hereinafter called "the Properties") and for that purpose to take any proceedings as he shall think fit;
- b) Make any arrangements or compromise with RBC Bank as he shall think fit whether in relation to any leases of the Properties or to any covenants, conditions or restrictions relating to the Properties or without limitation otherwise;
- c) Sell, transfer, assign, let or lease or concur in selling, letting or leasing the Properties or any part of it and the grant of any rights over the Properties (either by public auction or private contract or otherwise) on such terms and conditions and for such consideration including without limitation shares, securities (of any company) or other investments payable at such time or times as he may in his absolute discretion think fit;
- d) Demand and receive the rents and profits of the Properties and all arrears thereof from the present tenants including but not limited to Arima Diagnostic Clinic Ltd (ADSL) and College of Ultrasound Sciences Limited (CUSL) and future tenants and occupiers thereof and every person who is or at any time shall be liable to pay the same respectively as and when the same shall from time to time become due and payable and to use and enforce all lawful remedies and perform and do all necessary and proper acts and things for recovering the same rents and profits or any part thereof as fully and effectually in all respects as the Borrower could do;
- e) Generally to manage (sic) the Properties in such a manner as he shall think fit;

- f) To enter into bonds, covenants, commitments, guarantees, indemnities and like matters and make all payments needed to effect, maintain or satisfy the same in relation to the Properties;
- g) To settle adjust refer to arbitration, compromise and arrange any claims, accounts, disputes, questions and demands with or by any person who is or claims to be a creditor of the Borrower or relating in any way to the Properties;
- h) To appoint managers, officers contractors and agents for the aforesaid purposes upon such terms as to remuneration or otherwise as he may determine;
- i) To vary the terms of, terminate, grant renewals of or accept surrenders of leases or tenancies of the Properties or any part of it in such manner and for such terms with or without a premium or other compensation or consideration including the payment of money to a lessee or tenant on a surrender with such rights relating to other parts of the Properties and containing such covenants on the part of the Borrower or otherwise and generally on such terms and conditions as in his absolute discretion he shall think fit;
- j) To effect such insurance of or in connection with the Properties as he shall in his absolute discretion think fit; and
- k) To do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which he lawfully may or can do.

21. The Deed of Appointment further provides for the removal and replacement of the Receivers by RBC as it sees fit.
22. By letter dated 6 March 2019 addressed to each of the Alleyne's, the Receivers gave notice of their appointment by RBC. Enclosed with the letter was the Deed of Appointment. The letter stated that:

“We have been appointed as receivers of the Arima Properties and have not been appointed as receiver-managers of the Company.

...Take note that in accordance with the Companies Act Chapter 81:01 of the Laws of Trinidad and Tobago (the ‘Companies Act’), the Bankruptcy and Insolvency Act Ch.9:70 of the Laws of Trinidad and Tobago (the ‘BIA’) and the provisions of the Security Instruments, with respect to the Arima Properties, our powers as Receivers include but are not limited to:

- Taking possession of the Arima Properties;
- Receiving all income relating to the Arima Properties;
- Granting, terminating or extending leases related to the Arima properties;
- The incurring of costs (which will be for the account of the Company) for the repair, renewal or improvement of the Arima Properties; and
- The sale of the Arima Properties in order to realise the security interest on behalf of the Bank.” [Emphasis added.]

23. The reference to the Bankruptcy and Insolvency Act in the Receivers’ letter of 6 March 2019 was clearly inconsistent with the terms of the Mortgage Deeds and the Deed of Appointment. The Receivers made further reference to the Bankruptcy and Insolvency Act in notices issued by them to tenants of the Properties requiring them to vacate.

24. By Notice of Appointment dated 6 March 2019, the Receivers published their appointment in the newspapers. The heading of the Notice refers to the Companies Act and the Notice states that the Receivers were appointed pursuant to the Deed of Appointment and the various Mortgage Deeds. Although the Notice bore the same date as the Receivers' letter to the Alleynes, unlike the letter, the Notice did not refer to the Bankruptcy and Insolvency Act.
25. There is also a reference to the Bankruptcy and Insolvency Act in the Notice of Intention to Enforce a Security, dated 28 January 2019, issued by RBC to Mr. Benjamin Alleyne and Mrs. Helen Alleyne. The Notice states that it was issued pursuant to section 13(1) of the Bankruptcy and Insolvency Act and Regulation 8 in order to enforce the security "on the insolvent persons property (sic) described in the Schedule."
26. RBC later issued a Registration of Enforcement of Security dated 22 February 2019. This document states that it was issued under section 265 of the Companies Act and refers to RBC's appointment of the Receivers pursuant to the Deed of Appointment and the Mortgage Deeds. It does not refer to the Bankruptcy and Insolvency Act.
27. The foregoing demonstrates that there was no consistency in the references made to the Bankruptcy and Insolvency Act by RBC and the Receivers. The legal implications are discussed further below.

THE LEGISLATIVE REGIME

The Conveyancing and Law of Property Act

28. Section 39 of the Conveyancing and Law of Property Act confers powers on a mortgagee where a mortgagor defaults in payment of sums that are due under a mortgage agreement. The powers include the power of sale¹ and the power to appoint a receiver

¹ Section 39(1)(a)

of the income of the mortgaged property.² The powers apply to the same extent as if conferred by a Mortgage Deed and may be varied or extended under the Mortgage Deed. Where the powers are so varied or extended, they operate in the same manner as if conferred by the Act.³ The powers do not apply where a contrary intention is expressed in a Mortgage Deed, in which event the provisions of the Mortgage Deed take priority.⁴

29. The Act sets out conditions for the exercise of a mortgagee's power of sale. There must be (i) a default by the mortgagor in complying with a demand for payment for at least three months after a demand was served;⁵ or (ii) a failure by the mortgagor to pay interest for two months after it was due;⁶ or (iii) any other breach of the Mortgage Deed or the Act by the mortgagor or other party to the Mortgage Deed.⁷

30. Section 47 provides for the appointment, powers and duties of a receiver. So far as is material, it provides that:

47. (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) A receiver appointed under the powers conferred by this Act, shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the Mortgage Deed otherwise provides.

² Section 39(1)(c)

³ Section 39(2)

⁴ Section 39(2)

⁵ Section 41(a)

⁶ Section 41(b)

⁷ Section 41(c)

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act.

(4)

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

31. The Mortgage Deeds expressly exclude the application of the three-month period of default by a mortgagor after service of a demand for payment. Therefore, RBC was entitled to exercise its power of sale of the Properties at any time after a demand for payment was made to Sonomed and it had failed to comply with the demand. RBC's power to appoint a receiver would have accrued in the same circumstances.

The Companies Act

32. The Companies Act sets out the powers, functions and liabilities of a receiver. It prescribes the factors that disqualify a person from appointment as follows:

“289. (1) A person shall not be appointed a receiver or receiver-manager of any assets of a company, and shall not act as such a receiver or receiver-manager, if the person—

(a) is a body corporate;

(b) is an undischarged bankrupt; or

(c) is disqualified from being a trustee under a trust deed executed by the company, or would be so disqualified if a trust deed had been executed by the company.”

33. The Act makes a distinction between the functions of a receiver and the functions of a receiver-manager. A receiver may receive the income of the property, pay its liabilities and realise the security interest of the person on whose behalf he is appointed. However, a receiver may not carry on the business of the company without an order of the Court⁸ or unless appointed as receiver-manager.⁹
34. Under the Act, a receiver must act in keeping with the instrument of his appointment,¹⁰ honestly and in good faith, and must deal with the property in his possession or control in a commercially reasonable manner.¹¹ A receiver must give immediate notice of his appointment to the Registrar of Companies, take the property over which he is appointed into his custody and control, open bank accounts in his name and keep detailed accounts of all transactions that are carried out by him.¹²

The Bankruptcy and Insolvency Act

35. By its long title, the Bankruptcy and Insolvency Act states that it is an Act to revise the law relating to bankruptcy to make provision for corporate and individual insolvency; to provide for the rehabilitation of the insolvent debtor and to create the office of the Supervisor of Insolvency. With the exception of Part XI, which is yet to come in force, the Act came into operation on 26 May 2014.
36. The following definitions are provided by section 3:

⁸ Section 290

⁹ Section 291

¹⁰ Section 294

¹¹ Section 295

¹² Section 297

“debtor” includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Trinidad and Tobago and, where the context requires, includes a bankrupt.”

“insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Trinidad and Tobago, whose liabilities to creditors provable as claims under this Act amount to not less than four thousand dollars, and—

- (a) who is for any reason unable to meet his obligations as they generally become due;
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.”

“receiver” means a person who has been appointed to take, or has taken, possession or control, pursuant to -

- (a) a security agreement; or
- (b) an order of a Court made under any law that provides for or authorises the appointment of a receiver or receiver-manager,

of all or substantially all of—

- (a) the inventory;
- (ii) the accounts receivable; or
- (iii) the other property,

of a debtor that was acquired for, or is used in relation to, a business carried on by the debtor.”

37. Part III provides for the appointment, duties and liabilities of a receiver. Section 12 provides that:

“Only a person who is licensed as a trustee under this Act may be appointed a receiver under a security agreement.”

38. Section 23 provides that:

"23. Where the debtor is a corporation –

(a) the provisions of section 290 to 303 of the Companies Act shall apply in the absence of provisions relating thereto in this Act; and

(b) where the provisions of this Act are inconsistent with the provisions of sections 290 to 303 of the Companies Act, this Act shall prevail."

39. There is considerable dispute between the parties regarding the application of the Bankruptcy and Insolvency Act to the Receivers' appointment. The dispute arises as a result of the licensing and supervisory requirements provided by the Act to persons who are appointed as receivers under its provisions.
40. Counsel for the claimants relies on the references to the Bankruptcy and Insolvency Act in documents issued by RBC and the Receivers to support the argument that the Act applies to the Receivers' appointment. Counsel submits that the third defendant is not licensed as a trustee under the Act, therefore his appointment as a receiver is null and void and the agreement for sale of the Properties is, similarly, null and void.
41. Counsel for RBC submits that the inter-relationship between the Companies Act and the Conveyancing and Law of Property Act, on the one hand, and the Bankruptcy and Insolvency Act, on the other, is not clear and that there is uncertainty regarding the statutory provisions that apply to the Receivers' appointment.

42. Counsel for the Receivers disputes the application of the Bankruptcy and Insolvency Act to the Receivers' appointment. Counsel submits that the Receivers were appointed pursuant to the Mortgage Deeds under which RBC held the Properties as security and that the Conveyancing and Law of Property Act and the Companies Act apply to their appointment.
43. Counsel for the Receivers submits that under the Conveyancing and Law of Property Act, there is no restriction or limitation on a person who may be appointed as receiver and that a mortgagee is entitled to appoint any person he thinks fit. Counsel submits that the Receivers were not disqualified from appointment under the Companies Act, the disqualifying factors being that a receiver must not be a body corporate, an undischarged bankrupt, or otherwise disqualified from appointment under a trust deed executed by the company.
44. Counsel submits that the legislative regime in this jurisdiction is no different from what obtains in other jurisdictions where separate and distinct legal provisions apply to the appointment of a receiver to enforce a security and the appointment of a receiver of an insolvent person or a person who has committed an act of bankruptcy. Whereas the Companies Act and the Conveyancing and Law of Property Act apply to the former, the Bankruptcy and Insolvency Act governs the latter.
45. Counsel argues that if there were defects in the documents issued by the Receivers or RBC, the defects were in form, and not in substance, and did not invalidate the Receivers' appointment.

FINDINGS AND CONCLUSION

46. The Deed of Appointment refers to RBC's power to appoint the Receivers as arising from the Mortgage Deeds, Sonomed's default in its obligations under them, RBC's letters of demand for payment and Sonomed's failure to comply with the demand. Sonomed's

default in obligations under the Mortgage Deeds and its failure to comply with RBC's demand for payment are not in dispute, therefore the legal basis for the Receivers' appointment is established.

47. There is nothing in the Deed of Appointment to suggest that the Receivers were appointed pursuant to the Bankruptcy and Insolvency Act. Neither do the events giving rise to their appointment require them to be so appointed. The Receivers were appointed as a result of Sonomed's default in obligations under the Mortgage Deeds and its failure to comply with RBC's demand for payment and not as a result of Sonomed's insolvency or an act of bankruptcy of its principals. In the absence of evidence that Sonomed is an insolvent person under the Bankruptcy and Insolvency Act, there is no legal basis to assert that the Act applies to the Receivers' appointment.
48. While the reference to the Bankruptcy and Insolvency Act in documents issued by RBC and the Receivers was clearly misguided, the errors do not undermine the legality of the Receivers' appointment. There is no suggestion that the errors caused any injustice to the claimants. The effect of the documents was clearly understood, as evidenced by Mr. Benjamin Alleyne's proposals to the Receivers to discharge the mortgage debt and to thereby avoid the sale of the Properties.
49. Having considered the terms of the Mortgage Deeds, the Deed of Appointment, the Conveyancing and Law of Property Act, the Companies Act and the Bankruptcy and Insolvency Act, I have concluded that the Receivers' appointment is lawful and valid for the following reasons:
 - (1) The Receivers are not disqualified from appointment under the Companies Act and their powers and functions fall within the scope of a receiver under the Companies Act.

- (2) Under the Conveyancing and Law of Property Act, RBC is entitled to appoint any person that it considers fit to be a receiver. The conditions for appointment of a receiver were satisfied as Sonomed was in breach of its obligations under the Mortgage Deeds and failed to comply with RBC's demand for payment.
- (3) The terms of the Deed of Appointment are consistent with the Mortgage Deeds and the provisions of the Companies Act and the Conveyancing and Law of Property Act.
- (4) There is no evidence that Sonomed is an insolvent person as defined by the Bankruptcy and Insolvency Act. Therefore, there is no legal basis to establish that the Act applies to the Receivers' appointment.

50. The claimants have made numerous allegations of impropriety against the defendants, all of which are denied. Notwithstanding the detailed submissions made by Counsel, those matters did not arise for consideration on the application but are to be determined at the hearing of the claim when witness statements are filed and the evidence of witnesses is tested in cross-examination.

Jacqueline Wilson QC
Judge