IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 01494

IN THE MATTER OF CASH PLUS LIMITED AND ALL ITS SUBSIDIARIES AND AFFILIATES

AND

IN THE MATTER OF THE COMPANIES ACT

BETWEEN	MADAM 'A'	CLAIMANT
AND	CASH PLUS	DEFENDANT

Ms. Melrose Reid for the Claimant

Mr. Hugh Wildman and Miss Celia Barclay for Trustee in Bankruptcy

Mr. John Vassell Q.C., Mrs. Julianne Mais-Cox and Mr. Courtney Williams for the Receivers/Managers

Heard: 19th, 20th, 27th and 28th September and 4th November, 2011

Application challenging the appointment of Receiver/Manager – whether of receiver/manager can be set aside ex debito justiticiae – whether part 51 of CPR is applicable generally to the appointment of receiver/manager – whether failure by judge to state that security for costs is dispensed with vitiates appointment

SINCLAIR-HAYNES J

[1] This is an application by the Trustee in Bankruptcy for Cash Plus Ltd (defendant) by way of Notice of Motion challenging the appointment of

Receivers/Managers, consequential orders made and an injunction ordered by M. McIntosh J. He seeks the following orders:-

1. A Declaration that the appointment of the Co-Interim Receivers/Managers under Order of the Court made on the 31st March 2008 was improper and therefore ineffective. An Order that the injunction granted on March 31, 2008 herein, as varied by Order dated April 7, 2008 and extended on April 28, 2008 until further order be discharged.

2. An Order that the Co-Interim Receivers/Managers provide the Trustee in Bankruptcy with copies of all documents including Sales Agreements and Statements of Account with respect to all transactions and dealings involving the assets of Cash Plus Limited, its subsidiaries and affiliates, including all properties disposed of during the Receivership.

3. An Order that the Co-Interim Receivers/Managers provide the Trustee in Bankruptcy with copies of all reports of their receivership.

4. An Order that the Co-Interim Receivers/Managers pay to the Trustee in Bankruptcy all sums held on account of Cash Plus Limited, its subsidiaries and affiliates forthwith.

5. An Order that the Order of the court made on the 11th November 2008 approving the fees and expenses of the Co-Interim Receivers/ Managers be revoked and the Affidavit in Support of the application for their approval be unsealed.

6. An Order that the Co-Interim Receivers/Managers provide the Trustee with a detailed accounting of their fees and the fees for all legal, consultancy and other services commissioned by them during their receivership of Cash Plus Limited, its subsidiaries and affiliates.

7. An Order that the Trustee in Bankruptcy be permitted to retain a firm of accountants and/or auditors to review the fees mentioned in paragraph 6 above and assess its reasonableness and make payment to the Co-Interim Receiver/Managers in accordance with the said assessment.

8. An Order that the Notice of Application for Court Orders dated the 23rd March 2011 and filed on behalf of the Co-Interim Receivers/Managers regarding the sealing of documents in this matter be dismissed.

9. An Order that the Notice of Application for Court Orders dated the 23rd March 2011 and filed on behalf of the Co-Interim Receivers/Managers regarding the proposed sale of all that parcel of land registered at Volume 1288 Folio 351 in the Registrar's Book of Titles (commonly known as the Hillshire Hotel) be dismissed.

10. An Order that the Co-Interim Receivers/Managers and/or their Attorneys-at-law deliver up the Certificate of Title for that parcel of land registered at Volume 1288 Folio 351 in the Registrar's Book of Titles (commonly known as the Hillshire Hotel).

11. Such further and/or other relief as this Honourable Court deems just and reasonable in the circumstances.

BACKGROUND

[2] The Claimant, Madam 'A' was the accountant and chief financial officer of Cash Plus Ltd. (CPL). The defendant was a part of a group of companies owned by Mr. Carlos Hill. It borrowed from members of the public at high interest rates. The sums borrowed were used to fund its affiliate companies. The income generated from those companies was used to repay its creditors.

[3] CPL was pressured by the Financial Services Commission (FSC) to be registered with it. This was initially resisted by CPL which resulted in the FSC instituting court proceedings against it. Judgment was obtained in the FSC's favour.

[4] The FSC issued a Cease and Desist Notice against CPL on December 28, 2007. As a result CPL was forced to cease transacting business with its lenders. Prior to the issuance of the Cease and Desist Notice, National Commercial Bank, (NCB) on November 4, 2007, notified CPL of its intention to close all accounts which were operated by CPL and its subsidiaries and affiliates.

[5] CPL unsuccessfully instituted court proceedings against NCB and eventually in January 2008, all the accounts of CPL and its affiliates were closed. During the period between the service of the Cease and Desist Order and the 31st March 2008, the date of the orders of M. McIntosh J., it was unable to transact business with its lenders. Consequently, no payments were made to its over 450,000 creditors.

[6] On March 28, 2008, Madam 'A' instituted proceedings by way of Fixed Date Claim Form against the defendant. She sought an order under Section 213(A) of the Companies Act to "rectify matters that were oppressive and/or unfairly prejudicial to the officers and creditors of the defendant" *inter alia.*

[7] On March 31 2008, Minett Lawrence, the legal director of CPL and Gordon Robinson, attorney-at-law, attended before M McIntosh J. armed with a Without Notice Application in which they sought the appointment of a Receiver/Manager and an injunction among other things.

[8] Mr. Christopher Goulbourne, Vice President of Operations of CPL received a telephone call from Minett Lawrence requesting his attendance at court. He complied. At the hearing of the Without Notice Application the following orders were made:-

> Receiver X of the Jamaican firm of PriceWaterhouseCoopers (PWC) and Kevin Bandoian the US firm of PWC LLP respectively be appointed co-interim Receiver/Manager of the defendant and all its affiliates until further order by the court.
>
> The defendant be restrained, whether by itself, its officers, servants and/or agents. Howsoever, otherwise for a period of 28 days from selling, transferring or otherwise dealing with or dissipating the

defendant's assets, wheresoever situate, save as is required for normal business, normal business expenses or the cost of this suit.

That the interim manager take charge, supervise the operations of the defendant and specifically to collect the defendant's assets whether from debtors or otherwise and seek to discharge of the liability to the defendant's creditors.

That the Manager provide a report to the court within 35 days hereof.

That the claimant serve the defendant with the Fixed Date Claim Form, Affidavits and order within 7 days of the date hereof.
That the legal and other related expenses arising from or connected with the pursuit of this action and the fee charged by the receiver/manager to be paid the defendant on an indemnity basis.

The name of the claimant and of Receiver X remain confidential and should not be disclosed by any person and that the claimant be given permission to replace the documents already filed in court and pursue the action under the pseudonym Madam A and to simultaneously file with the Registry in a sealed envelope, the details of her name, occupation, address and the original documents.

Liberty to apply

[9] On April 7, 2008, M. McIntosh J. varied the said Order by including all of CPL's subsidiaries and affiliates.

[10] The Trustee in Bankruptcy has now launched an attack on the orders granted by filing the aforesaid motion seeking a declaration and orders.

THE CLAIMANT'S VERSION OF THE FACTS

[11] The claimant Madam 'A' depones that on March 28, 2008, she was hurriedly handed an affidavit by Mrs. Lawrence and was asked to sign the same. She was informed that it was to facilitate the rapid pay out to creditors. Madam 'A'

signed the affidavit in the belief that she was facilitating the payment process. She was unaware that she was the claimant in a matter against CPL.

CASE FOR TRUSTEE IN BANKRUPTCY

[12] The crux of his complaint is that the orders obtained by the claimant are invalid. He advances two reasons for his claim of invalidity. The first is that the defendant was not afforded a hearing. Section 213 (2), of the Companies Act which governs the application, does not allow for an *ex parte* hearing of the matter; it requires the participation of the defendant. He asserts that the court exceeded its jurisdiction by entertaining an *ex parte* application. The *ex parte* order obtained is therefore a nullity and can be set aside at any time *ex debito justiticiae*

[13] The second reason is that the Receivers/Managers provided no security. He also contends that Mr. Bandoian is a foreign receiver which fact disqualifies him because there was no evidence before the court that the Defendants had operations in the USA.

SUBMISSIONS BY THE TRUSTEE IN BANKRUPTCY IN SUPPORT OF THE MOTION

[14] Mr. Hugh Wildman, the Trustee in Bankruptcy submits that both the claimant and the Receivers/Managers erred in relying on Part 51 of Civil Procedure Rules (CPR). Part 51 contemplates a situation where one is seeking to appoint a receiver under a debenture or some other common law principle that would justify the court appointing a receiver and granting an injunction to restrain the company and its principals from obstructing the work of the receiver and

operating in a manner inimical to the interest of the company. The Court in considering such an application must apply the general principles governing *ex parte* injunctions. However he submits that this is not such a matter. Part 51 is not applicable because the Co-Interim Receivers/Managers were appointed pursuant to Madam 'A's' application which was made under section 213 of the Companies Act and not under a debenture. The application to appoint the Receiver was therefore not an application under part 51 of the CPR. The court had no jurisdiction to appoint the then Receivers/ Managers in the way they were appointed. The appointments are consequently *ipso facto* void and can be set aside *ex debito justiticia.* He relies on **National Transport Co-operative Society Ltd. v The Attorney General** [2009] UKPC 48.

SUBMISSIONS REGARDING BREACH OF NATURAL JUSTICE

[15] He submits that the appointment of the Co-Interim Receivers/Managers by way of this application was flawed. According to him, an examination of the totality of the appointment reveals a web of illegality. Service upon the company was required. It is trite, he submits, that in circumstances where service is required, failure to serve, entitles the person who was not served to invoke the court's jurisdiction to have the orders set aside *ex debito justicia.* He relies on **Grafton Isaacs v Emery Robertson** 1985 1 Appeal Case 97, **Tarzan Mighty v Wilson and Anor** (Unreported) SCCA CL1999/M188 delivered February 4,11,17,and 23, 2005,**White v Weston** (1968) 2 All ER 842 **Cripps (Pharmaceuticals) Limited v Wickenden and Anor** [1973] 2 All ER 606, **National Transport Co-operative**

Society Ltd. v The Attorney General [2009] UKPC 48**, Dawson v Beeson** (1882) CA 502**, Tilling, Limited v Blythe** (1899) CA 557and **Kerr on Receivers**.

[16] He submits that CPL was not served with notice of the hearing nor was it represented at the hearing. Mr. Goulbourne who ostensibly represented the defendant at the hearing was ignorant as to why he was summoned to court. It was only whilst in the judge's chambers he discovered that the proceedings (which had already begun) were to appoint persons as the company's Receivers/Managers.

[17] Additionally, Mr. Goulbourne was not an officer of the company. He was a mere employee. He had no authority to accept service or any instruction to represent the company. He was in charge of Operations. He was only summoned to court by way of a last minute telephone call in an effort to satisfy the exhortation of Lord Hoffmann in **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd 2009 UKPC 16**

[18] He submits that a telephone call cannot be regarded as service. What transpired amounted to a distortion of Lord Hoffman's exhortation. The word "satisfied" in section 213 (2) of the Act imports the requirement of natural justice. It contemplates an *inter partes* hearing. The Court could not have been satisfied without hearing evidence from both sides as to the status and viability of the company. In the circumstances the rules of natural justice were not observed. Non-compliance with rules of natural justice renders void any decision arising from that Act.

[19] The claimant was obliged to notify the company.. It was an important condition that the principals were to be served with the application. Not only should it have been served, it should have been given time to contest the application. Strict compliance with the procedure was required. It was the company's entitlement to challenge the application if it desired. Failure to serve the company with the application deprived it of an opportunity to defend the allegations made against it. This, he submits, is a serious procedural breach which renders the appointment and the subsequent orders made, irregular.

[20] The appointment of a Receiver/Manager is a draconian decision against a company. It is an adverse step taken against the will of the company. Mr. Hill and other principals of CPL were barred from conducting any business of C PL while the Receivers/Managers were in control. Such a decision ought not to have been taken in the absence of Mr. Hill and/or the principals. The order appointing the Receivers/Managers can, in the circumstances be set aside *ex debito justiticiae*. He relies on **Cripps (Pharmaceuticals) Ltd. v Wickenden and Anor,_Cripps and Sons Ltd. v Wickenden and Anor** date [1973] 2 All ER 606

SUBMISSIONS REGARDING RECEIVERS/MANGERS' FAILURE TO PROVIDE SECURITY FOR COSTS

[20] Mr. Wildman submits that Part 51.4 of CPR stipulates that an appointment of Receiver cannot be made unless security for costs is given. The Receivers' failure to post bond further renders the appointments void *ipso facto.* He cites as

authority **Rowley v Desborough** [1916. R. 34], **Brammall v Mutual Industrial Corporation** The Weekly Notes [February 13, 1915, 78].

[21] It is his submission that no order was made dispensing with the need for security for costs. The question of security was never raised at the hearing of the Without Notice Application. There was no request to dispense with the question of security for costs in the affidavits for the appointment of the Receivers/Managers. There is nothing to show that the judge adverted to the issue of security for costs.

[22] Although the court has the power to dispense with the requirement, it must be specifically stated. The court did not exercise its discretion to dispense with the security for costs. Failure by the court to make reference to security for costs vitiates the appointment. The effect is that the Receiver/Managers are trespassers in the affairs of the company.

[23] An order dispensing with security for costs must be with the consent of the party interested. In ordinary cases, the court will not dispense with security even with the consent of parties interested. The application appointing the Receivers/Managers was made *ex parte*. The principals of Cash Plus had no opportunity to contest the allegations because the application was without notice. The need for security was therefore even more crucial in the circumstances. He relies on the case of **Highfield Commodity** [1984] 3 All ER 884.

[24] There was, he submits, no basis to proceed with appointment without the posting of bond, especially in the context of the magnitude of the receivership that was to be undertaken, the huge sums of money involved and the potential for

breaches to the detriment of the company. These required the court to request the Receivers to put up a bond as security for costs. He relies on the statement made by the learned authors of **Kerr on Receivers** at page 162 of his text regarding the mode of appointment and **Halsbury's Laws of England** 4th edition 2004 Reissue volume 2.

[25] He submits that where acts are committed against the company while receivership is in progress, the company must be able to set off against that bond. The posting of bond is critical to the appointment. Such appointment ought not to be made lightly and the procedure must be followed because of the enormous effect the appointment has on the affairs of the company. He relies on the principle outlined in **Cripps (Pharmaceutical) Ltd. v Wickenden and Another**, **RA Cripps and Son Ltd. v Wickenden and Anor** [1973] 2 All ER 606 regarding the procedure to be followed when appointing a Receiver. He submits that various breaches have been alleged against the Receivers/Managers and the company has nothing to claim against the Receivers for the alleged breaches.

SUBMISSION CONCERNING MR. BANDOIAN'S STATUS

[26] He submits that the court had no jurisdiction to appoint Mr. Kenneth Bandoian as the Company's interim Receiver/Manager. Mr Bandoain resides out of the jurisdiction and operates in New York beyond the local jurisdiction. The test as to whether a foreign receiver would be recognized by the local courts is based on the principle of nexus. There must be sufficient connection between the foreign receiver and the local jurisdiction over which he seeks to operate. In support of his

contention, he relies on the cases of **Schemmer and Others v Property Resources Ltd. and Others** [1973 S. No. 6773] and **Millennium Financial Limited and (1) Thomas Mc Namara (2) Bank of Nevis International Limited – Saint Christopher and Nevis,** Court of Appeal HCVAP 2008/012.

[27] There was nothing at the time of their appointment to show that CPL had any operations in New York. There was no connection between New York where Mr. Bondoian operated and the local jurisdiction. There was no basis for his appointment other than his connection to Price Waterhouse Coopers.

[28] No evidence or argument was advanced as to why he should be appointed. He did not provide the court with an independent affidavit. Nor was he present at the hearing to accept the appointment which is a requirement in law. Receiver X in his very terse affidavit in support of the application deposed that he acted for himself and Mr. Bandoian.

[29] Mr. Bandoian is not amenable to the local courts. It is therefore, inconceivable that a court would have granted an application appointing someone who is beyond the reach of the court as Receiver/Manager of property in the local jurisdiction. If any tort was committed against the company while he was a receiver, the company has no redress against him. That is the rationale for the posting of bond. He therefore submits that the appointment of Mr. Bandoian should not be recognized in light of the absence of a nexus between him and Jamaica.

SUBMISSION REGARDING DISCHARGE OF INJUNCTION

[30] The Trustee in Bankruptcy submits that the Receivers/Managers have obtained injunctions which prohibit the Trustee in Bankruptcy, who has been appointed Liquidator of Cash Plus and its affiliates, from selling any of the properties owned by CPL. Consequently, the former Receivers/Managers have refused to turn over the title deeds to the Trustee or consent to the sale of these properties unless the outstanding fees are paid or the Trustee enters into some arrangement for the settlement of those fees. Hillshire Hotel is one of the properties in question.

[31] Subsequent to the appointment of Mr. Wildman as Trustee in Bankruptcy, the thenRreceivers/Managers sold the properties that were ordered to be sold and received the proceeds of those sales. Receivers/Managers have no right of sale in law yet the court granted them the right to sell properties and tie up properties which are not to be sold to satisfy the demands of the creditors.

[32] The application for the discharge of the injunction is made because of the increasing demand of creditors to settle their debts. There are other properties to be sold, but the Trustee is prevented because of the injunction which the Receivers/Managers have over those properties. The Trustee in Bankruptcy is authorized by law as the liquidator to collect all funds, including the sale of properties, to settle the debts of the creditors of C PL. He submits that he is an officer of the court; and to date no one has challenged the legality of his appointment.

[33] It is his submission that his responsibility as Trustee is being frustrated by the fact that a number of properties that are under the jurisdiction of the Trustee in Bankruptcy cannot be sold because of the continued injunction restraining the Trustee in Bankruptcy from selling or disposing of properties before the fees of the Interim Managers are paid. The injunctions create for the Receivers/Managers, preferential treatment that they are not entitled to in law.

[34] A claim for fees in excess of $240 million has been submitted by the former Receivers/Managers. They have been paid $100 million to date. If the injunctions are allowed to continue, the very purpose of the appointment would be defeated. He submits that the Trustee is at a stage where the liquidation is halted and thousands of persons cannot be paid.

[35] He further submits that assuming that the application to appoint the Receivers/Managers was correctly made, they would be entitled to be paid. However, they should not be able to prevent the sale of the properties. The properties are valued at more than is owed to them. There is therefore no legal basis for the continuation of the injunction.

SUBMISSIONS REGARDING PAYMENTS TO PRICE WATERHOUSE COOPERS (PWC)

[36] Mr. Wildman's submits that it is an established principle of law that a company or firm cannot be appointed receiver of a company's property. He cites **Halsbury Laws of England** 4th Edition 2004 reissue Volume 7(2) paragraph 1609 in support of his submission. An appointment must be made in a personal

capacity to a person who posted bond in the event of any tortious or any other illegal acts committed while in charge of the company. PWC is a company.

[37] An examination of the Affidavit of Ms. Grant Morgan and of the documents submitted by the company's interim Receivers/Managers reveal that the vast amount of fees is to be paid to Price Waterhouse Coopers. PWC was never appointed the company's Interim Receivers/Managers. There is no evidence that the court authorized the Receivers/Managers to retain their services. However, it has been paid large sums of money for work done pursuant to the order.

[38] The Order of M. McIntosh J stated that the Receivers could appoint experts. It did not state that a body corporate could act. The law prohibits the appointment of a body corporate. A power given cannot be delegated in the absence of expressed authority. This statement of principle is equally applicable to PWC. They could not act as Receivers/Managers of CPL. This he submits, is clearly circumventing the rule stated in **Halsbury's**. The liquidator ought not to be asked to pay those fees which constitute a substantial portion of the fees. **In the case of Re Shepherd Atkins v Shephard (1889) CA [**131, Lord Green formulated the test to be applied in determining the question of fees and the engagement of attorneys. Applying the ***Wednesbury*** test, the issue is whether it was reasonable to engage PWC and whether their fees are unreasonable, considering all circumstances.

SUBMISSIONS REGARDING RECEIVERS/ MANAGER'S FEES

[39] The fees are unreasonable and without any rational basis. Those factors must be taken into account by the court in determining whether the initial appointments can stand or whether they are void *ex debito justiticiae*.

[40] The order ratifying the fees was obtained *ex parte* in breach of the rules of natural justice. The defendant was not given an opportunity to participate and to contest the fees. On the face of it, the company has been prejudiced. There was no mechanism put in place by the court to ensure reasonableness of fees. The Receivers/Managers in the present case were given capricious powers which allowed them to dissipate the company's assets to the detriment of the creditors of the company. By so doing, they were allowed to charge exorbitant fees, over Two Hundred Million Dollars ($200,000,000.00); those fees constituting priority charges on the assets of the company without any proper assessment as to the accuracy of the fees and the manner in which they were arrived. The depositors of Cash Plus were, therefore, severely put at risk by the exorbitant fees in breach of the principles enunciated in the **Highfield Commodities Limited** case. The effect was to dissipate the assets of the company to the detriment of 4,600 creditors.

[41] The Receivers/Managers and PWC should not be given preferential treatment in the manner it was given. The approach was injudicious, arbitrary, and unreliable and based on irrelevant considerations. These are clear indications that the appointments were bad from the inception. He further submits that although a previous Trustee might have consented, the present Trustee can properly challenge the fees.

SUBMISSIONS REGARDING THE SEALING OF THE NAME OF THE TRUSTEE/MANAGER AND ALL DOCUMENTS RELATING TO THE APPLICATION AND ORDERS OF THE COURT PREVENTING DISCLOSURE OF OUTCOME OF PROCEEDINGS

[42] The Receivers/Managers have failed to justify their fees. Certain documentation was requested by the Trustee in Bankruptcy. The request has been ignored by the Receivers/Manages. Documents are in their possession which could assist. These documents belong to the company and not the Receivers. The Receivers have a duty to hand over on request such documents and account for any sale of assets of property. He relies on the principle expressed in **Smiths Ltd v Middleton**, 1979 3 All ER 842 that:-

> *"A receiver appointed under a debenture providing for him to be the agent of the debtor company, in practice ran the company on behalf of its directors and was, therefore, answerable to the company for the conduct of its affairs. That being so, the receiver was under a duty to keep full accounts and to produce those accounts to the company when required to do so."*

[43] This statement of principle, he submits, is a correct expression of the law that is applicable to all receivers including those appointed by the court. In the instant case the failure of the Receivers/Managers to provide proper accounts to the Trustee, constitutes a serious dereliction of duty and a violation of their responsibility to Cash Plus.

[44] The name of the Receiver X and the document of his appointment should not be sealed. In the application for the appointment of the Receivers/Managers, the court relied on an affidavit given by Receiver X, one of the partners of PWC. It is significant that the court relied on this affidavit and at the same time having

made the appointment, ordered that the name of the appointee remain under seal and not be disclosed to the public.

[45] This procedure is irregular as the company was entitled to know the persons who were appointed Receivers/Managers of the company. Mr Hill, the principal shareholder of Cash Plus, was entitled to know the credentials of Receiver X and whether he had the requisite standing to be appointed Receiver/Manager. Equally, the public and in particular the depositors of Cash Plus had a right to know who were the persons placed in charge of the company. Mr Hill was entitled to mount any challenge he deemed necessary against the appointment of Receiver X as Receiver/Manager.

SUBMISSIONS REGARDING TRUSTEES/MANAGERS POWER OF SALE

[46] In **Re Highfield Commodities Limited** [1984] 3All ER Sir Robert Megarry V-C as he then was, stated that an official receiver was appointed by the court as a provisional liquidator of the company until after the hearing of the petition or further order. His powers are limited to collecting and taking possession of the company's assets and protecting them, but not to distributing or parting with them. This statement of principle correctly represents the position of a receiver appointed by the court and demonstrates that a receiver is not permitted to sell and part with the company's property during the period of receivership.

[47] It was not permissible for the Receivers/Managers in the present case to be given permission to sell properties in the way that they have been able to dispose of the company's assets while they had control of the company. Their role was

solely to gather in and preserve the assets until the matter was further determined either by petition to wind up the company or by the appointment of a liquidator.

[48] It is an established principle of law that a Receivers/Manager does not have the power of sale. He is to gather the assets. The court granted the Receiver/Managers power of sale which permitted them to sell certain properties to realize their fees which exceeded two Hundred Million Dollars ($200,000,000.00) for work done. The work was done over thirty days. These Orders were to be served on the company.

[49] In pursuance of the Orders, PWC represented by Receiver X proceeded to take control of the assets of Cash Plus. Some of these assets were sold. The proceeds have not been accounted for. A number of real properties were sold and fees in excess of One Hundred Million Dollars ($100,000,000.00) have been realized. To date, they have not given a full accounting of all the sums received from the sale of all the properties.

[50] Against this background, the Trustee, Liquidator of Cash Plus Limited, its subsidiaries and affiliates, contend that the appointment of the Co-Interim Receivers/Managers in the way they were appointed by the Court and the subsequent Orders enabling them to act in relation to the companies and the assets of the companies, was irregular and was in breach of fundamental principles of law. Consequently, the appointments are illegal.

[51] PWC have sold or otherwise disposed of several assets of Cash Plus, including properties known as Arizona Meadows, Caenwood Mews and other

properties located on Slipe Road and Cargill Avenue. In addition, they have received and held funds derived from the sale of the property at Waterloo Road and are still in possession of Cash Plus Limited's shipping vessel.

[52] In light of the various irregularities and breaches, the Court was in grave error in appointing the then Receivers/Managers in the way they were appointed. The present application is in keeping with Lord Diplock's prescription in **Grafton Isaacs v Emery Robertson** *supra* to correct the various irregularities and consequential orders made in the appointment of the Receivers/Managers. In the circumstances, the Court ought to grant the various orders prayed and set aside the Orders made by M McIntosh J., with costs to the Trustee.

SUBMISSIONS ON BEHALF OF THE CLAIMANT BY MS. MELROSE REID

[53] Ms Reid submits that the Trustee in Bankruptcy for Cash Plus Ltd, has not challenged the Claimant herself as to whether she was a proper Claimant in law, but challenged the contents of her affidavit.

[54] The Claimant acted in her capacity as an Agent and Servant of the Defendant and so acted upon and under the aegis of the Defendant. She acted upon the expressed authority of the Defendant and any costs including Counsel's fees incurred by Madam 'A' are costs to be borne by the Defendants, now Trustee in Bankruptcy.

SUBMISSIONS REGARDING THE VALIDITY OF THE ORDER APPOINTING THE RECEIVERS/MANAGERS

[55] The Orders made by M. McIntosh J., on March 31, 2008 were made

because of the adverse conditions which existed in the Defendant's company when the application was made.

SUBMISSIONS REGARDING SERVICE

[56] The Claimant's submission is two- pronged. Firstly, a Without Notice Application is permissible by virtue of Part 51 of the CPR 2002; specifically Rule 51.2 (3). Secondly, Mr. Christopher Gouldbourne represented the Defendant at the hearing. The presence of Mr. Christopher Gouldbourne (who is a senior employee of the Defendant) operated as a waiver to the actual service, and speaks to the fact that the Defendant was aware of the Application. He was present during the proceedings and took no objection. The Court is obliged in light of the notation on the Order that he represented the Defendant, to find that he was present as the Defendant's representative. In addition, Mr. Gouldbourne would have seen Receiver X in court. He is an intelligent man, who held the capacity of Vice President of Operations. It must be taken that he understood the proceedings. It cannot be said that the Order was made without notice.

[57] The Court could not know that Mr. Gouldbourne was vice President of Operations as he has now stated in his Affidavit, unless advised. The Court acted upon what was presented and such was reflected in the Order.

[58] Further, the Defendant was served with the pleadings and the Order within seven days of the appointment. The CPR does not state how many days after granting of the Order, the Defendant is to be served, but the Learned Judge ordered service of the Fixed Date Claim Form, Affidavits and Order on the

Defendant within seven days. Mr. Anthony Phipps deponed that on June 19, 2008, he served the Fixed Date Claim Form, Affidavit and an attached cover letter from Ms. Minett Lawrence. This is confirmed by the bearers' note book.

[59] The Defendant therefore cannot claim that it was unaware of the application. The Chairman, Mr. Carlos Hill held meetings with the Co-Interim Manager, X, Richard Newman and Ms. Minett Lawrence where he (Mr. Carlos Hill) decided on the action to be brought before the Court and discussed the role of the Receivers/Managers. Ms Reid relies on the Affidavit of the Co-Interim Receiver/Manager of June 10, 2008, and the affidavit of Madam 'A' of March 28, 2008.

[60] Mr. Carlos Hill publicly on March 30, 2008 stated that he consented to the appointment of a Receiver/Manager. This was before the matter was even taken to Court and the Order was granted. He also deponed to this in his affidavit that he had given consent for the appointment of a receiver.

[61] The series of events make it clear that the Defendant had knowledge of and was the decision- maker in the proceedings.

SUBMISSION REGARDING SECURITY FOR COSTS

[62] Applications that are made *inter partes* do not require the Court to consider security for costs. However, the Court may consider security for costs where the applications are made *ex parte.* Ms. Reid also relied on the case of **Re: Highfield Commodities Ltd v Page.** Madam 'A's' application was not made *ex-parte* because Mr. Christopher Gouldbourne, Ms. Minett Lawrence, the then Legal

Director/Advisor of the Defendant and Mr. Gordon Robinson were present. Moreover, rule 51.4 of the CPR confers on the Court the power to dispense with security for costs.

[63] The company had ceased operation, and it was not a situation where a debenture holder or some shareholder from a distance brought action against the company. The action was brought by the Company itself, so there was no need for security for costs.

SUBMISSION THAT MADAM 'A' ACTED ON BEHALF OF THE COMPANY

[64] Ms. Reid submits that it is not correct that Ms. Minett Lawrence acted without permission. The Affidavit of the Co-Receiver/ Manager filed on June 10, 2008 in response to an Affidavit of Mr. Carlos Hill, outlines the various meetings with Mr. Carlos Hill, Mr. Richard Newman, and Ms. Minett Lawrence and others, before the application was filed.

[65] The affidavit which Madam 'A' signed was drafted by the Defendant's Legal Director/Advisor, Ms. Minett Lawrence

SUBMISSION REGARDING BREACH OF NATURAL JUSTICE

[66] Ms Reid further submits that the court was satisfied before it made the order appointing the receiver; the affidavit which was given at the request of the Defendant, contained sufficient material to satisfy the court. There has therefore been no breach of natural justice.

[67] Section 213 of the Companies Act requires the complainant to show that

the company's operation is oppressive or is unfairly prejudicial to any shareholder, debenture holder, creditor, director or officer of the company. She submits that CPL was operating in a burdensome, harsh and wrongful manner which was oppressive to the claimant and other employees. One act of prejudice is sufficient for the Court to grant the order appointing the Receiver/Manager. Madam 'A's' Affidavit stated multiple unfair, unjust and oppressive actions.

[68] Ms Reid relies on the definition of oppressive and unfairly prejudicial stated in the cases of **Radcliffe Butler v Norma Butler** 30 J.L.R. at 34, **Aaberg v Pedersen** [1975] 13 J.L.R 166, **Diligent v RWMD Operations Kelowna** [1976] 36 (S.C. and **Re H.R. Harmer Ltd** [1959] W.L.R.

[69] The Defendant's company was operating in an oppressive manner, which was prejudicial to the employers, the Claimant, managers, creditors, and the public. There were threats to their lives. Further delay could have resulted in public demonstrations. In the circumstances Madam 'A' was a proper claimant and the claim was brought under the correct section of the Act.

SUBMISSIONS BY MR. JOHN VASSEL Q.C. ON BEHALF OF THE CO RECEIVERS MANAGERS

[70] Mr. John Vassel submits that the word "satisfied" in section 213 can in no way be construed as precluding a Court from making an *ex parte* order in an application under that section, if the requisite circumstances of urgency exist and if the evidence reaches the requisite standard laid down for *ex parte* applications.

The word "satisfied" has in fact nothing at all to do with whether or not the matter is *ex parte*.

[71] "Satisfied" is used in this section in its ordinary and natural meaning as relating to the cogency or quality or sufficiency of evidence which will enable a Court to reach a conclusion that a legal or evidential criterion, required by the Act, has been met. Whether an application under section 213 is an *ex parte* application for temporary relief or proceedings for *inter partes* interlocutory relief pending trial or the trial itself, the Court will not make an order until it is satisfied in accordance with the degree of proof that is required at the particular stage. At the trial stage the Court must be satisfied on a balance of probability as to each element of the statutory cause of action. *Inter partes* interlocutory applications require the Court to be satisfied that there are arguable issues upon the material provided by each side. *Ex parte* applications for interim relief require the court to be satisfied that sufficient *prima facie* proof of the elements of the cause of action is present.

[72] **Re Highfield Commodities** dealt with the appointment of a provisional liquidator. The Court considered words in the Rules which were similar to "satisfied' in section 213 of the Companies Act. In **Highfield Commodities** a provisional liquidator was appointed on an *ex parte* application without any question raised that the court be fettered in *ex parte* proceedings.

[73] There is clear affirmative evidence in the language of Section 213 that jurisdiction is conferred on a Court to make an *ex parte* Order for relief under subsection (3) of Section 213.

[74] Under the CPR, a Court can hear an interim application on an *ex parte* basis provided there are good reasons for proceeding *ex parte*. Section 213, confers the legal right of the category of persons specified to seek interim or final relief against oppression but has not laid out a procedure to be followed in pursuing that right before the Court. The CPR sets out the procedure, and those Rules clearly authorize the making of an *ex parte* order if there are good reasons for doing so. In the instant case, the affidavit evidence revealed that there were clear circumstances pointing to the urgency with which there was need for the appointment of a Receiver of the Defendant Company and its affiliates.

[75] Part 51 of the CPR sets out the procedure for appointing a Receiver whenever the Court considers it appropriate to do so and pursuant to whichever jurisdiction is invoked - whether it is under section 49(h) of the Judicature (Supreme Court) Act or by way of equitable execution or now under section 213 of the Companies Act. Where a debenture gives power to appoint a receiver, those appointments are normally made out of Court and not under Part 51 of the CPR.

[76] It is instructive to examine the source and extent of the jurisdiction of the Court for the appointment of Receivers prior to the enactment of section 213 in the 2004 Companies Act. The Judicature (Supreme Court) Act, Section 49(h) provided for the grant of an injunction or the appointment of a Receiver:

[77] There still exists a parallel jurisdiction for the appointment by the Court of a receiver in appropriate circumstances who may be appointed by "an interlocutory order". At the time of the passing of this Act, the Rules contained express

provisions for interlocutory orders to be made on an *ex parte* basis initially. The Judicature (Civil Procedure Code) Law, section 486 provided for the making of *"ex parte"* orders if the Judge is satisfied that the delay in proceeding the ordinary way 'might entail irreparable or serious mischief.' It was recognized, for example in the notes to Order 32 of 1982 RSC, that applications for a receiver under the English equivalent to section 49(h) (Judicature Act 1925 section 45(1) would be made on an *ex parte* basis.

[78] Part 51 of the CPR, (the antecedent of which is Order 30 which prior to the CPR applied to Jamaica pursuant to section 686 of the Judicature (Civil Procedure Code) Law) expressly stipulates for the appointment of a Receiver on an *ex parte* basis where the application for a Receiver is joined with an application for an interim injunction.

[79] These provisions show that at the time of the enactment of section 213, therefore, there was a clear and settled practice founded upon Rules and Statute that a Receiver could be appointed on an *ex parte* basis. If section 213 of the Companies Act had not expressly stated that a Receiver could be appointed in an application under that section on an interim basis, there would have been strong grounds on which a Court should have been prepared to construe the section as authorizing *ex parte* applications in urgent cases.

[78] The word "satisfied" in section 213 (2) of the Companies Act cannot reasonably be construed as excluding a jurisdiction in the Court to make an interim

order under that section on an *ex parte* basis. The Trustee's principal argument about nullity and invalidity must therefore fail.

[79] In the instant case, the application was presented to the Supreme Court as an *ex parte* application and it was for the Judge in Chambers to consider and decide whether she had jurisdiction to entertain the application on an *ex parte* basis. She obviously considered herself as having jurisdiction. The Privy Council in **Leymon Strachan v The Gleaner_Company Limited** [2005] UKPC 33 (at paragraph 33 of the Judgment) has clearly held that where a superior court of record makes a mistake as to its jurisdiction, only the Court of Appeal can correct it.

[80] The requirements of fairness and natural justice depend upon the character of the decision- making body, the kind of decision it has to make, and the statutory or other framework in which it operates. Both the Companies Act (Section 213) and the CPR contemplate that the Court will in urgent cases have jurisdiction to make interim orders on an *ex parte* basis. Where the Court operates within such a statutory framework, there can be no question of a denial of natural justice.

[81] This was not a case where, for example, an originating proceeding or other proceeding, which was issued on the basis that it would be served upon the other side, was not served at all and the Court proceeded to make an order in the absence of the other side in the belief that there was service. The dicta of Lord Diplock in **Grafton Isaacs's v Emery Robertson** as to orders obtained in breach of natural justice cited by the Trustee, deals with that sort of situation. So do the

cases of **White v Weston** [1968] 2 All ER 842 and **Tarzan Mighty v Wilson et al.** The cases of **Craig v Kanssen** [1943] 1 All ER 108 was disapproved of by the Privy Council in the **Strachan v Gleaner Company Limited.**

[82] Lord Greene in his Judgment in **Craig v Kanssen** in the passage cited by Sykes J in **Tarzan Mighty** expressly exempted from any question of nullity arising from non- service of process, "proper *ex parte* proceedings."

[83] In the instant case, the application was presented as an *ex parte* one; was understood by the Court as being an *ex parte* application; and was dealt with by the Court on that basis. The situation that then existed was detailed in the Affidavit of Madam 'A', which was before the Court on the hearing of the Application. The facts set out in Madam 'A's' Affidavit justify a conclusion that the actual Orders made by the Judge were necessary and justified.

[84] In those circumstances the Court was entitled to proceed *ex parte*. The Order made was for Co-Interim Receivers/Managers to be appointed until further Order; leaving it open for the Defendant to apply to set aside the Order at any time if it saw fit. The injunction was limited to a period of twenty-eight days. These facts put the instant case far beyond the sort of case in which any question of breach of natural justice might be considered as legitimately arising.

[85] The merits of the Order made by the Judge in the instant case are not before this Court; the Trustee's principal ground being that the Order was bad for non-service and denial of natural justice, and therefore a nullity. However, the company's Director of Legal and Corporate Affairs, Mrs. Minett Lawrence and its

Chairman Mr. Carlos Hill and others in the Defendant company planned, orchestrated and decided upon the application to seek the appointment of the Receiver of the Company; who knew of the timing issues involved, the urgency created by its own default in paying its creditors and which, immediately after the making of the order, adopted and advertised it, and sought to appease public demands by reference to it. These facts are evident from the Affidavits of Receiver X, Carlos Hill, and Madam 'A'. The Affidavit of Carlos Hill shows that he agreed with the Receivership. In his Affidavit however he disputed its extension to affiliates.

[86] The Trustee's principal argument of nullity and a right *ex debito justitiae* for impeaching the Order of March 31, 2008 upon the grounds (rather than pursuant to the Rules) to set it aside, would fail upon a number of grounds.

[87] Firstly, it would be hopelessly out of time. The Company was served with the *ex parte* Order in early April 2008 in accordance with the direction of the Court in the March 31, 2008 Order and Appearance was entered on May 5, 2008. Under Rule 11.16 of the CPR, an application to set aside is to be made within fourteen days of service. No application to set aside was ever made. There was an application by the Company filed on May 9, 2008 to strike out the entire action but as the Affidavit of Receiver X filed herein on the May 2, 2011 states, when this application came on for hearing, upon the hearing of the Fixed Date Claim Form, it was withdrawn by the Trustee in Bankruptcy who had in the mean time become Provisional Liquidator of the Defendant Company.

[88] Secondly, the Defendant, through its Provisional Liquidator and subsequently Liquidator has, with knowledge of the Order, acquiesced in it, adopted it, and obtained benefits under it, and a Court would not in those circumstances entertain an application to set it aside on discretionary grounds:

(i) The Provisional Liquidator of the Defendant Company applied to the Court and obtained an order substituting himself as Receiver of the Defendant and affiliates without any fresh application under Section 213 and, therefore, on the basis that the Order under Section 213 appointing a Receiver was a valid one. This application, it should be noted, was *ex parte*. The doctrine of approbation and reprobation prevents this behavior. **Evans v Bartlam**, [1937] AC 473, at page 483

(ii) The Trustee in Bankruptcy as Liquidator of the Defendant Company and Receiver of the affiliates has approved the sale of Defendant's property for the purpose of paying the former Receiver's fees, thereby affirming the validity of the underlying Order appointing the former Receivers. The Trustee in Bankruptcy joined in an application by the Co-Interim Receivers/Managers to sell the Hillshire property to pay Receiver fees The Trustee in Bankruptcy in an Affidavit of Andrew Gyles filed November 20, 2008, recognized the enforceability of the Receiver's fees, which have been determined by the Court, thereby acquiescing in the validity of the Order appointing the Receiver.

(iii) The Trustee in Bankruptcy appeared on the inter partes hearing of an application in November 2008 for sale of properties and other orders and treated with that application on its merits without any challenge to the March 31, 2008 Order appointing the Receivers/Managers. There are a number of other examples of acquiescence/waiver.

SUBMISSION REGARDING RECEIVERS SECURITY

[89] Section 213(A) is entirely silent on the question of Receiver's security. Part 51 and the antecedent rules make clear that the ordering of security is a matter of

discretion for the Court. The Trustee's argument about jurisdiction/nullity therefore fails at the threshold.

[90] The submission that security should, as a matter of discretion, have been ordered, requires this Court to sit as a Court of review upon the decision of another Court of coordinate jurisdiction. This Court should be slow to embark upon that exercise. It is difficult to see the point of the Court considering at this stage whether in its judgment, security should have been ordered. The Receivers accepted their appointment on the basis that they were not required to provide security. The Court dispensed with security. The actions of the Receivers pursuant to the Order made by the Court are valid and the Receivers' entitlement to their fees is not affected by the non-provision of security, since the Court ordered no security. If the Court had ordered security, it would have been open to the Receivers to not accept the appointment or to resign. An order of this Court at this stage varying or setting aside the Order on the grounds of no security would have no practical effect.

[91] This is not a case in which it is being suggested by the Trustee or anyone, that there has been some misconduct by the Receivers during the receivership and that the non-ordering of security is operating as a barrier to recovery in respect of such misconduct. The various affidavits show that the Receivers acted with scrupulous care, diligence, and conscientiously throughout the receivership and, as officers of the Court, sought the direction and advice of the Court at every material step in the performance of their duties.

[92] It is impossible for the Trustee to argue that there is no evidence that the Court in fact considered the question of the Receivers giving security, especially since he was not Counsel who was present. The Court gave no written judgment and no agreed note of an oral judgment is available. The Court made the Order on the basis of the procedure and the matters set out in Part 51 CPR. There is no requirement that a Court that has dispensed with a requirement should say that it has dispensed with it. The non-imposition of the requirement is reliable evidence that the Court has dispensed with it.

[93] It was entirely understandable for the Court to have dispensed with the need for security given the insolvency of the Cash Plus entities which was apparent from the Affidavit of Madam "A" and the fact that the cost of securing the bond or guarantee by the Receivers, would be a cost of the receivership, which would further burden the resources of the Company to the prejudice of the creditors (see **Atkins Court Forms** Vol. 33 p 149).

[94] The fundamental point in relation to these proceedings is that the Judge had discretion as to whether or not to dispense with security and the Judge exercised her discretion in not ordering security. It cannot be assumed that she was ignorant of the Rules. There was therefore no irregularity of the Order, and these proceedings are not by way of an appeal of that Order.

[95] The case of **Alexander Haber v Carlos Hill**, Claim No. HCV 01910/2008 is clear precedent in the Supreme Court for Orders under Part 51 to be made *ex parte* and for security to be dispensed with without any express statement to that effect.

[96] A company cannot be appointed a Receiver. Receiver X and Mr. Bandoian – who were appointed, are individuals. PricewaterhouseCoopers Limited was not appointed by the Court as Receiver.

[97] There is ample precedent for the appointment of joint Receivers in this jurisdiction. In the case of **Alexander Haber v Carlos Hill** Mangatal J appointed Kenneth Tomlinson and R. Tacon of Kroll (BVI) Limited joint receivers over the assets of Carlos Hill's properties. In **Dyoll Insurance Company**, also, joint Receivers were appointed.

[98] Under the Companies Act, no one is excluded by virtue of residence from being appointed a receiver. If residence in Jamaica were a qualification, the Companies Act would have said so explicitly.

[99] In this case, the Trustee's argument refers to conflict of law principles, which is wholly different and irrelevant point. The appointment of the Receivers in this case involved one legal system only, that is, the Jamaican legal system. A non-resident was appointed as one of two receivers in a Jamaican receivership. He consented to his appointment and was, of course, subject to the jurisdiction of the Court on that appointment. He was not a foreign receiver (which means a receiver of a foreign company). He is a Jamaican receiver who is a foreigner. He is supremely qualified by training and international experience for the very complex multi-jurisdictional work, which includes the United States in which there were at least three Cash Plus entities, which the Court undertook the supervision of when it made the Order placing the Cash Plus entities in receivership.

[100] By his acceptance of the appointment, Mr. Bandoian became an officer of the Jamaican Court with all its duties and responsibilities, and the accountability attached to such a position. He is within the reach of the Court, in the sense that the Court had jurisdiction over him without any intervention of a foreign court. There was no conflict of law issues merely because Mr. Bandoian happens to be a non-resident.

[101] There is strictly no obligation to account to the Liquidator. The obligation is to account to the Court. Now that the appointment of the Receivers is discharged, there is a continuing obligation to file final accounts with the Court and the former Receivers/Managers, whether obliged to do so or not, will supply copies of those accounts to the Trustee. The former Receivers are not yet in a position to file a final account.

[102] There is neither principle nor authority, which supports the argument that the Court had no power to confer on the joint Receivers the authority to sell the company's properties and was limited to authorizing them to collect and preserve the assets until the liquidation of the company.

SUBMISSIONS ON THE RECEIVERS' FEE

[103] In its March 31 2008 Order, and its April 7, 2008 Order, the Court specifically prescribed the basis on which the Receivers' fees were to be arrived at and recovered by them. Even if there had been no specific Court Order, the law is that a Receiver appointed by the Court is entitled to recover his fees out of the assets of the Company, and in complex commercial receiverships where the Court, in this case with the concurrence of the company, saw fit to appoint senior

experienced receivers, the Receivers' ordinary charge-out rates represent a reasonable basis on which fees can be recovered. The regular charge-out rate of professional consultants to the Receivers is recoverable as receivership expenses (see **Atkins Court Forms** Vol. 33 pp 143 – 144).

[104] There is clear authority that an invalidity or irregularity in the proceedings for the appointment of a Receiver does not affect the validity of the Receivers' right to their fees. In **Mellor v Mellor** [1992] 4 All ER 11 the Court stated that a Receiver is entitled to his remuneration and to an indemnity in relation to his costs, expenses and liabilities even though the party who applied for the receivership was guilty of non-disclosure or some other impropriety, and the Court would not have appointed a Receiver if the Court had been apprised of the full facts.

[105] The allegation that Receivership fees ran to over $200M and that the work was done over 30 days is spurious. The fees were $39M; the rest was expenses. Further the work was done between the date of the appointment and the date of the discharge in November 2008, that is, over a period of 7 months.

[106] The application to fix the Receivers' fees was *ex parte* but it is submitted that that was entirely permissible, since the Court in fixing the fees was merely implementing a formula which had been earlier ordered by the Court and about which the company had no complaint as they took no step to challenge it or set it aside. Within days of the making of the Order, the then Trustee in Bankruptcy, Andrew Gyles filed an Affidavit saying that he had no problem with the amount fixed by the Court as the Receivers' fees. Even if proceeding *ex parte* in fixing the Receivers' fees was objectionable, the Defendant, through its Liquidators has

acquiesced in it and/or waived objections to it and is thereby precluded from challenging it at this stage. Moreover, a challenge on discretionary grounds would now be out of time.

SUBMISSIONS ON THE CLAIM FOR A DECLARATION

[107] The relief claimed in paragraph 1 of the Notice of Motion dated March 29, 2011 (which it has been agreed is to be treated as a Notice of Application for Court Orders) is as follows:

> *"A Declaration that the appointment of the Co-Interim Receivers/Managers under Order of the Court dated 31st March 2008 was improper and therefore ineffective."*

[108] As framed, this is not an application to set aside a Judgment or Order. It is an application for a Declaration as to the invalidity of an Order and, further, it is being pursued before a Judge of coordinate jurisdiction with the learned Judge who made the Order. Further still, it is a claim for final declaratory relief in interlocutory proceedings (the Fixed Date Claim Form has not yet been finally disposed of). It is far from clear that this is permissible procedure.

[109] In setting aside proceedings, a subsequent Court is entitled to reach a view as to the validity of an *ex parte* Order made by another Judge, so as to determine the setting aside application. However, where no question of discharging or setting aside the 31st March 2008 Order for the appointment of a Receiver arises (since, among other things, that Order has been discharged by a later Order of the Court) (see **Ramkaise Manogeesingh et al v Airports Authority of Trinidad and Tobago et al** (1993) 42 WIR 301), it is certainly arguable that there is no power in

a later Judge to grant a declaration that the earlier Order had been improperly or ineffectively made while that earlier Order had been in force.

[110] In any event a declaration is a discretionary remedy and it should, in the Alternative, be refused on discretionary grounds.

DECISION

[111] The issue of the discharge of the injunction is no longer live. That aspect was disposed of by Counsel for the Receiver /Manager agreeing before me to the discharge of the injunction.

WHETHER THE ORDERS ARE INVALID?

[112] Section 213(1) of the Companies Act provides:

If upon an application under subsection (1), the Court is satisfied that in respect of a company or any of its affiliates –

(a) any act or omission of the company or of its affiliates effects a result;

(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;

(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, any share holder or debenture holder, creditor, director or officer of the company; the Court may make an order to rectify the matters complained of.

[113] The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order-

(a) restraining the conduct complained of;

(b) appointing a receiver or receiver-manager;

[114] Madam 'A' was an officer of the defendant. The affidavit of Madam 'A' which accompanied the application for the appointment of the Receivers/managers, contained ample material which enabled the learned judge to come to the conclusion that the conditions which existed, were unfairly prejudicial to the relevant parties including Madam 'A'. In fact the situation which prevailed could also be regarded as oppressive. In **re H.R. Harmer Ltd**. (1959)1WLR 62, Jenkins LJ at page 75 said:

> *"The circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision."*

At page 79 he continued:

> *"I attach importance to Viscount Simmonds adoption of the meaning of "oppression" as "burdensome, harsh, "and wrongful"...suffice it to say that in the end I have reached the conclusion that there is evidence to justify the view that the affairs of the company were conducted in a manner oppressive to the respondents. I am not disposed to give a narrow meaning to those words, having regard to the manifest object of section 210."*

[115] Madam 'A's' affidavit told of the company's inability to pay its thousands of creditors and of the promise made by the Chairman to pay by March 31, 2008 date which was imminent and no funds were forthcoming. She urged the court to supervise the operations of the company so as to make it evident to the creditors that credible and forensic measures were instituted. She expressed concern that unless the company was placed immediately under the supervision of the court, she feared that violent actions might have been taken by the creditors. Both staff and property were vulnerable. Moreover no contingency plan was devised to ensure the protection of the staff and property. Her safety was at risk as she was the recipient of threatening calls from creditors who had grown impatient and had

become incensed at having waited five months. She feared that the staff was exposed to civil and criminal proceedings if the dissemination of information was not accurate and timely.

[116] Her concerns raised before the learned Judge surely supported the claim that she, members of staff, creditors and the other relevant parties were unfairly prejudiced.

[117] She also expressed concern about the operations of the company. She deponed that Cash Plus' sole preoccupation in its effort to repay its creditors was fund- raising activities by way of negotiations.

[118] The contents of Madam' A's' affidavit demonstrated that the 'requisite elements of both oppression and unfair prejudice were established and that it was just, equitable and convenient to appoint the Receivers/Managers. The learned Judge was therefore properly entitled to exercise her discretion to appoint Receiver X and Mr. Kevin Bandoian as Receivers/managers.

[119] In any event I have no jurisdiction to review the order of a judge of concurrent jurisdiction. Even if M. McIntosh J., had exceeded her jurisdiction, the orders made, would have been, in the words of Lord Millett in **Leymon Strachan v The Gleaner Company Limited** [2005] UKPC 33):

> *"...obviously vulnerable, but wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside."*

[120] Lord Millett cited with approval the statement of George Jessel MR in **Padstow Total Loss and Collision Assurance Association** (1882) 20 Ch D 137 p 142:

> *"The first point to be considered is whether, assuming that the association was an unlawful one, and that the court had no jurisdiction to make, to order, an appeal is the proper method of getting rid of it. I think it is."*

At paragraph 32 Lord Millett continued:

> *"The Supreme Court of Jamaica, like the High Court in England, is Superior Court or Court of Unlimited Jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have to decide after argument that he has jurisdiction; more often (as in **Padstow** case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong whether by law or fact which can be corrected by the Court of Appeal. But he does not exceeds his jurisdiction by making the error; nor does a judge of co-coordinate jurisdiction have power to correct it."*

WHETHER SECTION 213 (1) OF THE COMPANIES ACT ALLOWS *EX PARTE* HEARING

[121] Section 213 of the Companies Act does not provide assistance regarding the procedure for appointing a receiver. The CPR outlines the procedure to be followed. The procedure is therefore prescribed by subsidiary legislation. Part 51.1 of the CPR deals with the appointment of a receiver. It includes an application to appoint a receiver to obtain payment of the judgment debt from the income or capital assets of the judgment debtor.

[122] Part 51 requires scrutiny in light of the divergent interpretations ascribed to it by the Trustee in Bankruptcy and the other parties.

Part 51.2 provides:

> *(1) An application for the appointment of a receiver must be supported by evidence on affidavit.*
>
> *(2) The applicant may also apply for an injunction to restrain the judgment debtor or other respondent from assigning, charging or otherwise dealing with any property indentified in the application.*
>
> *(3) Where an application for an immediate injunction is made, the application for the appointment of a receiver and for an injunction may be made without notice.*

[123] The Rule speaks generally to the appointment of a receiver. Nothing in Part 51 restricts its applicability to debenture holders. Indeed it allows for the grant of *ex parte* injunctions generally.

[124] Rule 51.2(3) specifically imbued the court with the authority to proceed without notice in circumstances where there is an application for an immediate injunction. The application before the court was for an immediate injunction. The words 'is satisfied' cannot be construed to mean *inter partes.* The only logical requirement, in light of the court's authority to proceed *ex parte,* is that the evidence before the court must attain the required level of cogency and is sufficiently urgent. *Prima facie* there was a serious issue to be tried which required the immediate intervention of the court to preserve the status quo. Mr. Wildman's submission in this regard, is, in the circumstances untenable.

WHETHER THE DEFENDANT WAS EXCLUDED FROM THE PROCEEDINGS

[125] The issue is whether CPL was given fair notice of the proceedings so as to enable it to appear in its defence.

[126] Mr. Wildman's reliance on the cases of **White v Weston** (1968) All ER 842; **Grayton Issac v Emery, Tilling, Limited v Blythe** (1889) 1 QB 557 is misplaced. In those cases the defendants were not notified about the proceedings and final judgments were obtained. They were deprived of the opportunity to appear and defend themselves. In those circumstances the defendants were entitled as of right, *ex debito justiticiae* to have the judgments avoided and set aside. In the case of **Tilling, Limited v Blythe,** the application appointing the Receivers was granted on an *ex parte* application. There was no emergency which warranted such an appointment. AL Smith LJ who gave the decision of the court opined that "*orders for receivers should not be made without due notice, so that the defendant may have an opportunity of being present to show cause why the order should not be made.* "

[127] Rule 51.6 required the applicant to serve the defendant with a copy of the Judge's order appointing the receivers, on the receivers and on the defendant. Time to effect service is not specified by Rule 51. However Rule 17 deals generally with the grant of injunctive reliefs.

[128] Rule 17.3 allows for applications to be made without notice in urgent cases. Orders obtained in such cases are required to be served not less than seven (7) days before the date fixed for further consideration of the matter. In the

instant case, the claimant was ordered to serve the order and all the documents which were before the judge on the defendant, within seven days.

[129] It is the evidence of Mr. Phipps that he served the orders with the other court documents on the defendant. Mr. Phipps' veracity regarding his service of the documents on the defendant has not been challenged. The documents must be taken to have been duly served. The defendant was fully apprised of the proceedings.

[130] The defendant was not excluded from participating in the proceedings. It was given the opportunity to be heard within a short period. The rules of natural justice were, in my judgment, duly complied with. There is therefore no merit to Mr. Wildman's submission that the rules of natural justice have been breached. The defendant is therefore not entitled *ex debito justitiae* to have the appointments set aside.

[131] Although it is not necessary, to consider whether the defendant was served because of my foregoing finding, I am led to comment. The notice/advisory placed in the **Jamaica Observer** by Mr. Carlos Hill, on March 30, 2008, (the day before the hearing of the application) which stated that he had consented to the appointment of the Receivers/Managers, forcefully indicates that he had prior knowledge of the application before the court.

Mrs. Minett Lawrence, and Mr. Gouldborne, the legal director of the company and vice President of operations respectively were present. Both were senior officers of the defendant. Even if Mr. Gouldbourne's evidence that he was seized

unawares by Mrs. Lawrence is accepted as credible, and there was a conflict of interest regarding Mrs. Palmer's representation, the order cannot be impugned by that assertion alone. The Judge was in any event properly authorized by the Rules to proceed *ex parte.*

WHETHER FAILURE OF RECEIVERS/ MANAGERS TO PROVIDE SECURITY VOIDS APPOINTMENT

[132] The issue is whether the absence of an order dispensing with security is so egregious an omission as to invalidate the appointment. Can it be assumed that the Judge intended to dispense with security?

[133] Mr. Wildman's reliance on rule 51 to challenge the Receivers'/Managers' failure to provide security is impermissible. It is his firm submission that rule 51 is not applicable to section 213 (A) of the Companies Act. However he cannot approbate and reprobate at the same time. **Evans v Bartlam** [1937] AC 473 said:

> *"The doctrine of approbation and reprobation requires for it foundation inconsistency of conduct; as whereas man having accepted a benefit give him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."*

[134] In any event his submission that the Receivers' Managers' failure to provide security invalidates the appointments is untenable.

Rule 51.4 states:

> *(1) The general rule is that a person may not be appointed receiver until that person has given security.*
>
> *(2) The court may however dispense with security.*
>
> *(3) The order appointing the receiver must state the amount of the security.*

(4) *The security must be by guarantee unless the court allows some other form of security.*

(5) *The guarantee or other security must be filed at the registry.*

[135] I have been provided with no authority that failure by a judge to state that security for costs is dispensed with voids the appointment of a receiver. I am however of the view that the absence of an order for security for costs is sufficient to demonstrate that the Judge dispensed with the requirement. I am fortified in this view by the use of the word 'may' in Part 51.4(1) which is instructive. The provision of security is not mandatory. If the words 'shall' or 'must' had been used in the rule, the court would be constrained to order security. Failure to provide security would, in those circumstances render the appointment void. The rule however permits the judge to dispense with security. Had the court ordered security she would have been obliged to comply with the requirements of the rule regarding security. Mr. Wildman's submissions in this regard are therefore unsustainable.

Megarrry V-C in **Re Highfield Commodities Ltd said:**

> ***"...****the general practice is to require an undertaking in damages if a provisional liquidator is appointed ex parte...the general practice is not to require an undertaking in damages if the appointment is made inter partes. The distinction, I think, or a distinction must be that the protection of the undertaking will be given where the company has had no opportunity of providing any answer or explanation to contentions which may prove to be wholly unfounded, whereas if the company has at least had the opportunity of being heard, the court will be making the appointment after considering what the defendant has said, if it has chosen to speak, and so can better assess the propriety of making the appointment"*

[136] The order appointing the Receivers/Managers was served on the defendant. It was allowed the opportunity to resist the application if it desired. In any event even if the matter was begun *ex parte*, the learned Judge exercised her discretion not to request security for costs, I am a judge of coordinate jurisdiction. I cannot sit in judgment over her. Whether her discretion was judicially exercised is a matter for the Court of Appeal.

IS MR. BANDOIAN A FOREIGN RECEIVER?

[137] Goulding J in **Schemmer and others v Property Resources Ltd., and others** (1974) 3 All ER 451 after examining the English authorities concluded that before an English court would recognize the title of a foreign receiver, a court had to be 'satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order'.

[138] The principle was applied by the Court of Appeal of the Eastern Caribbean in **Millennium Financial Limited v Thomas McNamara and Bank of Nevis International Ltd.** Mr. Wildman relies heavily on the said case in support. In that case, Millennium Financial Limited was incorporated in Nevis and there was no evidence that it conducted business in the United States, nor was it a party to the United States action. It did not submit to the jurisdiction of the United States. Baptiste JA [Ag] who delivered the decision of the court found that the sufficient connection test was not satisfied as there was insufficient connection between Millennium (Nevis), the appellant and the United States Millennium.

[139] The scenario in the present case is different. It was not a foreign court that appointed Mr. Bandoian. He was appointed by the Jamaican court as receiver over properties outside the jurisdiction. In the **Re Maudslay, Sons and Field** (1990) 1Ch at 611, 612, Cozens-Hardy J said:

> *"It is well settled that the Court can appoint receivers over property out of the jurisdiction. The power, I apprehend is based upon the doctrine that the court acts in persona. The court does, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officers to take possession according to the laws of the foreign country... In other words, the receiver is not put in possession of foreign property by the mere order of the court. Something else has to be done"*

[140] Accordingly, there can be no challenge to Mr. Bandoian's appointment on the basis that he is a foreign receiver. There can therefore be no rational opposition to Mr. Bandoian's appointment by M. McIntosh J.

[141] The complaint that he was not present at the hearing is equally without merit. Rule 51.2 (1) requires that the appointment of a receiver must be supported by affidavit. Before the appointment can be effective the court must be satisfied that the appointment was communicated to the receiver. (See **Cripps (Pharmaceutical) Limited v Wickenden and Another**). Rule 51.6 mandates the service of a copy of the order appointing the receiver on the receiver. It is plain that the attendance of a receiver at the hearing is not a requirement.

RECEIVER'S FEES

[142] Although I have no authority to review M McIntosh J's order I feel constrained to refer to the head note of **Mellor v Mellor and others** which answers Mr. Wildman's submission:

> *"The court, however, retains control over the quantum of remuneration and actions by the receiver, although it will not deprive a receiver of his right to remunerations solely on the ground that the receivership has not in fact proved beneficial to the company, since the necessity for the receivership is a matter to be judged when the receivership is applied for and not when the receivership comes to an end ... a receiver's right to be indemnified out of the assets of which he was appointed receiver extends to all the assets subject to the receiverships and he is entitled to a lien over all those assets and not simply the assets which he has taken into his possession. Similarly, a receiver is entitled to assert his right to an indemnity over the assets over which he was appointed a receiver notwithstanding that the receivership has been discharged and control of the assets has reverted to the legal owner ..."*

[143] Any complaint of invalidity at this juncture ought to be directed to the Court of Appeal. However, any challenge at this point seems doomed to failure for a number of reasons; chief of which are the facts that the former Trustee acquiesced in the order and the application is hopelessly out of time.

[144] Accordingly, the attack by the Trustee on orders made by the court and actions taken by the Receivers/Managers pursuant to those orders, must be the subject of an appeal. This court therefore has no jurisdiction to entertain the applications sought by paragraphs 1, 5, 7and 8 of the Notice of Motion herein.

[145] It is therefore ordered that:-

1. The Co-Interim Receivers/Managers provide the Trustee in Bankruptcy with copies of all documents including Sales Agreements and Statements of Account with respect to all transactions and dealings involving the assets of Cash Plus Limited, its subsidiaries

and affiliates, including all properties disposed of during the Receivership (paragraph 2);

2. The Co-Interim Receiver/Managers provide the Trustee in Bankruptcy with copies of all reports of their receivership (paragraph 3).

3. The Co-Interim Receiver/Managers pay to the Trustee in Bankruptcy all sums held on account of Cash Plus Limited, its subsidiaries and affiliates forthwith (paragraph 4).

4. The Co-Interim Receiver/Managers provide the Trustee with a detailed accounting of their fees and the fees for all legal, consultancy and other services commissioned by them during their receivership of Cash Plus Limited, its subsidiaries and affiliates (paragraph 6).

5. Each party is to bear its own costs.