REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P235 OF 2020
CV 2017-02536

IN THE MATTER OF CL FINANCIAL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CHAPTER 81:01

BETWEEN

SELECT PROPERTIES LIMITED

APPELLANT/APPLICANT

AND

CL FINANCIAL LIMITED

FIRST RESPONDENT

TRINCITY COMMERCIAL CENTRE LIMITED

SECOND RESPONDENT

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

THIRD RESPONDENT

FIRST CITIZENS BANK LIMITED

INTERESTED PARTY

APPEARANCES:
Mr. A. Ramlogan SC, Mr. J. Jagroo and Mr. A. Pariagsingh, instructed by Mr. V. Siewsaran, on behalf of the appellant

Mr. B. Reid, instructed by Ms. K. Richardson-Dumitriu, on behalf of the First Respondent

Ms. D. Peake SC, Mr. R. Heffes-Doon, instructed by Mr. R. Thomas, on behalf of the Third Respondent

PANEL:
P. Rajkumar JA
V. Kokaram JA

Date of Delivery: 11th December, 2020

I have read the judgment of Rajkumar JA. I agree with it and have nothing further to add.

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Vasheist Kokaram
Justice of Appeal

JUDGMENT

Delivered by P.A. Rajkumar JA

1. By Amended Notice of Procedural Appeal dated 15th September, 2020 the Appellant appeals the Order of Ramcharan J dated 25th of August 2020 by which he dismissed its application filed on the 16th of October 2019 (the Appellant's application). That application was to set aside his earlier Order made on an application for directions by the provisional liquidator of CL Financial dated **September 18th 2019**, (**the initial order**) a) not to approve a sale to the Appellant of the property hereinafter described (the property), and

   b) giving approval for the sale of the property to be advertised, (together with other parcels of land). The initial order of the trial judge was made in the absence of the appellant.

2. The Court of Appeal in a procedural appeal (the first procedural appeal), in a judgment delivered on February 6th 2020, ordered that an earlier decision of Ramcharan J delivered on November 19th 2019, (dismissing the **appellant's** application), be set aside, that the appellant's application be remitted to the trial judge for **re-hearing,** and that the appellant be served with a redacted application and allowed to be heard thereon.

3. On the rehearing of the appellant's application the trial judge again declined to set aside his initial order, (not approving the sale to the appellant, and which provided for advertisement of the property). This appeal is in relation to his decision on that rehearing. In his written judgment dated August 25th 2020 he took into account matters that had occurred subsequent to his initial Order. Those matters included the receipt of higher offers after advertisement, including one materially higher offer.

4. Similar issues had arisen previously in relation to another sale agreement entered into by another potential purchaser, (Intercontinental[1]), in respect of property owned by HCL, a subsidiary of the first respondent. In respect of that property Ramcharan J on September 18th 2019 had also ordered advertisement of the sale of property and initially declined to approve that sale. Subsequently, on an application to review that decision he set aside his earlier order, declined to take into account higher offers received after advertisement, and approved the sale agreement with Intercontinental. The issues arising therefrom had been considered by the Court of Appeal in a procedural appeal (the Intercontinental procedural decision[2]). Those matters were further considered on an application to a three member panel of the Court of Appeal for conditional leave to appeal from that decision to the Privy Council[3] (the Intercontinental conditional leave decision), (together "the Intercontinental decisions").

Issues

5. i) whether this court was bound to follow the Intercontinental decisions or whether they were a) distinguishable or b) decided per in curium,

   ii) if not, whether the trial judge was plainly wrong in the exercise of his discretion not to set aside but rather to affirm his initial order (1) not to approve the agreement for sale with the appellant and 2) requiring advertisement, either:

   a. by taking into account the offers which had been received pursuant to and **subsequent to the initial Order,**

   b. by failing to appreciate that on an application for directions under **section 377 (3)[4]** of the Companies Act Chap 81:01 his discretion was limited to approving decisions by the

[1] Intercontinental Trading Company Limited

[2] CA P013-2020 CL Financial Ltd v Intercontinental Trading Company Limited and the Attorney General dated 2nd March 2020

[3] CA P013-2020 CL Financial Ltd v Intercontinental Trading Company Limited and the Attorney General per M Mohammed JA (29th May 2020)

[4] ***377. (3) The liquidator may apply to the Court in the prescribed manner for directions in relation to any particular matter arising under the winding up.***

liquidator except in limited cases (such as unreasonableness or fraud, (which were alleged to be inapplicable) or,

c. by failing to analyze the entirety of the evidence and appreciate that the **liquidator** had in fact **already made or approved a decision** to sell the property to the appellant. In that event it was contended that the trial judge could not therefore utilize the **limited** discretion available to the Court under an application for directions under section 377 (3), to set that decision aside in favour of a higher offer.

Conclusion

6. i. the Intercontinental decisions were **not decided per in curium**. On an application for directions under Section 377 (3) of the Companies Act, the **discretion of a judge is no different** from his discretion on an application **mandated by Section 376 (1)**[5] of the

[5] **376.** (1) The liquidator in a winding up by the Court may with the sanction either of the Court or of the committee of inspection—
(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;
(b) carry on the business of the company, so far as may be necessary, for the beneficial winding up thereof;
(c) appoint an Attorney-at-law or other agent to assist him in the performance of his duties;
(d) pay any classes of creditors in full if the assets of the company remaining in his hands will suffice to pay in full the debts and liabilities of the company which rank for payment before, or equally with, the debts or claims of the first mentioned creditors;
(e) make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
(f) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent,
ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.
(2) The liquidator in a winding up by the Court may—
(a) sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels;
(b) do all acts and execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;
(c) prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory, for any balance against his estate, and receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;
(d) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
(e) raise on the security of the assets of the company any money requisite;
(f) take out in his official name letters of administration to any deceased contributory, and do in his official name any other act necessary

Companies Act and the Court is not a rubber stamp[6]. Its role is to ensure so far as practicable the proper exercise of fiduciary powers or obligations and consider how best to realise an asset of the company in liquidation, (**Re Hinckley Island Hotel Ltd, Craig v Humberclyde Industrial Finance Group Ltd and others - [1998] 2 BCLC 526**). It must look to the interests of all persons concerned, including creditors, before giving its blessing to a transaction submitted to it for approval, (**Re Northland Bank [1989] M.J 205**, **[1989] 4 W.W.R. 701**). It is entitled to consider and take into account whether any sale put forward for approval is one which is improvident **in the circumstances.** For this purpose it is entitled to have regard, inter alia, to whether the **process** adopted for a sale is **transparent** or **designed** to secure maximum exposure to the market and maximize the value of the asset likely to be realised for the benefit of creditors.

ii. This court would be bound by both the Intercontinental procedural decision and the Intercontinental conditional leave decision unless the instant matter were distinguishable on its facts. The facts therefore had to be analyzed to determine whether the instant appeal was so distinguishable. On such analysis there is no sufficient distinction to justify considering those decisions inapplicable.

iii. Accordingly the trial judge was correct as a matter of law **to take into account the higher offers** received pursuant to his initial Order. Based on the Intercontinental decisions, the facts and matters that had to be considered were those in evidence **at the date of the rehearing of the application[7]**. There was no basis in law for disregarding them or pretending that those offers did not exist.

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for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due is, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, deemed to be due to the liquidator himself;
(g) appoint an agent to do any business which the liquidator is unable to do himself; and
(h) do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.
(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[6] See the Intercontinental leave decision
[7] See Tibbles v SIG plc [2012] EWCA Civ 518 considered and applied in both the Intercontinental decisions.

iv. It is contrary to the evidence to contend that the liquidator had made or approved a **decision** to sell the property to the appellant. The supplemental agreement[8] spoke for itself. The proposed sale was expressly **conditional upon approval by the court** on an application for directions. The supplemental agreement (at paragraph 2) expressly stipulated what were the remedies applicable in the event that the proposed sale was not approved by the court on an application to be made to it. It therefore contemplated that possibility. Further the liquidator's evidence in support of his application for directions set out his position. The only conclusion consistent with that evidence was that the liquidator had decided to approach the court for **directions**, not that he had already decided or approved the sale to the appellant. The trial judge considered the minutes of Board meetings of TCCL dated January 25th 2019 which appeared to suggest the contrary, and characterized them as second hand hearsay, (paragraph 26). He preferred the direct evidence of the liquidators that they did not object to the sale but it was never approved by them.

v. Even if the liquidator had made a decision, (which he had not), given that the court was not bound to approve a decision of the liquidator, was not a rubber stamp, and possessed power to review an improvident transaction, it was entitled to consider whether the **process of the sale** was designed to secure the highest value realizable value and assess whether this had been accomplished. It was entitled to decline to approve a sale arrived at as a result of a process which was not designed to achieve this, and to order instead a process which was.

Order

7. In those circumstances the appeal must be dismissed.

[8] dated April 26, 2019 Page 780 Record of Appeal

Analysis

8. The factual background giving rise to the instant procedural appeal are partly set out in the judgment of the Court of Appeal[9] delivered by the Honourable des Vignes JA on February 6th 2020 in the first procedural appeal in this matter.

9. Those facts are as follows: The second respondent, Trincity Commercial Centre Limited (TCCL) is a subsidiary of Home Construction Limited (HCL) which is a subsidiary of CL Financial Limited in liquidation. TCCL entered into an agreement with the appellant (Select Properties) for the sale to it of a parcel of land comprising 16 acres at South Park Touraba at a specified price. This agreement was entered into on January 9th 2019. A supplemental agreement was subsequently signed on April 26th 2019. It contemplated that an application would be made to the court for approval to complete the sale of the lands, and **if the court should prevent the completion of the sale,** the appellant shall be entitled forthwith inter alia to a refund of its deposit with interest plus expenses up to a maximum value of one hundred thousand dollars **with no further recourse** for any claim for damages and/or loss. Under the sale agreement a 10% deposit was paid by the appellant.

10. The court appointed joint liquidators, by application dated June 10th 2019, sought approval for the sale. Ramcharan J on **September 18th 2019** on hearing the application a. **withheld permission** for the sale and b. instead **authorised the advertisement** of the lands along with other lands owned by the company and its subsidiaries for sale to ensure that the highest price possible was obtained for the lands. The judge also ordered that the court file be sealed except for the orders of the court, (the initial order).

11. The appellant was **subsequently** informed of the court's order and was refunded the deposit.

[9] at paragraphs 4, 5 and 6)

12. The appellant then filed an application on the 16th of October 2019 seeking inter alia an order setting aside or varying the judge's order refusing permission for the sale of the lands and an order permitting the sale to proceed, which was refused.

13. The Court of Appeal dealing with that procedural appeal held that Select Properties was entitled to be heard on the application after it had the opportunity to peruse and consider a redacted application and the affidavit in support as well as the redacted copy of the transcript of the hearing of the joint liquidator's application for approval of the sale before the Judge.

14. The application was therefore remitted to the trial judge for rehearing, to hear the submissions from the purchaser the appellant in light of the new material and to decide whether or not to stay his order dated September 18, 2019 or grant approval of the sale agreement. The Court of Appeal did not itself set aside the order of September 18, 2019.

15. On the **rehearing of the application** the trial judge was asked to set aside his initial order, dated September 18, 2019 (wherein he had declined to approve the sale to Select Properties and in which he had made an order for the property to be advertised for sale).

16. The trial judge delivered his judgment on the 25th of August 2020. His decision was that the application to set aside his earlier order dated the 18th of September 2019 was dismissed with costs.

17. That court applying the Intercontinental procedural decision by which it was bound decided i) that he could take into account those matters and circumstances subsequent to his initial order which then applied, including the fact that a materially higher offer had been received pursuant to the public advertisement that he had ordered,
    ii) that the joint liquidators **had not made any decision** to sell or approve the sale of the subject land to the appellant

iii) that in any event even if the joint liquidators had made a decision, on an application for directions, he was **not bound to** simply **rubber stamp** any decision.

18. Counsel for the first respondent Mr. Reid submitted that based on the doctrine of stare decisis this court was bound by related decisions in the procedural appeal in Intercontinental and the application for conditional leave to appeal from that decision. Counsel for the Appellant submitted that this court was not bound by a decision on an application for conditional leave. He contended further that i. the Intercontinental decisions were decided **per incurium**, and ii. that in any event, even if they were not, the circumstances in the instant case were entirely **distinguishable**.

Whether the Intercontinental decisions were distinguishable

19. The Intercontinental procedural decision was also on a procedural appeal before the Court of Appeal. In that matter approval had been sought by the liquidators in relation to the sale to Intercontinental of lands owned by HCL, a subsidiary of the first respondent. Ramcharan J had initially, prior to approving any sale, ordered advertisement, (on **September 18, 2019**). On an application to him to review his initial decision and approve an agreement for sale with Intercontinental, he considered that he was bound to only consider matters that applied at the time of his initial decision, and not matters that had since arisen. Those would have included higher offers being obtained in response to the advertisement he had ordered.

20. His decision on hearing the application was to set aside his initial order and substitute for it an order approving the sale to Intercontinental, (which had been subject to court approval), which had been entered into without effective advertisement, and which was not the highest offer at the time of the hearing of the application. On a procedural appeal to the Court of Appeal it was set aside.

21. In the instant case Ramcharan J, by his initial order when the liquidator applied for directions, a) declined to approve a provisional sale agreement, and b) ordered that there be advertisement, (which as it turned out produced higher offers including a materially higher offer). Unlike in Intercontinental, he declined to set aside his initial order, (not approving the conditional/provisional sale to Select Properties) and took into account the higher offers which had been obtained after his initial order.

The Appellant's Argument

Whether the Intercontinental decisions were decided Per Incurium

22. The Appellant's arguments involve the following contentions:

i. that the attention of the Court of Appeal in Intercontinental was not drawn to the fact that the application by the liquidators for directions was made under section 377 (3) of the Companies Act. The significance of this was that **unlike an application** to the court by **liquidators** mandated under section **376 (1) of the Companies Act** in relation to specified matters, the liquidator was not even bound to approach the court for directions.

ii. The liquidator's **discretion** to sell a property was a matter of **commercial judgment** within the liquidator's expertise. That commercial judgment was not a matter that could be lightly interfered with or substituted by a Court's non-commercial expertise.

iii. That the circumstances in which it was permissible for a court to set aside a liquidator's decision or recommendation for a sale would be limited to matters such as fraud, or a high degree of irrationality which did not exist in this case.

iv. that the instant case was further distinguishable on the basis that the trial judge had not considered all the evidence and conducted an exhaustive analysis thereof. Had he done so he would have appreciated that the liquidators were not merely approaching the court for directions but were actually seeking approval of a sale which they had instigated, and/or of which they were aware, and which they approved, and/or which

they were actually recommending. It was alleged that on the evidence therefore the liquidators had actually taken a decision to seek approval of the instant sale.

v. That being so, the Court was not entitled under its limited discretion on an application under section 377 (3) of the Companies Act, to decline to approve the sale and to substitute its own process.

vi. Having done so, and in fact having done so wrongly initially by not having the Appellant participate on the initial application for directions, its order for advertisement was flawed. It was allegedly flawed because the court of appeal had upheld the appellant's procedural appeal in relation to it, (the appellant not having had the opportunity to be heard on the application on which it was made). It was also allegedly flawed on the basis of the trial court having exceeded its limited jurisdiction to approve a sale under section 377 (3) of the Companies Act.

vii. Consequently any higher or even any materially higher offers pursuant to that flawed order for advertisement were to be disregarded.

23. The result of this chain of reasoning and line of argument was that the only offer validly before the trial court for approval would have been that of the appellant. Further, the court in the exercise of its limited jurisdiction on a non-mandatory application for directions would have had no discretion to decline to approve the sale to the appellant in the absence of fraud or unreasonableness which did not apply. Consequently the argument was that the trial judge would have been plainly wrong in not setting aside his initial order by which he had declined to approve the sale to Select Properties, and in taking into account the higher offers received since that order.

24. There are aspects of this argument which need to be examined further. The first is that the Court of Appeal in Intercontinental allegedly did not appreciate the statutory

framework of the Companies Act which provided a distinction between a non-mandatory application for directions under section 377 (3), and an application which **mandated** such an application in relation to specific matters, which did not include sales by a liquidator. That Court allegedly erred in i. Not appreciating that the discretion of the trial judge on such an application was limited, ii. in failing to appreciate that the overriding consideration was not maximization of the value receivable from a company's assets, iii. in considering that the material time that was relevant to the application for review was the time of that application, and not the time of the initial decision sought to be reviewed.

Whether Court's discretion to approve a liquidator's sale is limited

Application by liquidator for directions under Section 377 (3) of the Companies Act Chapter 81:01

25. The UK Court of Appeal in **Re Hinckley**[10] considered Section 168 (3) of the UK Insolvency Act which was identical to Section 377 (3) of the local Companies Act[11]. After indicating that the power to sell in that case was exercisable without court sanction, he explained that it was nevertheless subject to the control of the court. Paragraphs 18 and 19 are set out hereunder.

> *"I do not accept that submission. The power which the official receiver was seeking to exercise is that conferred by para 6 of Sch 4 to the 1986 Act to sell the property of the company, as opposed to that conferred by para 4 to bring legal proceedings in the name* ***and*** *on behalf of the company. Though the power is exercisable without sanction in any winding up it is subject to the control of the court: s 167(3) of the 1986 Act. The jurisdiction Chadwick J was exercising is that conferred by s 168(3) of the 1986 Act whereunder—*

[10] ibid

[11] See paragraph 31 of the appellants submissions dated May 26, 2020 before the trial judge record of appeal page 820

'the liquidator may apply to the court ... for directions in relation to any particular matter arising in the winding up.'"

26. The Court in particular at paragraph 19 stated as follows:

"The purpose of the procedure is in an essentially administrative jurisdiction, as described by Wilberforce J in Re Eaton, to ensure so far as practicable ***the proper exercise of fiduciary powers or obligations****. It is true that the directions sought in this case are essentially how and to whom the asset of the company should be sold, rather than whether the company should itself sue. That distinction lacks substance. In each case the problem is* ***how best to realize an asset of the fund****, be it a trust fund or* ***the property of a company in liquidation divisible amongst its creditors****".* (All emphasis added)

27. **Hinckley, decided on the equivalent provision in the UK, makes clear that the court's jurisdiction on an application for directions under 377 (3) is not restricted in the manner contended.** It is a legitimate factor for a court approached on an application for directions, under section 377 (3), to consider how best to realise an asset of a company in liquidation. See **Hinckley** at paragraph 19. *"In each case the problem is how best to realize an asset of the fund, be it a trust fund, or the property of a company in liquidation divisible among its creditors"*.

28. Accordingly if there are higher offers available a court is required to take them into account in its decision as to whether or not approval of a lower bid should be granted. It was suggested that the Court could only override **decisions** of liquidators in an application for directions under section 377 (3) of the Companies Act if those decisions attained a "high threshold of irrationality". However as addressed subsequently this is not a case where the liquidator has already made a **decision**. To the extent that the appellant in support of that proposition relies upon cases which deal with **decisions already made by**

liquidators, those cases are distinguishable and not applicable. For example **Wentworth**[12] was a case where the liquidator had already made a decision to sell which the plaintiffs there were seeking to restrain by injunction. It is not a case on an application for directions by liquidators.

29. The cases of **Re Northland Bank [1989] M.J 205**, **[1989] 4 W.W.R. 701** delivered April 21st 1989, by the Manitoba Court of Appeal and **Wentworth Metals Group Pty Ltd v Leigh and Owen (as liquidators) (2013) FCA 349** were cited as authority for the limited discretion of a trial judge on an application for directions. ***Northland*** itself was considered by the Honourable Mohammed JA in the Intercontinental conditional leave decision. He distinguished it on the basis that it related to a process of sale preapproved both by the court and by the company's major creditors, which was designed to realise the maximum value of assets being sold. That being so it was held that the sale which resulted from that process should not be set aside on an application for directions simply on the basis that a subsequent higher offer had been obtained.

30. In fact **Re Northland** itself affirmed at paragraph 16: *"**it is certainly true that the principle function of the court is to obtain as high a price as possible in a liquidation as in a receivership**. Nevertheless where, as in this case **a process** is set up with the **consent** of the major creditors to have a sale procedure which would **normally result in the highest price being obtained**, it is not reasonable that court discretion (sic) should be withheld or that an auction sale should be carried on by the Court".*(all emphasis added) The Court in that case therefore accepted the general proposition that the court's function was to obtain as high a price as possible in a liquidation in a sale procedure designed to achieve this but justified an exception to it by the circumstances in that case.[13]

[12] Wentoworth Metals Group Pty Ltd v Leigh and Owen as liquidators (2013) FAC 349

[13] The Court also approved of the general principle that the Court must look to the broader picture to see whether the contract was for the benefit of the creditors as a whole per paragraph 17 referring to the majority ruling in Cameron v Bank of Nova Scotia (1981) 45 NSR 303 "where a sale by a receiver was to be subject to the approval of the Court such provisions showed an intention to invoke the normal equitable doctrine which placed the court in the position of looking to the interest of all persons concerned before giving its blessing to a particular transaction

31. In **Re Northland** it was the fact that an **established process** had been **approved** by both the **Court** and by the **creditors** of the company as acceptable, and **designed to result in the highest price being obtained** that led to the Court's refusal to permit the liquidators, even on the basis of a higher price being obtained subsequently, to fail to honour the initial agreement produced through that process that the liquidators had entered into. This led the court to conclude that that agreement was not conditional. Mohammed JA in the Intercontinental conditional leave decision recognised that the court of appeal of Manitoba, **in the specific circumstances** of that case considered that vacillation by a liquidator, or deviation from a preapproved, agreed and accepted process would have led to commercial uncertainty. The Court in the **Northland** case considered that even though the price obtained on the second agreement for sale was higher, the price obtained on the first agreement was not improvident or the result of an improvident process. In fact in **Northland** itself, at page 5, the dictum of McCrae J in **Re Selkirk** (1987) 64 CBR 140 was approved describing the actual position of a court in more comprehensive terms:

> *"The court will not likely withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some* ***unfairness in the process of the sale*** *or where there are* ***substantially higher offers*** *which would tend to show that the sale was* ***improvident*** *will the court withhold approval. It is important that the Court recognise the commercial exigencies that would flow if perspective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged"*

32. In **Northland** itself the court had concluded that:

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submitted for approval. In such circumstances the court would not consider itself bound by a contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole".

> *"….the discretion to be exercised by a judge under section 35 (1) of the* ***Winding up Act*** *in approving or disapproving of the sale made by a liquidator must be exercised* ***fairly.*** *The discretion cannot be used as a means of getting a higher price due to changed circumstances. If the Court is* ***satisfied with the process*** *(and here* ***the court itself set up the process*** *or approved of the process), then the discretion should be exercised in favour of the sale where* ***the price*** *was* ***not improvident at the material time****".*

33. This is not the case in the instant situation. There was no process that had been agreed to by the creditors of the company. There was no process that had been approved by the Court beforehand. The Intercontinental decisions were therefore not made per incurium by failing to recognise the alleged limits to a court's discretion on an application for directions by a liquidator under 377 (3).

34. **Re Northland Bank** therefore is not to be considered any authority for the alleged limited, restricted, or constrained discretion of a court on an application for directions by a liquidator to approve a sale. Neither is it authority for any proposition that the court should not be concerned that any sale procedure which it is asked to approve need not result in the highest price being obtained.

35. In the Intercontinental conditional leave decision Mohammed JA at paragraph 11 of the transcript, page 11 stated *"the relevant overarching consideration on the Section 377 (3) application, in these circumstances, in our view, is of* ***paramountcy of the interest of the creditors.****"* He referred to **Northland Bank** itself at paragraph 17 which referred to Justice of Appeal Sullivan, who in turn cited Cameron v Bank of Nova Scotia (1981) 38 CBR 1 1981 45 NSR 2d 203 where the majority held where "a sale by a receiver was to be subject to approval of the Court, such provision showed an intention to invoke the normal equitable doctrine which placed the Court in the position of looking to **the interest of all persons concerned before giving its blessing to a particular transaction submitted for approval**.

In such circumstances **the Court would not consider itself bound by a contract entered into in good faith by the receiver**, but **would have to look at the broad picture to see that the contract was for the benefit of the creditors as a whole**".

36. There is therefore authority binding on this Court that i. the Court is **not bound to accede** to any proposal by a liquidator, ii. it is entitled and in fact required to pay regard to how best to realise the property, iii that it must take into account the interest of the creditors. In this case that would require proper consideration to be paid to maximizing the realisable value of any asset of a company in liquidation and satisfying itself that the process of sale adopted was appropriately designed to achieve this in the prevailing circumstances.

37. Further **Re Northland Bank** itself, while recognizing that the discretion of the court should not be used to set aside a sale simply on the basis that a higher price is obtainable, makes it clear that this applies where the court is satisfied with the process of sale, and satisfied that the price obtained was not improvident at the time. This is far removed from being authority for the extremely limited jurisdiction being suggested. It in fact supports the jurisdiction of a Court to decline to approve a sale if there is evidence that the sale price or process is **improvident**.

38. The Appellant placed reliance on **Wentworth** as an authority for a restricted review of the liquidator's decision to enter into a sale under an application for directions under section 377(3) of the Companies Act. However the statutory provisions and the facts of that case are wholly different to this one. **Wentworth** involved an application for an injunction to restrain the liquidator's sale of property in aid of proceedings brought under section 1321 of the Corporations Act to **"appeal"** the liquidator's decision. This is far removed from an application by a liquidator for directions under section 377(3) of the Companies Act. **Wentworth** therefore is no authority for any general principle of applying a standard of

irrationality or unreasonableness when considering a liquidator's application under section 377(3) of the Companies Act.

39. There is therefore no basis for contending that that discretion and jurisdiction is limited if the application is under 377(3) of the Companies Act where the court's sanction is not mandated. To accept that proposition would carry the risk of reducing the court to a mere rubber stamp. Both Ramcharan J and Mohammed JA expressly rejected any such limitation of the Court's discretion and jurisdiction on an application for directions on section 377 (3).

40. The judgment of Mohammed JA, though a decision on a conditional leave application, is a thorough and reasoned written judgment which directly addressed the issues that arose in the Intercontinental case, and some of which also arise in the instant case. It is carefully and logically reasoned and analysed. That decision by a three member panel of the court of appeal is binding upon this court. Even if it were not it would be highly persuasive.

41. The appellant submitted that the Court would only have the power to intervene in a liquidator's decision in very limited circumstances such as where it is irrational. The trial judge rejected that proposition and stated that the Court is not a rubber stamp. At paragraph 29 he addressed this matter in detail. He indicated that the Court must on an application for directions, take a serious look at the application and the Court was mandated to ensure that the best interests of the creditors were being secured. This was consistent with **Hinckley** and the decisions of the Court of Appeal in Intercontinental. Those decisions, which were binding on him, were not made per incurium. Neither were they distinguishable in so far as they similarly decided: i. that he was entitled to take into account matters which had occurred subsequent to his initial order, ii. that the court's power on an application by the liquidator for directions under section 377 (3) was not limited to simply approving the liquidator's decision or recommendation, iii. that he was

entitled to consider the process employed and pay regard to whether the process of sale was designed to achieve the realization of the highest price obtainable.

42. On an application for directions under Section 377 (3) of the Companies Act, Chap 81:01, the Court is not a rubber stamp[14]. Its role is to ensure so far a practicable the proper exercise of fiduciary powers or obligations and consider how best to realise an asset of the company in liquidation, (**Re Hinckley**). It must look to the interests of all persons concerned, including creditors, before giving its blessing to a transaction submitted to it for approval, (**Re Northland Bank**). It is entitled to consider and take into account whether any sale put forward for approval is one which is improvident **in the circumstances.** For this purpose it is entitled to have regard inter alia to whether the **process** adopted for a sale is **transparent** or **designed** to secure maximum exposure to the market and maximize the value of the asset likely to be realised.

Whether the instant agreement for sale was binding

43. In **Northland Bank** the offer to purchase contained the following clause: "3. Conditions - This offer is conditional until January 29th 1989, upon vendor obtaining court approval for this transaction, failing which this offer to purchase shall become null and void and deposit monies to be returned to the purchaser in full with interest. This condition is inserted for the **sole benefit of the vendor** and maybe waived by him at his **sole option"**. The offer which contained this paragraph was accepted by the vendor "subject to court approval".

44. In relation to the agreement for sale in that case the Manitoba Court of Appeal accepted (at page 3) "it is quite clear that there are **circumstances where a condition precedent prevents the formation of any contract** at all, and **there are cases where a condition precedent suspends the performance of the contract**. However, in my view, the contract in question **in this particular case** was intended to and did bind Kuperman to pay the

[14] See the Intercontinental leave decision

amount of the consideration set out therein and he could not withdraw from the contract".

45. In the instant case the process which resulted in the initial provisional agreement was,

i) not a process designed to result in the highest possible sale price of the asset. In fact the evidence (page 367 record of appeal memo dated August 27, 2019) recorded that HCL management held meetings with real estate agents and perspective buyers in person as well as via exchanges via telephone conversations. The number of potential interested parties numbered (sic) between approximately 10 to 15 companies or individuals. Mr. Maharaj in his affidavit sworn to 5th March 2020 at paragraph 21 page 227/228 of the Record of Appeal indicated that he was approached at a cocktail reception where TCCL and HCL representatives were "working the floor" and encouraging persons to make an offer. The trial judge was fully entitled in those circumstances to consider that "process" less preferable to the more common and transparent process of public advertisement notwithstanding the suggestion that it was the product of "business acumen" or "commercial experience" and "expertise". The process utilised does not accord with common methods utilised by courts themselves on an everyday basis for the realization of assets including real property.

(ii)In this case the evidence did not disclose that the joint liquidators had taken a decision to sell to Select. They were not justifying or advocating for the approval of the provisional agreement for sale. The trial judge was entitled to prefer the more tried and tested approach of public advertisement to optimize and maximize the value that needed to be received in relation to a major, significant and valuable asset. This would be even more so in the case of any forced sale or approaching bullet payment due to creditors.

iii) The fact that a higher price was obtained upon advertisement itself suggested that the initial process had not been designed to maximize the price at which the asset could be sold;

iv) that the agreement for sale was supplemented by a deed, which expressly recognized the possibility that the Court may not have approved the sale and provided in that event for the remedies of the potential purchaser, namely return of the sale price with interest, inter alia. The agreement for sale was therefore at all times provisional and subject to the approval of the Court. The approval of the Court was never guaranteed and the agreement for sale recognized that the Court was not a rubber stamp, (a point made by both Ramcharan J and Mohammed JA).

46. In the instant case the supplemental agreement was quite clear. There would be no agreement if the court did not give its approval upon the application to be made to it. The supplemental agreement itself demonstrated that the joint liquidators could not have made a decision to sell to Select. There would have been no point in having the supplemental agreement executed instead of simply proceeding with the sale if their position was that they had actually already made a decision to sell the property to Select. Provided the Court acted judicially in exercising its discretion it was entitled to make the Order that it did for advertising the subject property, and maximizing the price which could be obtained therefor. It was entitled on a review of that order to confirm its initial order for advertisement. It was also entitled on a review of its initial order to take into account matters which had arisen **subsequent** to the initial order up to the date of the hearing of the application for review, including receipt of a materially higher offer.

Whether the Court erred in considering offers received subsequent to the initial order which it was being asked to review

47. The Appellant contends that the trial judge declined to set aside his initial order for advertisement despite its procedural appeal against that order being successful. In the instant case, unlike in the Intercontinental case, the appellant did challenge the order for advertisement. The Court, Mendonça JA, Des Vignes JA ordered the matter be remitted to the trial judge giving the Appellant the opportunity to be heard on the liquidator's

application for directions. As indicated previously it did not set aside the order for advertisement. That order remained valid unless or until set aside.

Relevant circumstances to be considered on the application

48. The trial judge considered and applied the authority of **Tibbles**[15] as the basis for his decision to take into account, as a material consideration, the fact that a materially higher offer had been received after the advertisement pursuant to his initial order. In ***Tibbles***[16] it was stated as follows:

> ***49*** *Fourthly, District Judge Wilding was in any event wrong to exercise his discretion on the retrospective basis on which he did. It was thus common ground, for that reason among possible others, that the question of discretion could be revisited. The question on such an application is not merely what the right order ought to have been at the time of the original order, but what should be done* ***at the time of the application to vary****, bearing in mind any* ***change of circumstance****, any* ***new evidence****, any delay and any explanation offered for it, and especially any prejudice (All emphasis added)*

49. The alleged distinction, that the order for advertisement had been challenged as part of the challenge to the initial order, carries the matter no further because the order for advertisement was not set aside. In fact in the Intercontinental procedural appeal decision the Court of Appeal held that where the trial judge had considered the law to be otherwise, (that is, that he could not take into account matters subsequent to his original order), that he would be, and was, plainly wrong not to consider the subsequent higher bids, (page 11 of transcript lines 22-25). There is no reason in principle why the position should be different between an application to set aside an order and a rehearing of an application aimed at achieving the same result.

[15] ibid
[16] ***paragraph 49***

50. The Court of Appeal accepted and applied **Tibbles** in the Intercontinental decisions. In any event the Intercontinental decisions were binding on the trial judge and now this court. The applicability of ***Tibbles*** is therefore beyond dispute. Where therefore the trial judge considered the bids subsequent to advertisement he was, in accordance with ***Tibbles***, correct to do so. He could not disregard the fact that higher bids had been obtained.

Whether on the entirety of the evidence the liquidator had made a decision to approve the sale to the appellant

51. Another proposed ground of distinction was that in this case it was alleged that the liquidator had actually made or approved a decision to sell to Select Properties, (or must be deemed to have done so). In the instant case:

i. the agreement for sale was conditional upon court approval being obtained.

ii. it expressly provided for what was to happen if that approval was not obtained,

iii. it was not the product of a process pre-approved by either the court or the company's major creditors, unlike in ***Northland Bank***,

iv. in fact the evidence referred to by the Appellant, though it suggests that the liquidator was aware of the sale, does not substantiate the Appellant's contention that it had given prior approval to the **process** which culminated in the sale agreement to the Appellant,

v. The liquidators' application to the court made clear their position with respect to the sale (paragraph 17 Holukoff's second affidavit dated 6th May 2020, page 796 Record of Appeal)

vi. It was also contended by the liquidators, (at paragraph 34 of that affidavit) that since the appointment of the joint liquidators in April 2017 neither HCL nor TCCL had sold any property without the property being first advertised or listed with sales agents save and

except for the subject property and the property that was the subject of Civil Appeal Number 013 of 2020. This contention itself raises "red flags" as to the deviation from a process of advertisement. The trial judge was entitled to take it into account.

vii. the trial judge did consider the evidence which consisted largely of minutes of board meetings of subsidiary companies and, considering them to be second hand hearsay, preferred the direct evidence of the liquidators on the application before him that they had not already approved the sale.

viii. the trial judge considered the minutes of Board meetings of TCCL dated January 25th 2019 which appeared to suggest the contrary, and characterized them as second hand hearsay, (paragraph 26). He preferred the direct evidence of the liquidators that they did not object to the sale but it was never approved by them. He concluded that that suggested that no positive decision had been made by them to sell the property to Select Properties and he found as a fact that there had been no such decision (see paragraphs 25 and 26 of his judgment).The applicant's submissions dated May 26, 2020 before the trial judge set out a complete chronology of the transaction and matters that allegedly reflected the position that the liquidator had made a decision[17].While the trial judge did not refer to every aspect of the chronology, it, together with the uncontroverted supplemental agreement, was before him and his reasons for preferring the evidence of the liquidators were clear. There is no basis therefore for concluding that he had not properly evaluated the entirety of the evidence before him.

Whether the trial judge was plainly wrong in not approving sale to the appellant

52. The exercise by the trial judge did involve an element of discretion. That discretion is a judicial discretion and is to be exercised in accordance with established principles of law. The trial judge did consider the duty of a liquidator to maximize the value received on the sale of assets. The appellant contends that he was plainly wrong in that i) he took into

[17] see pages 811 to 818 record of appeal

account, on the application to review his initial order matters which had arisen subsequent to his initial order, most importantly the fact that higher offers had been received in response to the advertisement that he had ordered, ii) that he failed to appreciate that the duty of a Judge in approving a liquidator's discretion and provisional **decisions** was considerably limited and did not permit him to decline to approve the provisional sale agreement that TCCL had entered into, iii) that there was material on the evidence which properly evaluated suggested that the liquidators had in fact **approved** the sale.

For the reasons set out above, he was entitled to take into account higher offers subsequently received. He was correct in his view that his discretion was not limited in the manner contended. He has not been shown to have incorrectly or incompletely evaluated the evidence in concluding that the joint liquidators had not made a decision to sell to Select.

53. Even if the liquidator had made a decision, (which he had not), given that the court was not bound to approve a decision of the liquidator, was not a rubber stamp, and possessed power to review an improvident transaction, it was entitled to consider whether the **process of sale** was designed to secure the highest realizable value and assess whether this had been accomplished. It was entitled to decline to approve a sale to Select arrived at as a result of a process which was not designed to achieve this, and to order instead a process which was.

54. The trial judge was plainly correct when he accepted the guidance of the Court of Appeal in the **Intercontinental decisions, (**binding upon him), and considered that higher offers had been received pursuant to his earlier order. It was a relevant factor, and a material change in circumstances, which confirmed rather than negated, the wisdom of his initial order that the sale of the property be advertised.

55. The trial judge clearly therefore exercised his discretion correctly i. in considering that his duty was to ensure that the best interest of the creditors was being secured. Inherent in this was the need to assist in the maximization of the price realisable on the sale of assets of the company in liquidation, ii. in taking into account the fact that the process of advertisement that he approved was better designed to achieve maximization of the asset price, iii. in not rubber stamping any (conditional) agreement for sale which resulted from a process not designed to achieve this, iv. in taking into account the material changes in circumstances, and the materially higher offer received upon advertisement. With respect to those matters therefore the trial judge was plainly correct in the judicial exercise of his discretion in declining to set aside his initial order upon rehearing of the application.

Conclusion

56. i. the Intercontinental decisions were **not decided per in curium**. On an application for directions under Section 377 (3) of the Companies Act, Chap 81:01, the **discretion of a judge is no different** from his discretion on an application **mandated by Section 376 (1)**[18]

[18] **376.** (1) The liquidator in a winding up by the Court may with the sanction either of the Court or of the committee of inspection—
(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;
(b) carry on the business of the company, so far as may be necessary, for the beneficial winding up thereof;
(c) appoint an Attorney-at-law or other agent to assist him in the performance of his duties;
(d) pay any classes of creditors in full if the assets of the company remaining in his hands will suffice to pay in full the debts and liabilities of the company which rank for payment before, or equally with, the debts or claims of the first mentioned creditors;
(e) make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
(f) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent,
ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.
(2) The liquidator in a winding up by the Court may—
(a) sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels;
(b) do all acts and execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;
(c) prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory, for any balance against his estate, and receive
dividends in the bankruptcy, insolvency or sequestration in respect of that balance as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;

and the Court is not a rubber stamp[19]. Its role is to ensure so far a practicable the proper exercise of fiduciary powers or obligations and consider how best to realise an asset of the company in liquidation, (**Re Hinckley Island Hotel Ltd, Craig v Humberclyde Industrial Finance Group Ltd and others - [1998] 2 BCLC 526**). It must look to the interests of all persons concerned, including creditors, before giving its blessing to a transaction submitted to it for approval, (**Re Northland Bank [1989] M.J 205**, **[1989] 4 W.W.R. 701**). It is entitled to consider and take into account whether any sale put forward for approval is one which is improvident **in the circumstances.** For this purpose it is entitled to have regard, inter alia, to whether the **process** adopted for a sale is **transparent** or **designed** to secure maximum exposure to the market and maximize the value of the asset likely to be realised for the benefit of creditors.

ii. This court would be bound by both the Intercontinental procedural decision and the Intercontinental conditional leave decision unless the instant matter were distinguishable on its facts. The facts therefore had to be analyzed to determine whether the instant appeal was so distinguishable. On such analysis there is no sufficient distinction to justify considering those decisions inapplicable.

iii. Accordingly the trial judge was correct as a matter of law **to take into account the higher offers** received pursuant to his initial Order. Based on the intercontinental

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(d) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
(e) raise on the security of the assets of the company any money requisite;
(f) take out in his official name letters of administration to any deceased contributory, and do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due is, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, deemed to be due to the liquidator himself;
(g) appoint an agent to do any business which the liquidator is unable to do himself; and
(h) do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.
(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[19] See the Intercontinental leave decision

decisions, the facts and matters that had to be considered were those in evidence **at the date of the rehearing of the application**[20]. There was no basis in law for disregarding them or pretending that those offers did not exist.

iv. It is contrary to the evidence to contend that the liquidator had made or approved a **decision** to sell the property to the appellant. The supplemental agreement[21] spoke for itself. The proposed sale was expressly **conditional upon approval by the court** on an application for directions. The supplemental agreement (at paragraph 2) expressly stipulated what were the remedies applicable in the event that the proposed sale was not approved by the court on an application to be made to it. It therefore contemplated that possibility. Further the liquidator's evidence in support of his application for directions set out his position. The only conclusion consistent with that evidence was that the liquidator had decided to approach the court for **directions**, not that he had already decided or approved the sale to the appellant. The trial judge considered the minutes of Board meetings of TCCL dated January 25th 2019 which appeared to suggest the contrary, and characterized them as second hand hearsay, (paragraph 26). He preferred the direct evidence of the liquidators that they did not object to the sale but it was never approved by them.

v. Even if the liquidator had made a decision, (which he had not), given that the court was not bound to approve a decision of the liquidator, was not a rubber stamp, and possessed power to review an improvident transaction, it was entitled to consider whether the **process of sale** was designed to secure the highest value realizable value and assess whether this had been accomplished. It was entitled to decline to approve a sale arrived at as a result of a process which was not designed to achieve this, and to order instead a process which was.

[20] See Tibbles considered and applied in both the Intercontinental decisions.
[21] dated April 26, 2019 Page 780 Record of Appeal

Order

57. In those circumstances the appeal must be dismissed.

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Peter A. Rajkumar

Justice of Appeal