REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO P105 OF 2020

CIVIL CLAIM NO 05161 OF 2019

Between

KEITH ARJOON

FIRST APPELLANT/ CLAIMANT

SHANDON ARJOON

SECOND APPELLANT/ CLAIMANT

KGC COMPANY LIMITED

(In Receivership)

THIRD APPELLANT/ CLAIMANT

And

MARIA DANIEL

(Receiver)

PANEL

C. Pemberton JA

M. Dean-Armorer JA

Date delivered: 23 September 2020.

Appearances:

For the Appellants/Claimants: Mr. F. Hosein leading Mr. D. Maharaj and Ms. S. Bridgemohan-Singh, instructed by Ms. K. Bharath-Nahous

For the Respondent/ Defendant: Mr. K. Garcia instructed by Mr. A. Byrne.

JOINT JUDGEMENT

INTRODUCTION

(1) By their procedural appeal filed on April 4 2020, the Appellants/ Claimants, Keith Arjoon (KA), Shandon Arjoon (SA) (collectively referred to as the 'Arjoons') and KGC Company Limited (KGC), have appealed against the trial judge's decision to strike out their claims and to discharge the *ex parte* injunction granted by Gobin J on December 16 2019. The Arjoons are KGC's only Directors. The Respondent, Maria Daniel (MD), is KGC's Receiver-Manager.

SUMMARY OF JUDGEMENT

(2) We shall allow this Appeal. We made the decision based on the submissions advanced by Counsel and a careful reading and analysis of the statutes and cases,

i. The need for a company in receivership, the debtor company, to provide a Third Party Indemnity is a question to be decided by a trial judge as part of the management process of a case and will be a tool to balance the rights of a secured creditor and rehabilitation of the debtor company, the stated policy of the **Bankruptcy and Insolvency Act,** (**BIA**).[1] It cannot be elevated to a pre-condition for a debtor company in receivership that wishes to maintain an action to which it is lawfully entitled to do by statute. The court does not have the power to stultify a statutorily given right.

[1] Chap. 9:70 of the Laws of the Republic of Trinidad and Tobago.

We find therefore that the trial judge was plainly wrong to strike out KGC's action as an abuse of process pursuant to **Part 26 rule 2(1)(b) of the Civil Proceedings Rules 1998.**

ii. The action brought by the Arjoons concerned the alleged breaches of statutory duties – failure to provide accounts, failure to act in good faith, failure to take steps that were commercially reasonable and failure to give due consideration to the company's rehabilitation. The conjoint effect of the **Companies' Act** (**CA**)[2] and the **BIA** gave directors the status of interested persons and the capacity to maintain actions against a receiver. The Arjoons satisfied the criteria to sue as interested persons. They had standing to bring and sustain this action, given the effect of both the **CA** and the **BIA**. The Arjoons contended as well that MD had failed in her equitable duties as receiver. The fiduciary duties of directors continue during the time that a company is in receivership. Directors are still under a duty not to engage in acts that may be detrimental to the company's interests. On this basis, directors may maintain on behalf of the company an action against the receiver for improper conduct. On both counts, the Arjoons have the requisite *locus standi* to maintain this claim qua directors. There was not need to plead losses personal to them. The plea for contemplated losses to the company was in order.

The pleadings disclosed a case sufficient for the receiver to answer. We therefore find that the trial judge was plainly wrong to dismiss the Arjoons's claim as disclosing no case for the receiver to answer pursuant to **Part 26.(2)(1)(c) of the Civil Proceedings Rules 1998** (as amended). We are fortified to come to this conclusion, as this is evident from the pleadings and arguments before us.

[2] Chap. 81:01 of the Law of the Republic of Trinidad and Tobago

iii. Both the **CA** and the **BIA** give the court the power to restrain receivers from acting and even the power to remove receivers upon proof of breach of their statutory duties. There is no provision disempowering a court from granting the usual interim relief on the allegation of these breaches. At this stage, the court is not required to hold a mini trial. KGC and the Arjoons informed MD of their dissatisfaction with the conduct of the receivership. The Arjoons and KGC put MD on notice of the alleged breaches. MD defended her position but those defences are best tested at trial. KGC and the Arjoons wish to pursue their statutory remedies so that an award of damages is not an adequate remedy in these circumstances. Given the nature of the complaints and impending disposition of assets, the balance of convenience lay with suspending MD's operations pending the hearing and determination of the claims at trial.

upon an examination of the trial judge's reasons for discharging the injunction, we find that the trial judge was plainly wrong to discontinue and discharge the interim injunction because,

i) Whilst the common law principles are relevant for the grant of relief;

ii) but since the case cannot be struck out as an abuse of process;

iii) and there is a case for the receiver to answer.

We restore and continue the interim injunction granted by the trial court on 16th December 2019; remit the matter to the trial judge for continued hearing and that the matter be deemed fit for urgent hearing. We have decided further that each party will bear their own costs. We now give our reasons.

PROCEDURAL HISTORY

(3) The Order of Gobin J dated December 9 2020, appointed MD as KGC's Interim Receiver. The Deed of Appointment executed on April 16 2020, subsequently appointed MD as KGC's Receiver-Manager.[3]

(4) On December 16 2019, the Arjoons and KGC applied for and obtained an *ex parte* injunction against MD, prohibiting her from selling or attempting to sell KGC's assets or business until the determination of the injunction application. On January 21 2020, MD applied to the Court for an order: a. striking out KGC claim in the proceedings; b. striking out the Arjoons's claims; and c. discharging the injunction.

FACTS

(5) The Arjoons and KGC claimed that between 2008 and 2014, KGC obtained a number of loan facilities from Republic Bank Limited (RBL). These loans were secured by Deeds of Mortgage and a Debenture. These Deeds provided for the appointment of a receiver and manager in the event that KGC defaulted in its obligations to RBL.[4]

(6) Between 2009 and 2015, having received debenture financing from RBL, KGC secured several Petrotrin contracts financed by loans. Thereafter, KGC experienced difficulties securing payments from Petrotrin in sums totalling $328,360,980.51 TTD, and this in turn affected KGC's ability to service its RBL loans. RBL appointed MD as Receiver- Manager pursuant to the terms

[3] Affidavit of Maria Daniel, [3]-[4], Record of Appeal (ROA) p 1988
[4] See for example Clause 8 of the Debenture, ROA p 121

of the Debenture. At the time of MD's appointment, KGC owed RBL $72,957,758.12 TTD and $808,629.71 USD.

(7) In or about November 2019, MA advised of her intention to sell KGC's assets for the sum of $35,500,000.00 TTD in 30 days with no option for the continuation of KGC's operations post sale. Although the current value of KGC's assets is unclear, MD deposed that the assets were not sufficient to liquidate KGC's debts. The shortfall is approximately $42,000,000.00.[5]

(8) On November 20 2019, the Arjoons and KGC, through their Attorneys, issued a pre-action protocol letter to MD citing breach of equitable and statutory duties and further, requesting that she consider two alternative re-finance options. MD did not respond, continuing instead to pursue agreements for sale already negotiated on RBL's behalf.

(9) Thereafter, the Arjoons and KGC obtained *ex parte* injunctive relief restraining MD from pursuing the sale. They then commenced proceedings against MD claiming breach of statutory and equitable duties. MD in turn applied to have KGC claim struck out and the Arjoons's action dismissed in addition to having the injunction discharged.

SUMMARY OF THE TRIAL JUDGE'S REASONS

(10) The trial judge determined the strike out application by embarking on a detailed examination of the affidavits filed on behalf of the parties, case law and the statutes relied on by both sides. The trial judge's ruling addressed three issues, namely whether,

[5] Maria Daniel's Affidavit, [24], ROA p1993

i. KGC be struck out as a claimant under **Part 26 rule 2(1)(b) of the Civil Proceeding Rules 1998 (as amended)** (the '**CPR**') as an abuse of process;

ii. the Arjoons' action be dismissed pursuant to **CPR 26.2(1)** since their claim failed to disclose losses incurred by them; and

iii. the *ex parte* injunction be discharged on the ground that the Arjoons and KGC failed to satisfy the preconditions for injunctive relief.

The trial judge's reasons are summarised below.

Should KGC's claim be struck out under CPR 26.2(1)(b) as an abuse of process?

(11) It was not in dispute that the directors of a company could institute proceedings against a receiver. MD's application under **CPR 26(1)(b)**, was based on KGC's failure to secure and produce a third party indemnity (**TPI**) at the commencement of the action. This, according to MD, constituted an abuse of process. The trial judge considered and decided that such an action cannot be pursued without a **TPI** first being provided to the receiver to cover any adverse costs order that may be made against the company. In the premises, the action filed in the absence of a **TPI** constituted an abuse of process.

Should the Arjoons's action be dismissed pursuant to CPR 26.2(1)(c)?

(12) The trial judge had to decide whether the action brought by the Arjoons should be struck out pursuant to **CPR 26.2(1)(c)** since all the damages pleaded by them were not damages or losses suffered by them personally but related instead to KGC. Having perused the pleadings, trial judge decided that since there was no pleading of loss personal to the Arjoons, there was no cause of action maintainable by them against MD.

Should the ex parte injunction be discharged?

(13) In determining whether the injunction should be discharged, the trial judge considered, *inter alia*, the principles set out in **American Cynamide Co v Ethicon Ltd**.[6] To this end the trial judge concluded that:

a. The Arjoons disclosed no good reason for failing to give notice of interim application.

b. The pre-condition for restraining the receiver was not met, namely that the Arjoons and KGC failed to make a payment into court.

c. On her assessment of the pleadings, MD's defence was stronger than the case put forward by the Appellants/ Claimants.

d. Damages is an adequate remedy since the Arjoons and KGC stated a money value in each of the declarations sought by them and also that they failed to demonstrate how the sums that they sought would not be an adequate remedy for their loss.

e. The balance of convenience lay with discharging the injunction order since beside one pending court matter, the Arjoons and KGC failed to set out any details of the extreme prejudice and hardship that they would face if they were not successful. Further, even if their assets were sold at an undervalue, KGC would have been compensated for the proper value of the assets sold.

THE APPEAL

ISSUES ARISING ON APPEAL

(14) The issues arising are whether the trial judge erred or was plainly wrong to make the following orders:

[6] [1975] AC 396, HL

a. That KGC's claim be struck out as an abuse of process because the company failed to provide a third party indemnity;
b. That the Arjoons's claims be dismissed as an abuse of process since their pleadings disclosed no losses or damages personal to them; and
c. That the *ex parte* injunction be discharged on the ground that the Arjoons and KGC failed to satisfy the conditions that must be met for injunctive the grant of such relief.

(15) The Arjoons and KGC asserted that since the trial judge erred or was plainly wrong in her assessment of these issues and the law relating to them, this in turn led to the misapplication of **CPR 26.2(1)(b) and (c)**.

(16) The matters raised on appeal touch and concern the following:
a. The need for a TPI where company assets are insufficient to meet the debt;
b. The broad and flexible supervisory powers of the Court under the **BIA** and the **CA** to compel a receiver to comply with his or her statutory duties;
c. How is the rehabilitative thrust of the **BIA** to be interpreted and applied; and
d. The statutory and/or fiduciary origin of the breaches complained of and the correlating statutory remedies available.

LAW

(17) Pursuant to **CPR 26.2(1)(c)**:

> ***The court may strike out a statement of case or part of a statement of case if it appears to the court—***
>
> ***…***

(b) that the statement of case or the part to be struck out is an abuse of the process of the court;

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim;

…

(18) **Section 14(a) and (b) of the BIA** provide that a receiver shall act honestly and in good faith; and deal with the property of the debtor in a commercially reasonable manner.[7] **Section 15(g)** of the Act requires the receiver to keep records in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor. **Section 15(h)** requires the receiver to prepare monthly summaries of accounts of his administration of the collateral and other property of the debtor.

(19) **Section 20 of the BIA** gives the Court the discretion to make an order on terms that it considers proper to compel a secured creditor, receiver or debtor to carry out its duties. In addition, the court is empowered to make an order to restrain such a party from realising or dealing with the debtor's property until that duty is fulfilled by the persons named.

(20) **Section 23 of the BIA** provides that where the Act is silent, the provisions of **sections 290 to 303 of the CA** shall apply, and where there is conflict between these **Acts**, the provisions of the **BIA** take precedence.

(21) **Section 296 of the CA** provides that, upon an application by receivers, receiver-managers or *'any interested person'*, the Court may make any

[7] See also section 295 of the Companies' Act *op.cit.*

order it thinks fit including but not limited to the orders set out in that provision. **Section 297 of the CA** lists the duties that a Receiver is required to perform.

DISCUSSION & ANALYSIS

Did the trial judge err or was she plainly wrong to strike out KGC's claim for abuse of process because the company failed to provide a third party indemnity?

SUBMISSIONS

Counsel for the Respondent

(22) Mr. Garcia submitted that the purpose of an indemnity is not based on the fraud of party (in this case the receiver). Counsel contended that the indemnity principle is applicable where assets of the insolvent company are being threatened and the losses claimed are losses suffered by the company. Mr Garcia stated his agreement with the trial judge's assessment that since there was no 'egregious or culpable breach of accounting duties' there was need for the TPI to be posted.

(23) Mr. Garcia further submitted that although there is legislation that governs the duties of a receiver, this did not negate the need for a **TPI**. He relied on analogous Canadian legislation that contained the very provisions as to the accounting responsibilities as in the **BIA**, and to the Canadian cases **Maple Leaf Foods v. North Atlantic, Lukezic v. A1 Label and Mapleleaf Foods v Marklamnd Inc**[8]. Counsel submitted that these authorities makes it clear that the rule as to providing an indemnity is "*still alive".* Therefore, the need exists in Trinidad and Tobago.

[8] Maple Leaf Foods v. North Atlantic 2005 NLT 36; Lukezic v. A1 Label 2011 ONSC 3063; Mapleleaf Foods v Markland Inc 2007 NLCA 7

Counsel for the Appellants/Claimants

(24) Mr. Hosein's position is that the **TPI** requirement was not relevant given the new legislative environment. Counsel averred that the **BIA** overtook the law as expressed in **Busy Printery Ltd v Bank of Commerce Trinidad and Tobago Limited.**[9] In any event, the authorities **Maple Leaf v North Atlantic Sea Farms Corp**[10] and **Bank of Montreal v Jarjoura**[11] were not relevant to these proceedings because,

- **Jarjoura** involved a counterclaim by Mr Jarjoura, on his personal guarantee, as shareholder of a debtor company against that the secured creditor Bank of Montreal.
- In **Maple Leaf**, a fundamental issue before the Court in was whether a debtor company had the capacity to bring an action against the secured creditor, based on the security document itself, after the appointment of a receiver.

These do not arise for consideration in this matter. In any event and in this case in particular, receivers ought to act in accordance with the **Act**.

DISCUSSION & ANALYSIS

(25) In the case at bar, the trial judge held that that KGC's claim be struck out as an abuse of process in that a pre-condition for maintaining an action had not been satisfied. That pre-condition according to the trial judge was that the company failed to provide a **TPI** at the start of proceedings in the event that it faced a hostile award for costs. The trial judge maintained that this decision was based on the approach taken by the Court of Appeal in **Busy Printery**. The trial judge opined that:

[9] CA P134/1993
[10] [2005] NLT 36
[11] [2010] ABQB 103

> *Without the appropriate indemnity, directors are not at liberty to commence proceedings on behalf of a company in receivership in circumstances where the assets of the company are insufficient to meet the debt owed to the debenture holder since the consequence is there may be inevitable costs orders against the company which will prejudicially deplete the assets available to the secured debtor for satisfaction of his debt.*[12]

The trial judge continued:

> *In my opinion given the undisputed facts in the instant action, and that [KGC] secured debt to RBL is significant, in the absence of the indemnity, [KGC]'s action against the Defendant is dismissed on the basis of abuse of process since any adverse costs order which is made against the Third Claimant in the instant action would imperil the assets of the Third Claimant which would ultimately prejudice RBL, the debenture holder.*[13]

(26) **Section 296 of the CA** empowers the Court to make any Order that it sees fit on an application by a person having *locus standi* to make such an application. Similarly, **section 20 of the BIA** provides that the Court is empowered to direct receivers to carry out their statutory duties, or restrain them from so doing, (such as realising or otherwise dealing with the property), until that duty is carried out. It is clear from the foregoing that the effect of the receivership regime gives the Court wide powers where allegations of breaches of statutory duties have been made against a receiver. Before making such orders, the Court must be satisfied of the veracity of any allegation made against the receiver. This would call for a thorough investigation (trial) of the facts.

(27) The legislation does not state that as a precondition for complaint, a complainer, whether the company or directors, must provide a TPI. That is

[12] CV 2019-05161, [61]
[13] ibid, [63] of published judgement

not to say that the Court cannot conduct an inquiry into the need for a TPI once a party files an action. This to our mind this can be utilised as a management tool or be a procedural step to be dictated by a trial court and contingent upon the facts of each case. It may satisfy the express policy basis of the **BIA** balancing the rights of secured creditors and the rehabilitation of the debtor company. Having recognised that basis, we do not see how the lack of a TPI can automatically trigger the nuclear option of striking out an action on the ground that it constituted an abuse of process.

(28) In the circumstances, we find the trial judge was plainly wrong to strike out KGC's claim as an abuse of process for failure to provide a TPI for MD.

(29) Before us, Mr Hosein argued that KGC should not have to provide an indemnity because the breaches complained of are obvious. In effect therefore, Counsel has asked us to view the breaches as proven on the pleadings. This is not an issue for determination in this appeal and we decline to use this as a basis for our decision.

(30) An option that was available to the trial judge was the approach adopted in **Busy Printery,** and this is how the extant case would remain relevant under this enhanced regime. To our mind, the rule that directors ought not to be at complete liberty to commence proceedings on behalf of a company and run the risk of a hostile costs order thereby depleting the assets of the debtor company remains relevant. This will therefore call for the Court to conduct an exercise to determine the extent of the indemnity needed and who could provide such an indemnity, even in the face of the company or directors providing such an indemnity. We highly recommend this course.

Was the trial judge plainly wrong to strike out the Arjoons' claims on the basis that their pleadings disclosed no grounds for bringing the claim?

SUBMISSIONS

Respondent's Submissions

(31) Mr Garcia submitted that as a matter of general principle in the case of a claim for breach of duty, a maintainable cause of action will arise unless the claimant alleges and can prove damages suffered by him personally as a result of the breach. Counsel expressed the view that the Arjoons's claim was therefore fatally flawed because:

a. the codification of a receiver's duty to account does not affect this principle;
b. when viewed in the context of **section 296 of the CA**, the category of *'interested person'* refers to someone who has an interest in the collateral managed by the receiver or to whom statutory duties are specifically owed;
c. as directors and shareholders, the Arjoons do not have an interest in the assets of the Company now held as collateral and so do not fall into the category of *'interested person';*
d. the Arjoons did not comply with the procedures set out in the **BIA** and the **CA**, which require parties seeking the intervention of the court to make an application for direction or interim relief;
e. the statutory remedies available under the **BIA** and the **CA** do not include private rights of action; and
f. further, the remedies of enforcement of the receiver's reporting and/ or accounting obligations are only enforceable by KGC.

Appellant/Defendants' Submissions

(32) Mr Hosein submitted that in exercising her discretion to strike out the claims made by the Arjoons, pursuant to **CPR 26.2(1)(c)**, the trial judge failed to recognise the statutory cause of action afforded to an interested person under the **CA**. The trial judge failed to consider as well that the receiver breached equitable duties to the company and these were sufficient to ground a cause of action. Counsel argued that:

a. although the breadth of the phrase '*any interested person*' need not be explored at this stage, directors of a company do in fact fall into this group by virtue of **section 297(e) of the CA**.;

b. proof of damages or some demonstrable loss are not essential to claims founded on a receiver's breach of his or her statutory and/ or duties. Counsel asserted that this is reflected in the provisions of **section 296 of the CA**.; and

c. the remedies delineated in the provisions of that section contemplate interventions other than or in addition to awards of damages.

DISCUSSION & ANALYSIS

Corporate Receiverships- Historical Context

(33) Historically, receivers were seen in a particular light. The appointment of a receiver heralded and visited dire consequences on a company's ability to control its assets and business and left many feeling helpless.[14] In the

[14] In *The Law of Corporate Receivers and Receiver-Managers,* Burgess examined the pre-reform functions of receivers and receiver-managers in the Caribbean. He concludes by noting that *'it is to be emphasised … that the receiver-manager is under no duty in performing his management function to essay any rehabilitation of the debtor company'.* (Burgess, A., *'The Law of Corporate Receivers and Receiver-Managers'* (The Caribbean Law Publishing Company 2002) p 12)

Australian case **Bond Brewery Holdings Ltd v National Australian Bank Ltd** the Supreme Court said, *'we cannot for the moment think of an order of greater consequence to a company than one which, until further order, robs it of its control over its own assets and business'*.[15] Although this observation refers to Court appointed receivers, it is of equal moment for corporations operating under the supervision of instrument appointed receivers or receiver-managers.

(34) By introducing the **BIA**,[16] Parliament signalled its intention to incorporate questions of whether there could be efforts to rehabilitate the indebted company whilst ensuring that all debts owed to the secured creditor are realised, as far as is possible.[17] In other words, the policy considerations under the **BIA** gave the debtor company a voice in the receivership process. The new legislation therefore, can be encapsulated in four words: **voice, rehabilitation, equity and efficiency**. These provide the keys to understanding the **BIA**.[18] Thus, any assessment of the merits of the

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It has also been observed that, *'far from being the company doctor, [the receiver] was probably thought of more as the undertaker or financial priest coming to administer last rites'.* (Picarda, H., The Law Relating to Receivers, Mangers and Administrators' (Tortel Publishing 2006) p 10

[15] (1991) 1 ACSR 448, 456

[16] Our **BIA** finds its genesis in Canada's Bankruptcy and Insolvency Act, overhauled and renamed in 1992 to address criticisms over it favouring creditors by providing for the liquidation of debtors and not their rehabilitation. The legislation was also criticised for favouring secured creditors at the expense of other creditors. The reformed legislation attempts to strike a greater balance between debtors and creditors. Receivers must now wear the hats of company doctor and security overseer with equal aplomb.

[17] '*The proposed law is aimed at meeting both the needs of debtors and creditors and also providing remedies which allow a company or business to remain viable as long as possible with the hope of reducing the loss of employment and other attendant hardships which accompany bankruptcy*'. Per the The Hon Sen J Jeremie, Bankruptcy and Insolvency (No 2) Bill, Senate Debate (18.11.2007) p 705. The long title of the Act states that the legislation is 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 the create the office of Supervisor of Insolvency.'***

[18] Oglivie, M.H., *'Rehabilitation, equity and efficiency: the new Bankruptcy Law in Canada',* 1994 JBL 304, p 305

Arjoons's claim in an application to strike out same must be guided by these principles. This was not evident from the trial judge's reasoning.

(35) Before examining the matters raised by the Arjoons, it is necessary to note that pre-statute case law will continue to provide guidance so long as the principles espoused do not conflict with the aims and policy of the **BIA**.

(36) The Arjoons's action is based on alleged breaches of statutory and equitable duties by MD, causing detriment of KGC and not in keeping with the rehabilitative policy of the **BIA**. On a striking out application involving alleged breaches of statutory and equitable duties by a receiver or receiver-manager, the Court must (assisted by expert evidence) consider:

a. Who the claimants are and the capacity in which they have sued, as pleaded;
b. The breaches complained and the evidence in support and in defence of the claim and the application; and
c. The remedies sought and whether they are proper in law.

Receiver's Statutory Duties

(37) The hitherto equitable duties of a receiver are now provided for in statute. Generally, statutory duties may give rise to liability in a civil action. This liability is sui generis and quite independent of other tortious liability.[19] In **London Passenger Transport Board v Upson**,[20] Lord Wright opined that opined that,

> *The **statutory right has its origin in the statute**, but the particular remedy for damages is given by the common law in order to make effective … his right to the performance of the defendant of that defendant's*

[19] Charlesworth and Percy on Negligence (Sweet & Maxwell 10th Edn) [11-01]
[20] [1949] AC 155

> *statutory duty … It is not a claim in negligence in the strict or ordinary sense*.[21]
>
> (Emphasis ours).

(38) What then are the statutory duties owed by a receiver or receiver-manager and to whom are these duties owed? The relevant and operational statutes are the **BIA** and the **CA**. We shall discuss each in turn.

(39) **Section 14** of the **BIA** itemises the duties of a receiver, which include the duty to: ***(a)*** '*act honestly and in good faith'*; and ***(b)*** *'deal with the property of the debtor in a commercially reasonable manner'*. In his commentary on the Canadian Bankruptcy and Insolvency Act, Ogilvie posits that,

> *In contrast to the previous Bankruptcy Act, the Bankruptcy and Insolvency Act now makes greater provision for the duties and legal standard of care required of receivers in the enforcement of a security. The legislation simply brings the receiver's position in law into line with the legal standards required of other legal actors such as directors, trustees, lawyers or accountants…*[22]

(40) Although we agree with this analysis, we are constrained to note that a receiver or receiver-manager, privately appointed, is not an officer or employee of the debtor. Although the exact nature relationship between the receiver-manager and the debtor depends on the terms of the debenture or mortgage deed, general commercial practice favours an arrangement in which the receiver acts as *'agent'* of the debtor so as to satisfy the security of the debenture holder or mortgagee.

[21] ibid, p 168
[22] Ogilvie, p 320

(41) **Section 14 of the BIA** states that the duties as itemised are for the benefit of the Supervisor, Debtor, Trustee and any creditor.[23] **Section 18** titled *'Secured Creditors and Receivers'* provisions of the **BIA**, makes the only reference to directors and this is contained in **subsection (d**). This requires the receiver to notify the debtor of the planned disposition of its collateral at least 14 days before and in the case of a company, notice must be given to at least one of its directors. It is noteworthy that there is no hierarchy of duties contained in the **BIA**. A receiver-manager must be mindful of them all and act accordingly.

(42) The *'Secured Creditors and Receivers'* provisions of the **BIA** operate alongside the *'Receiver and Receiver-Managers'* provisions of the Companies Act. Indeed, **section 23** of the **BIA** sets the framework within which the receivership provisions of both **Acts** coalesce. If the **BIA** is silent on a particular issue, **sections 290 to 303 of the CA** apply to the determination of that issue. However, when and if the provisions of the **CA** are inconsistent with the provisions of the **BIA**, the provisions of the **BIA** take precedence.

(43) Section **295 of the CA** sets out the duty of care owed by an instrument appointed receiver and is identical to **section 14(a) and (b) of the BIA**. **Section 297 of the CA** identifies duties of the receiver that are in large part a mirror of **section 14 of the BIA** with some differences. In particular, **section 297(e) of the CA** provides that a receiver or receiver-manager must keep accounts of his administration, which shall be available during usual business hours for inspection by directors. Therefore, under the receivership regime, a receiver or receiver-manager has two express duties or obligations that must be met in relation to directors. The receiver must

[23] See Bankruptcy and Insolvency Act section 14 (e), (f) and (g)

notify a director of the debtor company of any plan to dispose of the collateral at least fourteen days in advance. The receiver also has a duty to keep accounts of his administration, which must be made available to debtors/directors during usual business hours.

(44) However, this is not the end of the matter. **Section 15 of the BIA**, sets out the general activities that should be carried out by a receiver during the specified times. These activities are general in nature in they are not limited to benefit any particular party or class *per se* but sets out the '*job description'* or day to day functions of the receiver. As will be seen below, a director can call upon a receiver to account for his performance through litigation commenced on behalf of the debtor company.

Receiver's Equitable Duties

(45) The Arjoons claimed that the receiver breached equitable duties in her management of KGC's affairs. The equitable duties of a receiver-manager run parallel and are quite similar to the equitable duties owed by a mortgagee to the mortgagor. In **Medforth v Blake and Ors**, Sir Richard Scott VC recounted how the equitable duties of a receiver emerged:

> *The duties of a receiver towards the mortgagor have the same origin [as those of a mortgagee]. They are duties in equity imposed in order to ensure that a receiver, while discharging his duties to manage the property with a view to repayment of the secured debt, nonetheless in doing so takes account of the interests of the mortgagor* ***and others interested*** *in the mortgaged property. These duties are not inflexible. What a mortgagee or a receiver must do to discharge them* ***depends upon the particular facts of the particular case****. A want of good faith or the exercise of powers for an improper motive will always suffice to*

establish a breach of duty. ***What else may suffice will depend upon the facts****.*[24]

(Emphasis ours)

(46) Before leaving this question of the equitable duties owed by a receiver, we note with approval, the propositions of law expressed by Sir Richard Scott VC:[25]

(1) A receiver managing mortgaged property owes duties to the mortgagor and anyone else with an interest in the equity of redemption.

(2) The duties include, but are not necessarily confined to, a duty of good faith (which is the most general of the equitable duties imposed on a receiver and requires him to act without *mala fides*).

(3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of the particular case.

(4) In exercising his powers of management, the primary duty of the receiver is to try to bring about a situation in which interest on the secured debt could be paid and the debt itself repaid.

(5) Subject to that primary duty, the receiver owes a duty to manage the property with due diligence.

(6) Due diligence does not oblige the receiver to continue to carry on a business on the mortgaged premises previously carried on by the mortgagor.

(7) If the receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps be taken in order to try to do so profitably.

[24] [2000] Ch 86, pp 101 - 102

[25] Medford v Blake and Ors, p 102 (n22)

(47) The equitable duties of a receiver are flexible, cover a widening range of circumstances. The categories are not closed. For the purposes of these proceedings, it not necessary to expound any further on what each of these duties require from a receiver-manager. We are of the view that these equitable duties compliment the statutory duties of a receiver-manager.

(48) The equitable duties of a receiver-manager are distinct from any duty of care that may arise in tort and the **BIA** gives an qualified aggrieved person the right to seek the Court's intervention against a receiver not only for breach of statutory duties but also for breach of equitable duties. In any event, whether a receiver-manager has fulfilled these duties, is a matter to be explored at trial. It is clear that the trial judge overlooked this issue and this may have contributed to a failure to consider relevant legal principles in relation to this matter.

(49) We note the **BIA** does not mention "*directors*" among the class of persons who may found an action based on breach of the equitable duties of a receiver-manager.[26] What then is the position of the Arjoons? Can they sustain an action against MD for the alleged breaches of duties arising in equity?

Meaning of 'any interested person'

(50) Mr Garcia submitted that the Arjoons should not be allowed to rely on the argument that they are interested persons under **section 296 of the CA** because they did not invoke the Court's jurisdiction under this section**.** Mr Garcia's objections do have merit. However, for reasons forthcoming, these objections will not on their own, defeat the Arjoons's arguments on

[26] Picarda, pp 115 – 156 (n13)

the power of directors to commence proceedings against the receiver on behalf of the indebted company.

(51) The Arjoons rely on the wording of **section 296 of the Companies Act** and in particular, on the phrase '*any interested person'* to assert that they fall within a class of persons with locus standi to commence proceedings challenging the actions of a receiver. Mr Hosein submitted that the Arjoons are interested persons by virtue of the fact that they are referred to as being owed certain duties under the legislation. Mr Hosein contended that although the phrase was not defined by the **CA** it is possible to determine whether the Arjoons fall into that class of persons by reference to their interest in, or to use our own word *nexus* to, the management or disposal of the collateral. Counsel suggested that *'any interested person'* may be defined in one of three ways depending on the approach adopted by the courts in this jurisdiction. They are:[27]

(1) A person who has a proprietary interest in the collateral subject to the receivership;

(2) A person who has a legally recognised claim or entitlement to the collateral including but not restricted to a claim arising from a proprietary interest in it; or

(3) A person who is affected by the management and disposition of the collateral, regardless of whether he or she has a proprietary interest in it or a direct legal entitlement to it.

(52) There is a dearth of case law on the meaning of *'any interested person'.* We are of the view, that on the face of the legislation and in the context of the receivership provisions of both **Acts** (in so far as **section 23 of the BIA**

[27] Buckwold, T., *'The Treatment of Receivers in the Personal Property Security Acts: Conceptual and Practical Implications'*, (1997) 2 CBLJ 277, p 302

allows), the phrase *'any interested person'* would include every class of person to whom the legislation says a receiver owes a duty. In the case at bar, we find that the phrase includes the directors of a company. This view is based on the interpretation and analysis which **section 23 of the BIA**, provides for, the intertextual approach.

(53) We have reviewed the definitions proposed by Mr Hosein. However, in the **CA** the phrase *'any interested person'* is used throughout the without definition. We are therefore of the view that we need not make a definitive statement on whether directors should be recognised as a class of persons captured by the phrase.

(54) The fact remains that under the receivership provisions of the **BIA**, the Arjoons do not have an explicit right to commence litigation against MD. Therefore, the issue is now whether, based on lack of standing, the Arjoons are completely shut out from challenging MD's actions as receiver-manager.

The Legal Position of Directors of a Company in Receivership

(55) **Section 292 of the CA** limits the powers of directors during the duration of the receivership so that, directors are not permitted to exercise any power that a receiver-manager is authorised to exercise. Picarda posits that a receiver-manager does not usurp all the functions of the company's board of directors: '*The directors have continuing powers and duties … in relation to the preparation of annual accounts, the auditing of those accounts, calling statutory meetings … and lodging returns remain*'.[28] The duties of

[28] Picarda, p 116

directors will also continue in relation to any debtor assets not included in the in the collateral or not covered by the debenture-holder's security.[29]

(56) In **Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd**,[30] Street J explained the interplay between the powers of a receiver and the directors of the debtor company in this way:

> ***Receivership and management*** *well dominate exclusively a company's affairs … dealings and relations with the outside world. But it* ***does not permeate the company's internal domestic structure****. That structure continues to exist not withstanding that the directors no longer have the authority to exercise their ordinary business management functions. As valid receivership and management will ordinarily supersede but not destroy* the company's own organs through which it conducts its affairs. The capacity of these organs to function bears an inverse relationship to the validity and scope of the receivership and management.[31]

We associate ourselves with this learning.

(57) Do the directors of a debtor company have the right to commence proceedings on behalf of that company against a receiver? In **Newhart Developments Ltd v Co-operative Commercial Bank Ltd**,[32] the Court of Appeal held that the power given to the receiver to bring proceedings was an enabling provision that equipped him to realise the company's assets and carry on business for the benefit of the debenture holder. Although the receiver is the only person authorised to treat with the collateral, this power does not divest company directors of their power to pursue a right of action if it was in the company's best interest so long as that action does

[29] Doyle, L., *'The residual status of directors in receivership'*, Comp Law 1996, 17(5), 131 – 138, p 132
[30] [1969] 2 NWSR 782
[31] ibid, p 790
[32] [1978] QB 814

not threaten the collateral. Further, although directors cannot dispose of assets, *'if there is an asset which appears to be of value, although the directors cannot deal with it in the sense of disposing of it, they are under a duty to exploit it so as to bring it to a realisation which may be fruitful for all concerned'*.[33] The Court of Appeal also held that directors have the power to institute claims on behalf of the company without the consent of the receiver.

(58) Although **Newhart** dealt with an action commenced by the directors against the debenture-holder, we find the principles expressed to be instructive on the question that we seek to answer. In **Watts v Midland Bank Plc**,[34] the court was concerned with a derivative action brought by majority shareholders against the receiver for the improper discharge of his duties in that he had entered into an agreement for sale of the company's property at what the company viewed an undervalue. The Court disapproved of the approach adopted by the company directors and opined that it is either that:

> *[The Company] is in law unable to sue the receiver (in which case it is hard to see how the shareholders suing on behalf of the company can be in a better position than the company itself to sue) or [the Company] can sue the receivers (in which case there is no justification for the derivative action in circumstances such as obtain here) where the plaintiffs are the directors and majority shareholders and can procure the company to bring such action.*[35]

We agree. The fiduciary duties of company directors continue during the Receivership of the company so that directors have a duty to secure the bests interests of the Company.

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[33] ibid, p 820 per Shaw LJ
[34] (1986) BCLC 15
[35] ibid, p 20 per Gibson J

(59) Although directors may initiate proceedings against a receiver for the improper conduct of duties owed to the debtor company, directors cannot challenge the receiver in their own right, that is, in their personal capacity.[36] This is at odds with the trial judge's finding that the Arjoons were required to prove losses personal to them. In a claim brought on behalf of a debtor company by the directors, the losses proved must be losses sustained by the company. Where directors commence proceedings against a receiver on the ground of a breach of duty owed to the debtor company, the directors do not need to seek the consent of the receiver for same, nor can a receiver pursue an action against himself.[37] This again buttresses our view that the trial judge was plainly wrong to conclude that since the pleadings did not disclose personal loss to the Arjoons, the case against the receiver must be struck out as disclosing no grounds for bringing the claim.

The Role of the Trial Judge

(60) What then, was the proper approach that a trial judge should adopt when faced with similar applications? First, the usual principles apply. The trial judge is not required at this stage to conduct a mini trial. The trial judge must undertake a preliminary assessment of the claims and reliefs sought by the claimants juxtaposed against the evidence adduced by the defendant in support of the strike out application. However, once there is a conflict of evidence or interpretation of the law, the court must approach the process with trepidation. Striking out is a nuclear option that Courts utilise as a measure of last resort.

[36] Malaysian Ropes v Malaysian Prestressed Concrete Strand Manufacturing Sdn Bhd (6 March 1992, unreported)
[37] Newhart Developments Ltd v Co-operative Commercial Bank Ltd

(61) The relevant statutes clearly set out the duties owed by the receiver. There were allegations of breaches of the equitable and statutory duties owed to a debtor by a receiver. These formed the legal basis of this claim. The claim was mounted by the directors on behalf of the company and not in their personal capacity. Based on the intertextual interpretation and analysis of the **BIA** and the **CA** we find that as directors, the Arjoons had l*ocus standi* to commence an action on KGC's behalf against MD in her capacity of receiver-manager.

(62) In the premises, the pleadings disclosed a case sufficient for the receiver to answer. We therefore find that the trial judge was plainly wrong to dismiss the Arjoons's claim as disclosing no case for the receiver to answer pursuant to **Part 26.(2)(1)(c) of the Civil Proceedings Rules 1998** (as amended). We conclusion is fortified by the pleadings presented and arguments made before us.

THE INJUNCTION

Did the trial judge err or was she plainly wrong to discharge the ex parte injunction on the ground that the Appellants/Defendants failed to satisfy the conditions that must be met to obtain injunctive relief?

SUBMISSIONS

Appellant's Submissions

(63) We thank Counsel for their helpful submissions and we shall refer to them as we need to.

DISCUSSION & ANALYSIS

The Trial Judge's Findings

(64) The trial judge considered the authorities and principles that guide the Court on an application for injunctive relief. Her reasons are above and we do not propose to repeat them. We must mention that we find it curious that RBL, the secured creditor is not a party to these proceedings. We say no more. We note as well that the debt remains unliquidated.

(65) The trial judge failed to consider the statutory regime under which the parties brought these proceedings. This failure caused an approach to the grant of an interim injunction using solely common law principles and reasoning, which, though important were not the only matters that the trial judge needed to address in coming to the finding and conclusion.

(66) We start by observing that both the **BIA** and the **CA** give the court the power to restrain receivers from acting or even remove receivers upon proof of breach of their statutory duties. There is no provision disempowering a court from granting the usual interim relief on the allegation of these breaches.

Commercial reasonableness

(67) After reviewing the authorities, the trial judge concluded that commercial reasonableness or the lack thereof were key to determining whether the injunction should be discharged for failing satisfy the Court that the Appellants/Claimants had good prospects of success. The trial judge relied on **Barclays Bank Plc v Unit Credit Bank AG and Anor**[38] for the proposition that commercial reasonableness fell within the scope of ***Wednesbury***

[38] CV 2019-05161

unreasonableness. Applying that standard of care to the circumstances of this case, the applicable test would be whether the trial receiver's exercise of discretion was so unreasonable, that no reasonable receiver would have come to it. The trial judge also found that,

> *In order to sustain a claim breach of the duties in section 14 of the BIA, the onus is on the party making the allegations … to adduce evidence which establishes fraud or mala fides on the part of the receiver, or … that the receiver's actions and decisions have been so absurd that no sensible person could have made such decisions. The courts will not interfere with the decisions and actions of receivers, in the absence of such evidence even if there is evidence that a reasonable opposite conclusion is available on the same set of facts. The courts will not look further into its merits and will not interfere as long as a receiver's actions and decisions are within the confines of reasonableness.*[39]

(68) Mr Hosein submitted that trial judge's assessment of what commercial reasonableness entailed was wrong in law. He asserted that to place an absurdity standard into the statutory requirement risked conflating commercial reasonableness with the discrete requirement of *'good faith and honesty'*.[40]

(69) Mr Garcia countered that it does not matter whether the test for commercial reasonableness is the Wednesbury test or some other test. He asserted that whatever the test, the policy of the courts is clear – courts will not lightly interfere with decisions made and actions taken by a receiver save in the most exceptional circumstances.

(70) We agree with Mr Garcia in part. The trial judge was correct in her observation that the Court will not interfere with a receiver's decisions,

[39] ibid, [129]
[40] BIA section 14(a) and Companies Act section 295(a)

without evidence that he breached his duty to act in a commercially reasonable manner and so long as his actions are within the confines of reasonableness.

(71) However, the trial judge fell into error and went on to do the opposite of what she stated by examining the concept of commercial reasonableness to determine whether there was a case to be tried in the quest of determining whether to discharge the interim injunction, without the benefit of tested evidence.

(72) We propose to say a brief word on this. The concept of commercial reasonableness originates in the Law of Contract and the principles that govern commercial contracts. It is distinct from the obligation to obtain fair market value and transcends agreements for the sale of property. We therefore agree with Mr Hosein that commercial reasonableness is not limited to agreements for sale of debtor assets. [41]

(73) What standard of care does the duty to deal with the debtor's property in a commercially reasonable manner impose on a receiver? In its barest terms, the test is simply: what would a reasonable person having the knowledge, skill and expertise of the receiver do in the circumstances. In **Canadian Western Bank v Quigley and Ors**, the Court opined that *'commercial reasonableness refers to the actions of a reasonably prudent business person in similar circumstances'*.[42]

[41] See for example People's Trust Company v Longlea Estate and Ors (2005) BSC 1332 where the Court had to decide whether the fees charged by the receiver were commercially reasonable; and Textron Financial Canada Limited v Beta Limitee [2007] CanLii 37461 (On, SC)
[42] [2019] BCSC 1020, [53]

(74) Where does the burden lie? In **HSBC v Kuptritz**[43], the Court opined that it is for the party alleging that a receiver has breached his duty to act in a commercially reasonable manner to adduce the evidence. The Court also found that:

> *In practical terms, this onus of proof requires the debtor to establish both that the secured party departed from industry norms, and that a higher price would have been obtained if the secured party had done what is considered to be reasonable in that particular sector or industry. Generally,* ***meeting that burden will require the debtor to provide expert evidence on the industry standard against which the debtor's allegation of substandard conduct can be measured****. However, it will not always be the case that expert evidence is required; in some cases the conduct of a secured party may so obviously depart from commercial common sense that evidence of what was done alone will suffice.*[44]

(75) In **Government of Yukon v Yukon Zinc Corporation**,[45] the Court found that the receiver acted with commercial reasonableness in the following circumstances:

> *In my view, the Receiver has not acted arbitrarily. It has exercised proper discretion in the circumstances. It carefully considered its options, was transparent about its intentions, and attempted to negotiate a mutually acceptable agreement with [the secured creditor]. It has been honest and fair. The Receiver provided legitimate reasons showing the onerous nature of the lease terms in the circumstances. In exercising its duty to maximize value for all of its stakeholders, the Receiver acted in a commercially reasonable manner in doing so.*[46]

(76) **Yukon** and **Kupritz** demonstrate that the question whether a receiver has acted in a commercially reasonable manner is dependent on the facts of

[43] [2011] BCSC 788
[44] ibid, [36]
[45] [2020] YKSC 16
[46] ibid, [73] per Duncan J

each case. In assessing allegations of unreasonableness, the Court focuses on the methods or procedures adopted by the receiver and not simply on the fact that there may have been offers or opportunities for business viewed as more favourable by the debtor. The Court also has regard to the terms of the instrument(s) that govern the receiver's appointment.

(77) We have not lost focus of the fact that this is a procedural appeal challenging the trial judge's decision to strike out the claim and discharge the *ex parte injunction*. We therefore make no findings on the conclusions drawn by the trial judge on whether Ms Daniel acted in a commercially reasonable manner. However, we would take the opportunity to move the approach adopted by the Court in **Kupritz** one step further. Unless a judicial officer is an expert in the field of bankruptcy and insolvency law (and even then), the question whether a receiver has acted in a commercially reasonable manner should not be embarked upon without the assistance of independent industry experts. Of course, this may not be necessary where the conduct of the receiver or indeed the secured creditor obviously departs from commercial common sense.

(78) Even though the **BIA** professes rehabilitation, it has not changed the telos of a receivership, which is to recover the debt. It has added an additional element- recover the debt and try as far as possible to assist the company to rehabilitation. The Canadian cases demonstrate how an action taken by the receiver may be considered commercially reasonable. The Courts advocate against the debtor taking action simply because it does not like the decisions made by the receiver. The Courts do not overturn the decisions of the receiver just because the debtor is of the view that it would do things differently or has identified alternatives in dealing with a particular situation. Our regime will benefit from such guidance.

(79) Further, at this stage, the court is not required to hold a mini trial. Further, the authorities suggest that the issue of commercial reasonableness is a matter of mixed fact and law and ought to be determined upon trial. We find that the course adopted by the trial judge to make a finding on commercial reasonableness as a factor to continue or discharge the injunction at this stage was precipitate and plainly wrong.

(80) The trial judge found further that the Arjoons gave no good reason for failing to give notice of the interim application. The affidavit evidence in opposition to the striking out application revealed that KGC and the Arjoons informed MD of their dissatisfaction with the conduct of the receivership. MD had notice of the alleged breaches. MD defended her position but again we find that trial judge should not have made a determination of the issues without testing the evidence. We think that the trial judge was plainly wrong to have used this issue as a reason to discharge the injunction.

(81) In this case, the breaches alleged are, the non provision of accounts, breach of the duty of good faith and the receiver taking actions that were not commercially reasonable. These are the kinds of actions reliefs for which are contemplated by both the **CA** and the **BIA**. KGC and the Arjoons wish to pursue any available statutory remedies. An award of damages is not an adequate remedy in these circumstances.

(82) Given the nature of the complaints and impending disposition of assets, we find that the trial judge was plainly wrong to find that the balance of convenience lay with suspending MD's operations pending the hearing and determination of the claims at trial.

(83) Based on our findings that,

a. the action survived the striking out application as there is a case for the receiver to answer;
b. the case was not an abuse of process; and
c. upon an examination of the reasons given for the discharge of the injunction,

we find that the requirements have been satisfied to continue the injunction and that the trial judge was plainly wrong to discontinue and discharge the interim injunction. We find that at the very least that the *status quo* should be maintained until these matters are determined at trial.

CONCLUSION

(84) We are of the view that the justice of this case requires that the matter be remitted to the trial judge for continued hearing and trial. Further should the trial judge find upon inquiry that a TPI is required, the court should permit KGC to supply same, subject to reasonable terms and conditions.

COSTS

(85) Usually, costs will follow the event where the losing party will be the costs of the action both here and below. In receivership matters, the costs of the action will be borne by the company's assets or coffers, such as they are. The appellants have invited this Court to impose a costs order on the receiver personally. The **CA** and the **BIA** make provision for such a course of action. We are not inclined to follow that lead in this case for two (2) reasons:

a. The conditions for the imposition of costs personally on the receiver have not been fulfilled; and
b. The issues raised in these proceedings test the receivership regime, which is still in its infancy.

c. A Court Order for costs as against a receiver may have a deleterious effect on the stability of the Regime.

We take this opportunity as well to implore the relevant authorities to outfit and operationalise the Office of the Supervisor to provide the necessary support for viable business operations.

(86) Having declined Mr Hosein's invitation and in keeping with the exercise of the Court's discretion on the awards of costs, we order that each party do bear their own costs.

ORDER

It is hereby ordered:

1. This Appeal is allowed.
2. The Orders of the trial judge are set aside.
3. The interim injunction granted on the 16th December 2019 is hereby restored and continued until the determination of the trial.
4. Each party bears its own costs both here and below.
5. This matter is remitted to the trial judge for continued hearing and dermination.
6. This matter be deemed urgent and fit for early hearing.

We place on record our gratitude to both Counsel in this matter for their assistance. We thank our Judicial Research Counsel, Ms Koya Ryan and Ms Aleema Ameerali.

/s/C. Pemberton JA

/s/M. Dean-Armorer JA