[2018] JMCC Comm 9

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00593

BETWEEN	**MORGAN'S HARBOUR LTD (IN RECEIVERSHIP)**	**CLAIMANT**
AND	**LASHMONT FINANCIAL SERVICES LTD**	**1ST DEFENDANT**
AND	**MYLES MCCLYMONT**	**2ND DEFENDANT**

Ms Debbie-Ann Gordon and Ms Ivally McDonald instructed by Debbie-Ann Gordon and Associates for the claimant

Ms Kemilee Mclymont instructed by PeterMc & Associates for the defendants

Mark Williams instructed by Williams, McKoy and Palmer for the principals of Morgan's Harbour Limited

HEARD: 18 and 29 January and 12 February 2018

INSOLVENCY – CONVERTIBLE DEBENTURE – APPOINTMENT OF JOINT RECEIVER – MANAGERS BY DEBENTURE HOLDER – DUTY OF RECEIVER – MANAGERS TO THE DEBENTURE HOLDER IN THE EXERCISE OF THE POWER OF SALE UNDER THE CONVERTIBLE DEBENTURE – WHETHER RECEIVER – MANAGERS IN BREACH OF DUTY – TERMINATION BY THE DEBENTURE HOLDER OF THE RECEIVER – MANAGERS AT THE POINT OF THEIR EXERCISING THEIR POWER OF SALE – WHETHER ANY BASIS EXIST UPON WHICH RECEIVER – MANAGERS MAY REFUSE TO ACCEPT TERMINATION – DUTY OF DEBENTURE HOLDER – WHETHER DEBENTURE HOLDER IN BREACH OF DUTY – WHETHER A COURT OF EQUITY CAN INVALIDATE THE TERMINATION OF THE RECEIVER – MANAGERS BY THE DEBENTURE HOLDER

EDWARDS, J

Background

[1] Morgan's Harbour Limited is the current long term lessee of six (6) parcels of land, amounting to approximately 23 acres, from the Government of Jamaica, through the Commissioner of Lands who is the head lessee. This includes the lease of lands on which is situated, what was formerly known as the Morgan's Harbour Hotel (the hotel), which operates in the picturesque, if infamous, town of Port Royal. The lease expires in 2053. The assets of Morgan's Harbour Limited, inclusive of this long term lease on lands, sea-lodges, hotel, marina and club in Port Royal, have been up for sale by the directors and shareholders since 2013.

[2] The 1st defendant is a company which has shown an interest in purchasing the leasehold rights to the properties since 2013 and has been in possession of the hotel lands (Brown Lands) as a sub-lessee from 2013. The 2nd defendant is the principal of the 1st defendant.

[3] The National Investment Bank of Jamaica, now the Development Bank of Jamaica (DBJ), held a debenture over the assets of Morgan's Harbour Limited for debts totalling $263,153,314.19. In 2013, the 1st defendant agreed to purchase the leasehold rights to the properties but this sale agreement was later cancelled. Morgan's Harbour Limited and the 1st defendant, thereafter entered into what was, effectively, a sub-lease agreement for 18 months with an option to purchase. After this sub-lease expired the 1st defendant offered to purchase the leasehold rights at a price unacceptable to the directors and shareholders of Morgan's Harbour Limited. The 2nd defendant who is the majority shareholder and managing director of the 1st defendant, later informed the directors of Morgan's Harbour Limited, that the 1st defendant had, in fact, settled Morgan's Harbour Limited's indebtedness to the DBJ in 2014 and had been assigned, by deed of assignment, the debenture agreement granted by Morgan's Harbour Limited to DBJ over its assets.

[4] The 1st defendant, (hereinafter referred to as the debenture holder) thereafter, called on the debt which was not being serviced by Morgan's Harbour Limited. At that time the assets were on the market for sale. A Notice of Intention to Enforce Security with a demand for the sum of $79,021,627.49 was made by the debenture holder on Morgan's Harbour Limited. The debenture holder also took the further step of appointing joint receiver-managers (hereinafter referred to as the receivers) over the assets of the company. The receivers took control of the company and its assets with a view to selling the assets and realizing the debenture holder's security.

[5] In the meantime, the receivers entered into a short term arrangement with the debenture holder for a further sub-lease. Although there is no direct evidence of this fact, inferentially it appears that the hotel, situated on Brown Lands, was being operated by the debenture holder under the name of Grand Port Royal Hotel Marina and Spa. The 2nd defendant is described as the owner/manager in correspondence attached to affidavits in this matter.

[6] The receivers set about doing the extensive work necessary to achieve the goal of selling the assets of the company in receivership to pay off the debt to the debenture holder. It is the successful achievement of this goal that has resulted in this unprecedented and highly unusual application before this court. The reason for the application is that the 1st defendant, as debenture holder over the assets of Morgan's Harbour Limited (in receivership), has purported to terminate the appointment of the receivers before the receivership is complete and whilst the receivers are in the throes of a contract of sale of the company's assets. But that is not the only unprecedented fact of this case, for equally unprecedented, is the fact that the receivers have refused to accept their termination at this stage of the receivership.

[7] Further, though not unprecedented, the debenture holder, having placed the company in receivership and appointed receivers, and in keeping with the unusual theme of this case, sought itself to purchase the assets of the company

it placed in receivership. Cautioned by legal advice that such a move might not be prudent and may not survive close scrutiny, the defendants then arranged for the purchase to be made by an affiliate company called NURU. The 2nd defendant is the principal of NURU.

[8] The receivers sought purchasers for the company's assets through a competitive bidding process in which NURU participated. NURU was not successful, as they were not selected by the receivers as the preferred bidders. NURU's bid was the third highest bid and, by virtue of the criteria set by the receivers, it was the second preferred bidder. The receivers selected the preferred bidder and proceeded with the sale to that buyer. It was during this process that the debenture holder and the 2nd defendant, as its principal, proceeded to 'instruct' the receivers to suspend the sale as they had entered into a separate private sale agreement with the shareholders of the company. When the receivers refused to suspend the sale, the defendants then wrote to the receivers purporting to terminate their appointment.

[9] As mentioned earlier, the receivers have refused to accept their termination as lawful at this stage of the exercise of their power of sale and have come to the court for directions and for certain orders to be made.

The claim

[10] The claim was brought by the receivers in the name of Morgan's Harbour Limited (In Receivership). The Joint Receivers-Managers are Mr. Wilfred Baghaloo and Mr. Caydion Campbell of Price Waterhouse Coopers. They claim against the 1st and 2nd defendants, the following Orders:

1. A declaration that the Joint Receiver-Managers having been validly appointed be allowed to continue with the powers of sale exercised by them pursuant to the Convertible Debenture under which they were duly appointed;
2. A declaration that the Joint Receiver-Managers having been validly appointed, be allowed to conclude the sale of assets to the Preferred

Bidder pursuant to the signed Deed of Assignment between Preferred Bidder and the Joint Receiver-Managers;

3. A declaration that the First Defendant vacate and quietly yield and fully deliver up its occupation of the Leasehold Properties as occupier;

4. A declaration that the First Defendant vacate and quietly yield and fully deliver up its occupation of the Leasehold Properties as occupier and operator for and on behalf of the Joint Receiver-Managers within thirty (30) days of completion of the sale to the Preferred Bidder;

5. A declaration that the Joint Receiver-Managers be allowed to comply with the terms of the duly executed Deed of Assignment which requires the Joint Receiver-Managers to deliver vacant possession of the Leasehold Properties to the Preferred Bidder;

6. A declaration that the First Defendant as Debenture Holder has no automatic right to ownership of the assets covered by the Debenture and is only entitled to repayment of monies in satisfaction of the debt due to him after realization of the assets covered by the Debenture in accordance to the Companies Act;

7. Further and/or in the alternative, that if the Joint Receiver-Managers are not so Ordered to continue in the exercise powers of sale and to conclude the sale to the Preferred Bidder, that the following Orders be collectively granted:

    i. That the appointment of the Receiver-Managers be terminated forthwith as of the date specified by the Court as the effective date of termination; and

    ii. That on or before the day being the effective date of termination of the Joint Receiver-Managers pursuant to the above Order of the Court, that the First Defendant pay in full by way of direct deposit to a Bank account designated in writing by the Attorneys-at-Law for and on behalf of the Joint Receiver-Managers in readily available funds the fees of the Joint Receiver-Managers including such to cover all expenses of the Receivership up to and including the effective date of terminations, as well as such costs and charges necessary to record and notify the Companies Office of Jamaica and such other agencies as required, of the termination of the appointment of the Receiver-managers;

    iii. That on or before the effective date of termination of the Joint Receiver-Managers, the First Defendant provide an Indemnity in the form of a bankers' guarantee from a local reputable financial

institution to the Joint Receiver-Managers to indemnify the Joint Receiver-managers and their agents, servants and assigns from all action howsoever arising including suits from the Preferred bidder and/or other stakeholders of the Claimant;

and

iv. That on or before the effective date of termination of the appointment of the Joint Receiver-managers, the First Defendant be simultaneously removed as Operator of the Hotel under its agreement with the Joint Receiver-Managers; and

v. That on or before the effective date of termination of the Joint Receiver-manager that the First Defendant simultaneously vacate and quietly yield and fully deliver up its occupation of Brown Lands; and

vi. That on the effective date of termination of the Joint Receiver-Manager, the Joint Receiver-Managers hand back the Company, Morgan's Harbour Limited to the Directors for the said Directors to resume full management powers and authorities.

8. The costs be costs in the claim.

[11] The claim is made pursuant to section 79 of The Insolvency Act, which states inter alia that:

"79.- (1) A receiver or other interested party, may apply to the court for directions in relation to any provision of this part.

(2) The Court shall in relation to an application for directions under subsection (1) give such directions, it considers proper in the circumstances including an order-

Appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;

Determining the notice to be given to any person, or dispensing with notice to any person;

(c) declaring the right of persons before the court or otherwise, or directing any person to do, or abstain from doing, anything in relation to the receivership;

> *(d) fixing the remuneration of the receiver or receiver-manager;*
>
> *(e) requiring the receiver or receiver – manager, or a person by or on behalf of whom he is appointed –*
>
> > *(i).......*
> >
> > *(ii)......*
> >
> > *(iii) to confirm any act of the receiver or receiver-manager; and*
>
> *(f) giving directions on any matter relating to the duties of the receiver or receiver – manager."*

[12] According to the written submissions of counsel for the claimant Ms Gordon, the application was made for directions as to whether (a) the receiver manager should continue with the exercise of the powers of sale in light of the fact that:

i. There is an executed contract with full payment guaranteed to the attorneys for the receiver manager;

ii. The proceeds of sale will more than adequately satisfy the debenture holder's security;

iii. The receivers have acted honestly and in good faith;

iv. The financial cost if the work is halted would be excessive, prohibitive and prejudicial to all stakeholders; and

v. The debenture holder has not established any legitimate reason for interrupting or disrupting the receivership;

vi. There is no legal basis for the disruption of the receivership.

[13] The Insolvency Act applies to both receivers appointed by the Court and those appointed out of court. S.73 (1) of the Act states that:

> *"73.- (1) A receiver shall when appointed by-*
>
> *(a) Instrument, act in accordance with the conditions imposed under that instrument of appointment and any directions by the Court;*

(b) a Court order, act in accordance with the direction directions of the Court."

[14] By virtue of section 74 of the Act, a receiver shall in carrying out his duties as stated in the section and as required under the agreement with his appointer, act honestly and in good faith.

Preliminary issue

[15] At the hearing of this matter, the two directors and shareholders of the company in receivership attended the hearing in chambers accompanied by their attorney at law. Preliminary objection was taken to their presence on the basis that they have no locus in matter, as the issue is between the receiver-managers and the defendants. Counsel Ms. Gordon had no objection to the presence of the shareholders/directors on the basis that they had a significant issue with operation of the hotel by the defendants and view their actions as prejudicial. There has been no application to join in the matter but Mr. Neville Blythe has filed an affidavit in support of the application by the receiver-managers. I ruled that the shareholders/directors of the claimant could remain. They, however, took no part in the proceedings.

The issues

[16] As I have said, this case is without any reported precedent. Although generally a debenture holder who has appointed receivers out of court under the debenture and/or an instrument of appointment has the right to terminate the appointment under and by virtue of the terms of the agreement, there is actually no recorded case of this being done, before the conclusion of the receivership. Certainly, there is none recorded where a receiver is in the process of realizing the assets of the company in receivership by exercising his power of sale to pay the debt of the debenture holder and he is dismissed at the point where he is about to do so. Certainly too, there is no recorded case where a receiver has refused to accept

his termination by his appointer. In all respects therefore this case is a first. Therefore, this case must be decided on first principles.

[17] To my mind this case requires me to consider the following issues;

(a) whether a debenture holder has the unconditional right to terminate a receiver it has appointed at the point of which the receiver is about to realize, by sale, the assets which have come into his hand and to pay off the debenture holder's debt; and

(b) whether a receiver appointed by a debenture holder under an instrument of appointment can, in any circumstance, refuse to accept his termination as lawful; or

(c) whether there is any circumstance in which the court of equity will treat a termination of a receiver as a breach of duty by the debenture holder who appointed him so as to render such termination invalid and so set it aside.

Summary of the debenture holder's basis for the termination

[18] The basis put forward by the defendants for terminating the receivers may be summarised as follows;

a) Pursuant to deed of appointment which allowed them to terminate by agreement;

b) The receivers had not complied with the instructions of the debenture holder;

c) The receivers' delay in effecting the sale;

d) The receivers wrongfully refused to allow the debenture holder sight of the Deed of Assignment Agreement with the preferred bidder;

e) The receivers failed to act honestly and in good faith.

The receivers' submissions

[19] Counsel for the receivers pointed to the fact that receivers, who are appointed under a debenture, are appointed with a view to sell and manage pending sale; in doing so, a receiver has a duty both to his appointer and to the company. The duty to the appointer, according to counsel, is to realise the security interest of

the debenture holder and to sell the charged assets to pay off the debt to his appointer. The duty to the company, she says, is to act honestly and in good faith when enforcing the security. Counsel cited section 2 of the Insolvency Act, and the cases of **Re Newdigate Colliery Ltd** [1912] 1 Ch 468; **Re B Johnson & Co (Builders) Ltd** [1995] 2 All ER 775; **Medforth v Blake** [1999] 3 All ER 97 and **Standard Chartered Bank Ltd v Walker** [1982] 3 All ER 938.

[20] Counsel submitted that, in their management of the company pending sale and in the exercise of their power of sale, the receivers need not take instructions from their appointer in relation to the conduct of the receivership. The receivers, she said, are only accountable to the debenture holder to the extent of the duty owed to them. In that regard, counsel argued, the receivers were not in breach of any duty to the debenture holder for failing to comply with their instructions.

[21] Counsel further argued that, the failure by the receivers to comply with the attempt to terminate by the debenture holder was based on the dire implications flowing from the time at which the debenture holder purported to terminate the receivership, as well as the extremely disproportionate prejudicial effect termination would have on the receivership. Counsel further argued that, knowing the stage at which the sale had reached, the purported termination by the debenture holder appeared contrary to the primary objective of realizing the charged assets. Counsel further submitted that due to this extraneous motive, the receivers would have been in breach of their duty to exercise their powers for proper purposes and expose them to personal liabilities. Counsel cited section 76 of the Insolvency Act and the case of **Downsview Nominees Ltd v First City Corp. Ltd** [1993] 3 All ER 626.

[22] Counsel further drew the court's attention to the fact that the receivers were still the registered receivers of the company at the Registrar of Companies, despite the publication in January 2018 of an interim receiver having been appointed by the debenture holder.

[23] Counsel also pointed to the fact that the termination would result in costs to the company to discharge their fees and the fees associated with the appointment of a new receiver. Counsel also asked the court to consider that after the purported termination, the debenture holder continued to accept and rely on the reports of the receivers which was tantamount to a waiver of the termination. Counsel noted that no termination procedures were in place, so that, as a matter of fact and law, the receivers could not have ceased operation without it amounting to an abandonment and dereliction of duty. Counsel asked the court to find that the purported termination was wholly void and of no effect.

[24] Counsel in addressing the claim that the receivers refused to allow the debenture holders sight of the deed of assignment agreement with the preferred bidder, pointed to the fact that the 2nd defendant was the principal of both the debenture holder and NURU, which was also a competing bidder. Counsel argued that due to the duplicity of roles, the receivers were justified in withholding access to confidential information. Counsel also pointed to the fact that there was a clear conflict of interest which extended to the fact that if the sale fell through with the preferred bidder, they would have to go to the second preferred bidder, which was the defendant's affiliate NURU.

[25] Counsel also denied that the receivers had failed to act honestly and in good faith by failing to act in a speedy and efficient manner and by acting on a "tainted bidding process". Counsel argued that the receivers carried out their duties imposed by law (citing section 74 of the Act) and under the deed of appointment. Counsel also argued that the claim that the bidding process was somehow 'tainted' and that the bid accepted was not an unconditional bid, is without merit. Counsel pointed out that part of the work of the receiver included negotiating with; (a) the Commissioner of Lands to get permission for the sub-lease for which there had been no permit, (b) the National Land Agency regarding the boundaries; (c) the Tourism Product Development Company (TPDCO) who inspected the hotel property as well as furnished a report; and (d) other stake holders.

[26] Counsel also noted that the receivership was interrupted by court action brought by the directors of the company against the receivers, which took three months. Counsel noted that there was a challenge to the receivership by the shareholders which was thrown out by the court. Counsel pointed to the fact that, in that action the debenture holder had defended the appointment. Counsel noted also that the debenture holder and the receivers had had a cordial, friendly and prudent relationship. Counsel pointed out too, that the relationship only broke down at the point of selection of the preferred bidder. Counsel submitted that it was only at that point that the debenture holders placed on record any concerns relating to the conduct of the receivers.

[27] The competitive tender process, counsel submitted, was quite rigorous and the criteria for the bids were set out in an Information Memorandum packaged for all bidders. She stated that a virtual data room was set up where all bidders could go and see the bid conditions and the conditions of sale and that draft documents were also included.

[28] Counsel submitted that the debenture holder had not presented evidence of any dishonesty or improper motive in the receivers, neither was there evidence that they had acted in bad faith. The debenture holder, she submitted, was more intent on owning the property and was less interested in realizing the debt. Counsel argued therefore, that the court ought to grant the declarations and orders sought in the fixed date claim form.

Defendants' submissions

[29] Counsel Ms Mclymont submitted on behalf of the defendants, that the debenture holder was entitled to terminate the receivers pursuant to its powers under the convertible debenture and by virtue of clause 7 of the deed of appointment. She said neither of those documents required the debenture holder to give any reasons for termination. However, Counsel argued, if reasons were required there were several reasons to terminate the receivers' appointment.

[30] Counsel submitted that the performance of the receivers was unsatisfactory and there now exist serious distrust between the parties, therefore the debenture holder was entitled to revoke the appointment. Counsel cited **Downsview Ltd v First City Corp. Ltd** and the *Law of Corporate Receivers and Receiver Managers* at page 81. Counsel pointed to the fact that on the affidavit evidence given by the 2nd defendant, the debenture holder had lost confidence in the receivers and was of the view that they have failed to act honestly and in good faith towards their appointer and the company.

[31] Counsel also argued that the receivers have breached their duty to act in good faith and for proper purposes which they owed to the debenture holder. Counsel cited the case of **Medforth v Blake** which she said described the duty owed to the debenture holder by the receivers**.** Counsel submitted that the many breaches include the receivers; (a) total disregard of the defendants' request to move to other bidders; (b) the lack of transparency; (c) the irregularities in negotiations with the preferred bidder; (d) the failure to provide the duly executed Deed of Assignment Agreement; as well as (e) the delays in completion. All of these, counsel argued were reasons to terminate the receivership. Counsel also argued that it was no excuse for the receivers to say that they have exercised the power of sale as this was not a barrier to their termination, especially in light of the fact that a new receiver had been appointed. Furthermore, counsel said, the termination was in accordance with the agreement between the parties.

[32] Counsel argued further, that the exercise of the power of sale by the receivers was no barrier to their termination because at the time of the notice of termination, the deed of assignment had not yet been executed. The termination, she said, was on the 8 June 2017 and the agreement was signed in and around 27 June 2017. Counsel submitted further, that even if the termination had taken place after a valid agreement was in place, it still would not have precluded a valid termination of the appointment at that time. Counsel argued that the indemnity given by the debenture holder to the receivers would protect them from

exposure to third party claims resulting from their breach of the agreement with the preferred bidder.

[33] Counsel argued that the receivers had abused their powers by exercising them otherwise than for the purpose of enabling the charged assets to be preserved and realised for the debenture holder. Counsel argued that in the bidding process, the bids were mandated to be unconditional offers and that, in so far as the preferred bidder's bid was a conditional one, the receivers breached their duty under the receivership in accepting it. Counsel also argued that the prolonged negotiations with the preferred bidder 'tarnished' the competitive process.

[34] Counsel also argued that the debenture holder was entitled to full and proper details of the bidding process and that the fact that an affiliate entity was a competitive bidder should not have prevented full disclosure once that entity was not selected. Counsel pointed out that the information was necessary so that the debenture holder could satisfy itself that the preferred bidder could complete the transaction and that any amendments to the deed of assignment would not prejudice the bidding process and the timeliness for completion. Counsel stated that non-disclosure and lack of transparency was a clear 'violation' of the receiver's duty and was in bad faith. Counsel also pointed to a failure to adhere to the monthly reporting regime as stipulated by the agreement and that the receivers had only provided ten (10) reports since their appointment in September 2015.

[35] Counsel stated that the receivers have failed to complete in time, have shown a lack of objectivity and fairness in their facilitation of the preferred bidder in granting extension of time for completion, rather than moving to the next preferred bidder. Counsel argued that to date there is still concern whether there is an executed agreement with the preferred bidder. Counsel noted that the relationship was now disrupted and there was no trust because of the delay between the selection of the bidder and date of the signature on the Deed of

Assignment Agreement. Counsel noted that it took six (6) months and the debenture holder had no knowledge of when there would be completion so the debenture holder took the view that it would not get back its money. Counsel noted that the debenture holder, having received no proof of sale as requested, had legitimate grounds to doubt and could not be expected to wait indefinitely.

[36] Counsel argued finally, that the receivers owed a duty to secured creditors and that the defendants had a second charge over the assets, which raised concern whether sufficient funds would be there to satisfy that debt also. Counsel also submitted that the termination being valid, the second receiver was validly appointed and should be allowed to conclude the receivership, including the Deed of Assignment Agreement. Counsel asked that the orders sought by the claimant be refused.

The applicable principles

[37] In this very unusual situation, I believe it is necessary to consider the law in relation to receivers, and their relationship to the company in receivership and the debenture holder who has appointed them. I will then apply those principles to the determination of this case. All references to receivers is inclusive of receiver-managers.

(a) The appointment of receivers

[38] Section 2 of the Insolvency Act 2014 provides that a "receiver":

> *"means a person who, pursuant to a security agreement or an order of a court made under any law that provides for or authorizes the appointment of a receiver has been appointed to take, or has taken, possession or control of any assets of the insolvent person or bankrupt."*

[39] A receiver is therefore, a person appointed for the collection in and/or protection of properly of a debtor or insolvent person. A receiver is either appointed by the court or by individuals or companies out of court under an instrument of

appointment. If appointed out of court, the receiver is an agent with such powers duties and liabilities as are defined by the instrument of appointment or by the statutory provisions under which he is appointed. Being an agent, he is also governed, to some limited extent, by the general law of agency. See **Ford v Rackham** [1853] 17 Bear 485.

[40] Any debenture holder may enforce his security by the appointment of a receiver. A receiver appointed under a debenture may be an agent for the company or of the debenture holder who appointed him. The debenture or the instrument of appointment usually expressly states whether the receiver is an agent of the company. The receiver, if he is expressed to be the agent of the company, is thereby authorised to act on behalf of the company.

[41] Debentures under seal issued by a company giving a floating charge over the assets of the debtor are viewed in law in the same way as mortgages. After the security has crystallised to a fixed charge, the debenture holder, as mortgagee, is entitled to appoint a receiver. The debenture deed itself may also give the power to appoint a receiver.

[42] A receiver appointed under the statutory power to do so is deemed to be the agent of the mortgagors and is entitled to be indemnified by the company in receivership for any acts lawfully entered into by him, but the mortgagee may, in special circumstances, also be bound by his acts. See **Stroud Building Society v Delament** [1960] 1 All ER 749, where it was held that a receiver, by reason of section 109 of the Law of Property Act 1925, was an agent of the mortgagor. Whether the receiver is the agent of the company or of the debenture holder is a matter of construction of the instrument of appointment, if not expressly stated. See **Cully v Parsons** [1923] 2 Ch 542 and **Deyes v Wood and others** [1911] 1 K.B. 806.

(b) The role of the debenture holder in the appointment of a receiver

[43] The rules governing the relationship between the debenture holder (as mortgagee), the company in receivership (as mortgagor) and the receiver (as agent) were developed in equity. In appointing a receiver, a mortgagee is in a relationship, akin to a fiduciary, to the mortgagor. Where a receiver is appointed under a deed, such as a debenture, the appointment is made by the mortgagee, with the consent of the mortgagor and the receiver so appointed becomes the agent of the mortgagor: See **Jeffery's v Dicksons** (1866) LR–1 Ch 183, per Lord Cranworth at page 190.The mortgagee, in making the appointment, acts with the consent of the mortgagor – per the debenture.

[44] It is however, possible to infer from the terms of the instrument of appointment that the receiver is the agent for the debenture holder. See **Re Vimbos** [1900] 1 Ch 470; **Robinson Printing Co. v Chic Ltd** [1905] 2 Ch 123 and **Deyes v Wood**. In such a case, the receiver becomes the agent of the debenture holder and is liable to recover their remuneration from them. A receiver so appointed is also personally liable to persons dealing with him but may be indemnified by the debenture holder. See **Robinson Printing Company**. Even then, for some purposes, the receiver will still be the agent of the company, especially when exercising the power of sale. See **Deyes v Wood** and **Rogerstone Brick and Stone Company** [1919] 1 Ch 110. A receiver is either an agent of the company or of the debenture holder who appointed him, as such, the principles applicable to the law of agency is also relevant as regards the receiver's personal liability to those with whom he does business.

[45] In **Downsview Nominees v First City Corp.**, the appeal required a consideration of the duties, if any, which a first debenture holder and a receiver-manager appointed by a first debenture holder, owed to a second debenture holder. The Privy Council held at page 633-634 that:-

> *"A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance,*

assignment or demise or by a charge on any interest in real or personal property. An equitable mortgage is a contract which creates a charge on property but does not pass a legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court ....

The security for a debt incurred by a company may take the form of a fixed charge on property or the form of a floating charge which becomes a fixed charge on the assets comprised in the security when debt becomes due and payable. ***A security issued by a company is called a debenture but for present purposes there is no material difference between a mortgage, a charge and a debenture. Each creates a security for the repayment of a debt****." (Emphasis added)*

[46] Later on in dealing with the duties of a receiver the Board held that:

> *"[W]hen a receiver and manager exercises the powers of sale and management conferred on him by the mortgage, he is dealing with the security, he is not merely, selling or dealing with the interests of the mortgagor. He is exercising the power of selling and dealing with the mortgaged properly for the purpose of securing repayment of the debt owing to his mortgagee and must exercise his powers in good faith and for the purpose of obtaining repayment of the debt owing to his mortgagee. The receiver and manager owes these duties to the mortgagor and to all subsequent incumbrancers in whose favour the mortgaged property has been charged."*

[47] The Board then went on to consider the nature and extent of that duty and said at page 635:

> *"Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for payment of a debt is only a mortgage.* ***From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and***

> ***secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantages to the borrower.*** *These principles and rules apply also to a receiver and manager appointed by the mortgage." (Emphasis added)*

[48] The debenture holder, like a mortgagee, owes equitable duties and equitable principles apply. The debenture holder must be diligent in discharging his debt and returning the property to the company. A receiver exercising the power of sale owes the same duties as the debenture holder. The Board in **Downsview Nominees v First City Corp.** said further at page 639 that:

> *"**A mortgagee owes a general duty to subsequent encumbrances and to the mortgagor to use his powers for the sole purpose of securing repayments of the moneys owing under his mortgage and a duty to act in good faith. He also owes the specific duties which equity has imposed on him in the exercise of his powers to go into possession and his powers of sale**. It may well be that a mortgagee who appoints a receiver and a manager intends to exercise his powers for the purpose of frustrating the activities of the second mortgagee or for some other improper purpose or who fails to revoke the appointment of a receiver and manager when the mortgagee knows that the receiver and manager is abusing his powers, may himself be guilty of bad faith but in the present case this possibility need not be explored.*
>
> *[The liability of the second defendant] in the present case is firmly based not on negligence but on the breach of duty. There was overwhelming evidence that the receivership of the second defendant was inspired by him for improper purposes and carried on in bad faith, ultimately verging on fraud." (Emphasis added)*

That case therefore decided that the receiver and the debenture holder both owe duties to the company in receivership (the mortgagor) and the receiver owes a duty to the debenture holder (the mortgagee). Those duties are owed in equity.

[49] In **Medforth v Blake** it was said that a mortgagee who appoints a receiver has no general right to instruct the receiver as to how or when to exercise the powers conferred on him. The court held that the receiver's main function is to assist the mortgagee in obtaining payment of the secured debt. The court also held that a receiver who exercises his powers in accordance with instructions given by a mortgagee will be liable to the mortgagor. Sir Richard Scott VC in handing down judgment said:

> *"If the mortgagee chooses to instruct the receivers to carry on the business in a manner that is a breach of the receivers' duty to the mortgagor, it seems to me quite right that the mortgagee, as well as the receivers, should incur liability. This conclusion does not in the least undermine the receivership system. What it might do is to promote caution on the part of mortgagees in seeking to direct receivers as to the manner in which they (the receivers) should exercise their powers. I would regard this as salutary."*

(c) The role of the Receiver

[50] The primary duty of a receiver is to get in and as is necessary, realize sufficient of the company's assets to satisfy the outstanding debt of the debenture holder who appointed him. A receiver's duties are owed first and foremost to the debenture holder who appointed him and the company in receivership. The receiver is not a fiduciary in the fullest sense but cannot use his powers for improper purposes: See **Downsview Nominees Ltd v First City Corp.** and LS Sealy: "*Cases and Materials in Company Law",* seventh edition, pages 583 to 592.

[51] The receiver's duty is therefore to, *inter alia*;

i. Collect and sell enough of the charged assets (collateral) to repay the debt owed to the debenture holder;

ii. Pay out money collected in the order required by law; and

iii. Report any possible offences or irregular matter they come across.

[52] The usual way in which the receiver will pay off the debt of the debenture holder is to sell the assets of the company in receivership. In the case of a company's business, the receiver may consider it prudent to carry on the business until they sell it as a going concern. Money from the sale of the assets is then paid to the debenture holder after the costs and fees of the receiver, accrued in collecting in the assets, have been paid.

(d) The receiver as agent

[53] Where the mortgage instrument so stipulated, the receiver is the agent of the mortgagor, otherwise he may be found to be the agent of the mortgagee. Where he is the agent of the mortgagor all directions given to and powers conferred on him are given and conferred by the mortgagor pursuant to the debenture. A mortgagee who has appointed a receiver, as agent of the company, has no right to instruct the receiver how to conduct the receivership. See **Medforth v Blake**. The receiver, on appointment, exercises his powers as agent for the mortgagor. Even though the receiver may be an agent for the company or the debenture holder he is not their servant and they cannot instruct him how to operate the receivership. As agent of the debenture holder he is liable to exercise his powers in accordance with the terms of his appointment but is not subject to the direct control or supervision of the debenture holder. A receiver who carries out his duties in accordance with the terms of his appointment, and in so doing acts in good faith and for proper purposes, is not liable to the principal, whether it is the debenture holder or the company, merely because the consequences differ from those which the principal had expected. See **Overend and Gurney Co v Gibb and Gibb** [1872] LR5 HL 480; **Commonwealth Portland Cement Co v Weber Lohmann and Co** [1905] AC 66, PC and **Downsview Nominees v First City Corp.**

[54] In **Downsview Nominees v First City Corp.** it was said that:

> *"The decisions of the receiver and manager whether to continue the business or close down the business and sell assets chosen by him*

> *cannot be impeached if those decisions are taken in good faith while protecting the interests of the debenture holder in recovering the money's due under the debenture even though the decisions of the receiver and manager may be disadvantageous for the company."*

[55] In **Re B Johnson & Co (Builders) Ltd** [1955] 2 All ER 775 at 780, it was emphasised that the receiver, in managing a company in receivership, was not doing so on behalf of the company but did so in order to facilitate the exercise of the mortgagee's power of sale, for the mortgagee's benefit, to enforce the security.

(e) Liability of receiver appointed out of court.

[56] A receiver of the property of a company appointed under a debenture bares the same personally liable as a receiver appointed by the court or under statutory provisions. The receiver so appointed, however, is usually indemnified by the company or the debenture holder. If he is indemnified by the company he may be entitled to be further indemnified by the debenture holders. See **Jennings v Mather** [1902] 1 KB 1 CA.

[57] Lord Templeton in giving judgment in the case of **Downsview Nominees v First City Corp.** held that if a mortgagee exercised his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. A receiver exercising his power of sale also owes the same specific duties as the mortgagee and if he exercises his duties in good faith and for proper purpose he too, is not liable to the mortgagor. The duty lies in equity not in negligence, but reasonable care must be taken in selling, to obtain a proper price.

[58] In **Kennedy v de Trafford** [1897] AC 180 Lord Herschell sought to define a failure to act in good faith and said of the receiver, that, "if he wilfully and recklessly deals with the property in such a manner that the interests of the

mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith." In **Medforth v Blake** it was said that the equitable duties were developed to ensure that the mortgagee dealt fairly with the mortgagor. So too the receiver. The duties were imposed to ensure the receivers manage the property whilst discharging their duties with a view to repaying the debt but nevertheless taking into account the interest of the mortgagor and others interested in the mortgage property. "A want of good faith and exercise of powers for improper motive will always suffice to establish a breach of duty."

[59] The following propositions were stated in **Medforth v Blake**:

> *"(1) A receiver managing mortgaged property owes duties to the mortgagor and anyone else with an interest in the equity of redemption.*
>
> *(2) The duties include, but are not necessarily confined to, a duty of good faith.*
>
> *(3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of the particular case.*
>
> *(4) In exercising his powers of management the primary duty of the receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid.*
>
> *(5) Subject to that primary duty, the receiver owes a duty to manage the property with due diligence."*

(f) Discharge of Receiver

[60] A receivership usually ends when the receiver has collected and sold all of the assets of the company in receivership or enough to repay the secured creditor; completed all their receivership duties and paid their receivership liabilities. Generally, the receiver resigns or is discharged by the debenture holder who appointed him. Unless another receiver has been appointed, full control of the company and assets go back to the directors. If the receiver is discharged and a

new one is appointed without delay the receivership remains continuous. See **Re: Whites Mortgage** [1943] Ch 166. There is no particular formula for terminating a receiver's appointment. In **Downsview Nominees v First City Corp.** the Privy Council stated that a dissatisfied debenture holder may revoke the appointment of his receiver manager. However, this is in the context of receivers found to be poorly performing and errant receivers who have been found to be abusing their powers. The appointment of a receiver by the court can also operate as a discharge of a previous appointment out of court. So too if the principal ceases to exist. See generally *Halsbury Laws of England, 4th edition, Vol 39* paragraph 802-807. See also R. Walton, "*Kerr on Receivers*", 14th edition at page 274. It is possible however, for a court not to countenance the discharge of a receiver for misconduct, where the appointer was the cause of it. See **Griffith v Griffith** 2 Ves. 400 cited in "*The Law and Practice as to Receivers Appointed By the High Court of Justice"* by William Kerr at page 349 to 350.

(g) Conflict of interest, improper purpose and good faith

[61] The receiver's primary duty is to the debenture holder who appoints him. However, in carrying out that duty the receiver must be cautious not to sacrifice the interests of the company, its shareholder or the general creditors. The receiver, like the mortgagee, must act in good faith in exercising his power of sale and must not disregard the interests of the company. He must take reasonable step to determine value of property to be sold: See **McHugh v Union Bank of Canada** [1913] AC 299 PC. To act in good faith means, *inter alia*, not to wilfully or recklessly sacrifice the interest of the mortgagor.

[62] **In Re B Johnson and Co (Builders) Ltd** at 790 -791 Jenkins LJ said:

> *"[A] receiver and manager for debenture holders is a person appointed by the debenture holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as condition of obtaining the loan, to enable him to preserve and realise the assets comprised in the security for the benefit of the debenture holders.*

> *…*
>
> *The primary duty of the receiver is to the debenture holders and not the company. He is receiver and manager of the property of the company for the debenture holders, not manager of the company.*
>
> *...*
>
> *Again his power of sale is, in effect, that of a mortgagee and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price…"*

[63] At page 636 of **Downsview Nominees v First City Corp.** it was also said that:

> *"[S]ince a mortgage is only security for a debt, a receiver and manager commits a breach of his duty if he abuses his powers by exercising them otherwise than "for the special purpose of enabling the assets comprised in the debenture holder's security to be preserved and realised for the benefit of the debenture holder."*

[64] At page 637 of that same case the Privy Council also held that a mortgagee who exercises his power of sale in good faith for the purpose of protecting his security is not liable to the mortgagor even if the sale was disadvantageous to the mortgagor. However, it was reiterated at page 639, that the mortgagee's general duty was to use his powers for the sole purpose of securing repayment of the moneys owing under the mortgage and in exercising that power, the mortgagee had a duty to act in good faith. Lord Templeton said at page 637 that:

> *"If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All ER 633, [1971] Ch 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition. A receiver exercising his power of sale also owes the same specific duties as the mortgagee."*

[65] The Privy Council ultimately found that:

i. The receiver had used his powers not for the proper purpose of realizing Downsview's security but in order to meet the managing directors' wish that the company should continue trading.

ii. Downsview ought to have accepted FCC's offer to redeem; and

iii. Each should compensate FCC for its losses.

[66] In **Yorkshire Bank plc v Hall** [1999] 1 All ER 879. Robert Walker LJ, delivering the judgment of the Court of Appeal, held that the general duty owed by a mortgagee to mortgagor (and subsequent encumbrances) is partly determined by the expressed terms of the agreement and partly in equity. The general duty is for the mortgagee to use his powers only for proper purposes and to act in good faith (applying the Privy Council decision in **Downsview Nominees Ltd v First City Corp.**). If the mortgagee exercises his power of sale he must take reasonable care to obtain a proper price. The same duty is equally owed by the receiver in the exercise of his powers.

[67] The cases demonstrate that a mortgagee or receiver exercising a power to sell the mortgaged property owes a duty to the mortgagor or the guarantor to take reasonable care to obtain fair value. Lord Deming in **Standard Chartered Bank Ltd v Walker** [1982] 3 All ER 938 said:

> *"He owes this duty not only to himself, to clear off as much of the debt as he can, but also the mortgagor so as to reduce the balance owing as much as possible, and also the guarantor so that he is made liable for as little as possible on the guarantee."*

[68] In **Medforth v Blake** the head note reads:

> *"Where a receiver managed property, his duties to the mortgagor and anyone else interested in the equity of redemption were not necessarily confined to a duty of good faith. Rather, in exercising his powers of management, the receiver owed a duty to manage*

the property with due diligence, subject to his primary duty of attempting to create a situation where the interest on the secured debt could be paid and the debt itself repaid.... Such a duty, like the duties owed by a mortgagee to the mortgagor, was imposed by equity.

Per curiam. A receiver cannot be in breach of his duty of good faith to the mortgagor in the absence of some dishonesty, improper motives or element of bad faith."

[69] Where there is a conflict between the interest of the mortgagor and mortgagee, any duty of care which the mortgagee owes to the mortgagor is subordinated to his right to act in the protection of his own interests. See Salmon LJ in **Cuckmere Brick and Co Ltd v Mutual Finance Ltd [1971] Ch 949.**

[70] The exercise of the power of the mortgagee can only be challenged on the grounds of bad faith, or *mala fides*, inclusive of any element of dishonesty or improper purpose. Neither a debenture holder appointing a receiver nor the receiver himself owes a fiduciary duty or general duty of care towards the debtor company (or any other interested party such as a creditor holding a subordinate security) but the powers of the debenture holder and the receiver it appoints, must be exercised in good faith and for proper purposes of enforcing the security. They may be held personally liable if loss results from the breach of these equitable duties. So that if an offer is made to redeem the secured debt (thereby extinguishing the charge), the debenture holder is bound to accept it. A limited duty to take reasonable care to obtain the best price available is owed to the company and other interested parties in the actual conduct of a sale of the charged property. The Privy Council in **McHugh v Union Bank** at page 312 noted that it was well settled law that the mortgagee had a duty, when realizing the mortgaged property by sale, to conduct such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

(h) Can a mortgagee sell to himself?

[71] A mortgagee cannot sell the mortgaged property to himself either alone or with others or to a trustee or agent for himself. See **Farrar** v **Farrar Pty Ltd** 73 (1888) 40 Ch D 395 and **Sewell v The Agricultural Bank of Western Australia** 74 [1930] 44 CLR 104. Lindley LJ in **Farrar v Farrar** stated:

> *"It is perfectly well settled that a mortgagee with a power of sale cannot as against the mortgagor sell to himself nor to anyone employed by him to conduct the sale... A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction."*

[72] The lack of independent bargaining power present in such a transaction forms the substantive basis for the rule. A sale of a property found to be in breach of this rule will be voidable in equity for constructive fraud or alternatively the property will be held in equity to remain subject to the mortgagee's right of redemption. See **Hotel Terrigal Pty Ltd (in liquidation) v Latec Investments Ltd** (No. 2) 77 [1969] 1 NSWR 676 at 679-80. However, the mortgagee may not be held to breach the rule if it sells to a company in which it is a shareholder and the sale is for a reasonable price**.** All reasonable efforts to sell otherwise must be made, however.

[73] In **Hotel Terrigal Pty Ltd** it was held that a sale and transfer of land to the mortgagee's own subsidiary whose directors were directors of the present company was not an exercise of the power of sale at all but was in substance merely a transfer to the mortgagee or its agent.

[74] In **ANZ Banking Group Ltd v Bangadilly Pastoral Co. Pty Ltd** [1978] 19 ALR 519, it was held that the transaction was not a proper exercise of the power of

sale because it was not an ordinary mortgagee sale in which the mortgagee sought to recover principal and interest, but rather, right from the time of the acquisition of the mortgage, there was always the plan that a company related to the mortgagee would purchase the company assets at auction. The sale was held to be invalid.

[75] In **Tse Kwong Lam v Wong Chit Sen and Others** [1983] 3 All ER 54, the Privy Council held that a sale by a mortgagee to a company in which the mortgagee was interested, could only be supported if it were proved that the sale was done in good faith and that the mortgagee took reasonable precautions to obtain the best price possible at the time of sale. The Board said:

> *"[O]n authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time."*

Even then the mortgagee must not buy from himself and it must be a genuine bargain.

Applicability of the principles to the present case

(i) The debenture

[76] The defendants claim a power to terminate the receivers pursuant to the debenture assigned to them from the DBJ on the 2 May 2014 and the Deed of Agreement appointing the receivers. Paragraph 12 (d) of the convertible debenture confers the power of sale and distress and to appoint a receiver and /or receiver-manager, on the debenture holder. Paragraph 18 of the said debenture gives the debenture holder the power to appoint a receiver and/or receiver manager of the mortgaged property at any time after the money secured becomes immediately payable. It also authorises the debenture holder to remove the receiver and/or manager so appointed and appoint another in his place.

[77] A receiver and/or manager so appointed had the powers conferred on him by the debenture and by law. The powers of the receivers under the debenture included the power to enter and take possession of the mortgaged property and take proceedings in the name of the company. With the debenture holder's concurrence, the receiver also had the power to manage the business of the company in receivership and to sell it. In selling the mortgaged property, the receiver had the power to do so in any manner and generally on any terms that he thought fit, in the name and on behalf of the company. The receiver was also empowered to do 'all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers' which he could do as agent for the company. The receivers also had the power to make any arrangements or compromise, as they thought expedient.

[78] The debenture provided that any receiver and/or manager so appointed was deemed to be an agent or agents of the company and the company alone was responsible and liable for their acts of default and their remuneration.

(ii) The instrument of appointment

[79] By Deed of Agreement dated 23 September 2015, the receivers Caydion Campbell and Wilfred Baghaloo were jointly appointed by the 1st defendant as the debenture holder. A condition of the appointment was the contemporaneous execution of a deed of indemnity issued by the debenture holder to the receivers. Article 1 entitled: Obligations of the Receivers, provided that:

> *"The Receivers shall carry out their services (hereinafter called "the Receivership") with due diligence and efficiency in a practical manner so as to maximize realization of all the present and future undertakings and assets of the Company charged under the Securities and notwithstanding the generality of the foregoing the Receivers shall:*
>
> *(1) Subject to the general law, carry out the general powers conferred on him by the Securities, do all such acts and perform such tasks as are conducive to the effective control and management of the*

Charged Assets and/or the marketing and disposal of the same in such manner as they deem fit; and shall:

(a) Not later than fourteen (14) days after being appointed Receivers publish a notice of their appointment in the form prescribed in one(1) issue of a local daily news paper in circulation throughout Jamaica;

(b) Take into their custody or control the collateral in accordance with the Securities;

(c) Deal with any property of the Company in their possession or control in a commercially reasonable manner;

(d) ...

(e) ...

(f) Prepare monthly summaries of accounts of their administration of the Charged Assets and other property of the Company;

(g) ...

(h) Act honestly and in good faith."

[80] They were also required to give account of the Receivership in meetings with the appointer's representatives and deliver written or oral reports as well as written reports on the Receivership to the appointer with regard to the items included in the Charged assets and any recommendations; interim reports on the charged assets monthly and within 90 days of the agreement a full report on the charged assets with substantive recommendations. They were also obliged to comply with their statutory duties and obligations under the Companies Act and the Insolvency Act or any directions by the Court. The agreement also provided for the receivers to be indemnified out of the charged assets.

[81] Article 7, on which the defendants rely to justify the termination of the receivers, provide that the receivers and/or the appointer may terminate the agreement upon not less than 30 days written notice and that upon receipt of such notice by either party the appointer and receivers shall take immediate steps to bring the

agreement to a close in a prompt and orderly manner and reduce expenditure to a minimum.

(iii) The events leading up to the termination

[82] After their appointment, the receivers set about carrying out their mandate. It was decided that it was best that the leasehold rights to the hotel property be sold as a going concern. Pursuant to that objective, the receivers entered into a sub-lease agreement with the debenture holder by which it would continue to operate the hotel on behalf of the receivers. The debenture holder was, therefore, in possession not as mortgagees but under the sub-lease agreement. The receivers called in the TPDCO to assess the hotel property which they did on the 7 October 2015. On the 13 October 2015, the work of the receivers was interrupted by a claim brought by the shareholders of the company in receivership, against them. That claim was determined on the 8 December 2015.

[83] The assets of the company were valued in November of that year and a report handed in on the 26 November 2015. Following a meeting with the Commissioner of Lands in December 2015, it was discovered that the sub-lease was a breach of the head lease and that no permission to sub-let had been granted to the company. The receivers had to seek and did receive approval to sub-lease thereafter. The receivers then sought to market the assets of the company and by August 2016 had circulated teaser documents and finalized the Information Memorandum. The sale was advertised on 7 August, 17 August and 18 August 2016. Twenty-seven (27) potential investors showed interest in the product between 8 August and 4 November 2016. In the meantime, the receivers conducted preliminary due diligence, answered questions and addressed the concerns of potential purchasers. The final bid date was extended at the request of potential buyers from September 2016 to December 2016. On 5 December 2016, 6 bids were received.

[84] The receivers then began ranking the bids, conducting an extensive system of evaluation. The preferred bidder was selected based on the criteria, but was also the highest bidder. The second ranked bidder based on the criteria was the 2nd defendant's company NURU, which was the third highest bidder.

[85] On 27 January 2017, the receivers received a request from the debenture holder to hold off on selecting the preferred bidder. On the 3 February 2017 the receivers wrote to the debenture holder informing that the process of finalizing the preferred bidder was on way, they having held off for two weeks to meet with the debenture holder. They then selected the preferred bidder and informed them of the selection on 16 February 2017.

[86] Between March and April 2016, there were negotiations with the preferred bidder on the contents of the draft Deed of Assignment Agreement. Part of those negotiations resulted from the receivers' offer to the preferred bidder of a short term lease to facilitate their possession of the property, until completion. The preferred bidder chose to forego this offer, preferring to await the execution of the Deed of Assignment Agreement for the full term lease. Another issue was the fact that the hotel was operating without license or permits, which was of concern to the preferred bidder, who had bid for a property with permits in place. As a result of the lack of permits and licenses, as well as the defects in the hotel property, the preferred bidder requested a "cure letter" for three years which was rejected by the receivers. Instead, the receivers assumed the responsibility for securing the license and permits and gave an 8 month indemnity from the date of assignment. The other aspect of the negotiations was to have the preferred bidder agree to accept less land than they had bid on in order to facilitate a request by the Port Authority of Jamaica to acquire a part of the land. The Port Authority of Jamaica would pay for the portion of the land they requested and that portion of the price was deducted from the original bid price made by the preferred bidder. The preferred bidder agreed to this. The revenue collected from the sale of the land would remain the same except the shortfall on the bid price would be met by the payment from the Port Authority of Jamaica. However, the

total figure was more than sufficient to cover the debt to the debenture holder, leaving a surplus. The revised bid price, resulting from the Port Authority's intervention was still competitive in relation to the other bids, in any event.

[87] Between 7 May and 9 May the preferred bidders met with the head lessee and other stakeholders. On the 8 June 2017 the defendants wrote to the receivers requesting a suspension of any further action on the basis that the defendants had reached an agreement with the company's shareholders. The receivers wrote the defendants informing them that there was no reason to suspend the sale as it was too far advanced to be halted. By letter dated 8 June 2017, the debenture holder purported to terminate the receivers, giving a 30 day notice. It also required the receivers to immediately cease any further negotiations for the sale of the company's assets.

[88] Through their attorneys, by letter dated 22 June 2017, the receivers indicated that the exercise of the power of sale had commenced with the selection of the preferred bidder and that any action to halt it would result in hefty financial consequences to all the stake holders. The Deed of Assignment Agreement was executed by the preferred bidder on the 27 June 2017. By 6 July 2017 having received no response, the receivers, through their attorneys-at-law, advised that having had no communication from the debenture holder they would continue as receivers uninterrupted, until the assets were realised and the debt owed to the debenture holder was discharged. They also indicated that evidence of the executed agreement had already been provided.

[89] Whilst the defendants accept that the receivers were not obliged to take instructions from them, they argue that the receivers owed them a duty to ensure that the debt was realized in a timely manner. This, they argued, the receivers failed to do. They further argued that the negotiations with the preferred bidder were unacceptably protracted and therefore the receivers failed in their duty to stick to the time line for recovery. They argued that the length of the delay was unacceptable. They also point out that it was only after the claim was filed that

they discovered that the preferred bid was not unconditional and therefore, ought to have been selected, as the Information Memorandum called for an unconditional bid.

[90] The defendants also argue that the debenture is convertible and should the transaction fail there are other options available, including reopening the bidding process or converting the debenture. The defendants also maintain that the joint receivers have failed to perform their duties as contractually agreed.

(iv) The issue of delay

[91] The receivers argue that the delay was unavoidable because;

(1) TPDCO had become involved;

(2) The time table was interrupted by the application for an injunction brought by the shareholders and directors of the company in receivership against the joint receiver managers;

(3) Guidance was necessary from the National Land Agency to accurately determine the boundaries of the various parcels of land which comprised the leasehold assets of the claimant;

(4) The assets were not attractive to the investment community which made marketing challenging. The extension of time was necessary to ensure that the properties were marketed to achieve optimum results;

(5) The appointer having entered the market to acquire the assets posed unprecedented challenges in reporting.

[92] I find that the defendants only began complaining of delays after the preferred bidder was selected. They have in fact admitted to this, as well as to having agreed to earlier extensions of time which became necessary for the reasons the receivers have given. With regard to the complaint of protracted delays in the execution of the deed of assignment agreement, I find that there is no bona fide

reason for this complaint. From February 2017 when the preferred bidder was selected, to June 2017 when the receivers were terminated at the point of the execution of the agreement with the preferred bidder, it can hardly be said that this was an interminable delay. The receivers were not selling a car or any regular consumer product; they were selling leasehold property rights which had proven notoriously difficult to sell. There were several other stake holders involved, including government entities which do not move until they move.

(v) The failure to inform and report

[93] The defendants complain that they received only ten reports out of a possible twenty reports that they should have received regarding the operation of the asset. However, I find this complaint ingenious since the debenture holder was the one in possession of and operating the asset. As stated by the receivers in their affidavit, there would be nothing to report on the operation of the asset. That would only have left the reports regarding the sale of the assets. The tenth report from the receivers dealt with: (a) the issue of Insurance over the hotel property (Brown Lands) which was not being paid by the debenture holder who was in possession; (b) the issue of the outstanding arrears on the lease owed by the debenture holder as sub-lessee (c) requested a confirmation of claims by the debenture holder as secured creditor for capital expenditure on the property; and (d) the expected outcome after the sale as well as the expected outcome should the sale fall through. All were within the scope of knowledge of the debenture holder with the exception of (d).

[94] The receivers also maintain that in order to maintain the integrity of the bidding process, certain information could not have been disclosed to the debenture holder. The related company NURU, being the second ranked bidder always had the possible chance of succeeding, if the agreement with the first ranked bidder fell through. The receivers also maintain that a validly executed Deed of Assignment Agreement exists (a redacted copy of which was exhibited) and it was necessary to withhold certain information from the defendants as the second

ranked bid from NURU International in which the 2nd defendant has an interest, would be the candidate for the leasehold rights, should the deal with the preferred bidder fall through. The debenture holder was informed of the receivers' stance on this issue by letter dated 29 May 2017.

[95] I find that the debenture holder having entered the fray as a purchaser, has created a conflict of interest with the receivers, therefore, the defendants cannot complain if the receivers sought to act honourably by not conflating their duty to the debenture holder with their obligation to the potential purchasers. Whilst there is an obligation to report to the debenture holder, the receivers are not obliged to take instructions from the defendants as to how to exercise their power of sale and are required to act independently. The decision in the case of **Knight v Lawrence** (1993) BCLC 215 underscores the necessity for a receiver to act independently of his appointer and to understand that he is not there to do only what his appointer tells him. The defendants' complaint in this regard is without merit.

(vi) The complaint regarding protracted negotiations after selection of the preferred bidder and that the bid was not unconditional

[96] The receivers indicated that the debenture holder's complaint regarding the deed of assignment agreement and the further negotiations were not valid because;

i) The executed Deed of Assignment Agreement did not materially deviate from the draft Deed of Assignment Agreement.

ii) The Information Memorandum clearly stated that there would be a period of negotiation with the preferred bidder as the documents were clearly stated to be in draft.

iii) That the request from the preferred bidder for a "cure period" to remedy defects highlighted by TPDCO was rejected but it was in the interest of all to continue discussions as the nature of the asset made it difficult to dispose of.

iv) The Information Memorandum clearly stated that timelines were indicative only, therefore, as was characteristic of private commercial contracts it was open to both sides to continue due diligence subsequent to the selection of the preferred bidder.

v) The delay in the execution of the Deed of Assignment Agreement was, therefore, a result of the negotiation process.

vi) Part of the negotiations with the preferred bidder is for them to forgo lands in which the Port Authority of Jamaica has expressed an interest in acquiring and which the preferred bidder has agreed to forego in the lease agreement.

[97] I find that the complaint that the transaction with the preferred bidder to execute the deed of assignment agreement was protracted is deliberately misleading and without merit. The Information Memorandum is not a contractual document and the selection of a bidder is only a first step in a sale by bid tender. It is hardly likely that the step from accepting the bid to signing a contract would be a single step. I stand to be corrected in my belief that this has never happened in a sale by tender.

[98] It is clear from the correspondence between the preferred bidder and the receivers, that the preferred bidders had natural concerns with regard to what was stated in the Information Memorandum and what was in the draft Deed of Assignment Agreement and wished to hold the receivers to what was stated in the Information Memorandum. Thus, their letter of 20 February 2017 pointing out that there was no mention of a short term lease in the Information Memorandum and holding the receivers to the offer of the assignment of the full term leasehold rights for which they had made their bid. There was also items not covered in the Information Memorandum, such as the permits and licenses and who was responsible for acquiring them, which had to be ironed out between the transacting parties.

[99] With regard to the claim that the bid was not unconditional and ought not to have been accepted, that was never a basis for the termination, since the defendants claim they only became aware of it after the claim was filed. However, the receivers deny that the bid is conditional as the sale is for vacant possession and to require a clean release upon transfer is not a condition of the bid but a condition of the sale, as stipulated in the Information Memorandum.

[100] In any event, the bid by the preferred bidder was the highest bid with a cash deposit component which was immediately payable to the receivership on assignment and was considered by them to be a cash settlement. This was of great advantage to the debenture holder whose debt would become immediately payable. In fact, the affidavit of Ms Debbie-Ann Gordon filed in this claim indicates that the preferred bidder has lodged sums to the client accounts under the control of the attorney-at-law for the receivers pursuant to the sale agreement. A bank guarantee/standby letter of credit has also been made for the balance on the sale price, awaiting completion of the transaction.

Can the claimant succeed?

[101] I find that at the time of the termination of the receivers, there was no valid basis for doing so. The 1st defendant was in possession of the hotel under a sub- lease from the receivers, held over from their possession under the sub-lease from the company prior to the receivership. The 1st defendant, and the 2nd defendant as its principal, had at all times shown a relentless objective to acquire the rights to the assets, which was ever present from even before the acquisition of the debenture. Their first attempt at acquisition of the property was the attempt to purchase the leasehold rights from the directors of the company. Having failed in that approach they purchased the company's debt from DBJ and appointed the receivers. Having appointed receivers and the receivers having decided to exercise their power of sale, the debenture holder and the second defendant as its principal, attempted to purchase the leasehold rights through a company in which the 2nd defendant is the principal. In so doing, the interest of the 1st defendant as debenture holder and the interest of the 2nd defendant as the principal of both the 1st defendant and the prospective purchaser, NURU, became conflated, so that the 1st defendant became unable and or unwilling to carry out its duty of good faith and to act for proper purposes.

[102] In the instant case there is a conflict between the interest of the debenture holder in obtaining the highest price for the company's assets and its interest in the

company's assets as a prospective purchaser who wishes to pay the lowest price possible. A sale by a receiver appointed by a debenture holder to a company in which the debenture holder had an interest, could only pass scrutiny if it was a sale at arm's length, in which the debenture holder played no part and made no interference in the decision. The appointment of receivers by a debenture holder to exercise the power of sale must be bona fide for the benefit of enabling the debenture holder to realize his debt and must be exercised for that purpose 'without corruption or collusion', see **Warner v Jacob** (1882) 20 Ch D 220 at 224, cited in **Tse Kwong Lam**.

[103] In this instant case the conduct of the debenture holder calls for close scrutiny and in this claim the court has to decide whether the act of termination was bona fide in the interest of the debenture holder or in the interest of NURU. Based on the evidence and on the conduct of the defendants, it appears to me that the debenture holder was not interested in the receivers closing the sale with anyone else but NURU. In terminating the receivers, the defendants were doing, not what was best for the debenture holder in being repaid, but what was best for NURU in acquiring the company's assets. To allow the debenture holder to do this is to place debtors who provide their lender's with debentures over the charged assets, in grave jeopardy. A mortgagee must act fairly towards his borrower.

[104] A receiver is an agent of the mortgagor, acting for the benefit of the debenture holder who hires him on the authority of the debenture, with the consent of the mortgagor. In terminating the receivers, the debenture holder was not acting in its own interest or in the subordinate interest of the company in receivership but were mainly acting in the interest of prospective purchaser NURU and as such they were acting for improper purposes. A sale to NURU in those circumstances would be liable to be set aside. Why then should the attempted termination not be liable to be set aside as invalid, having been done in bad faith and done for improper motives?

[105] Whether the receivers were properly terminated turns on whether they were in breach of their duties to the company or the debenture holder. Their duty is one based in equity and like all agents they are bound to take reasonable care in doing what they have agreed to do and to do it honestly and in good faith.

[106] Where the receiver is expressly made the agent of the mortgagor, though the mortgagee appoints the receiver, in making the appointment the mortgagee acts with the consent of the mortgagor given in the debenture. The receiver's main function is to collect in the assets, sell or manage with a view to sell and pay off the debts. The instructions to the receiver to do so, emanates from the debenture given to the mortgagee by the mortgagor. Therefore, between the receiver and the mortgagor, the receiver "stands in the position of a person appointed by a deed to which the mortgagee was no party": per Lord Cranworth in **Jeffreys v Dickson** at page 190. The debenture holder cannot, therefore, complain that the receivers were not following his instructions, for they are not the receiver's principals but are only the beneficiaries of the receivers' work.

[107] The receivers in this case are agents of the company and therefore the debenture holder is not liable as the principal for any of their actions. It is the company that is liable for their remuneration but beyond that the company is also liable to all persons dealing with the receivers. So if the receivers breach the agreement with a third party it is the company which will bear the cost of that breach, not the debenture holder. The financial prejudice will be to the company if the receiver or the debenture holder were to be allowed to act wilfully and recklessly in sacrificing the interest of the company.

[108] The entire manner in which the 1st defendant as the debenture holder and the 2nd defendant, as its principal, have gone about this business smacks of bad faith and improper purpose. The receivers were appointed under an instrument of debenture. Their duty was to realise the asset and if necessary sell it and pay off the debt. Their duty in doing so was to act in good faith and for proper purposes. The defendants, at every step, have shown that their interest in appointing the

receiver was not in having the debt repaid but in actually securing the assets for themselves. This is made clear by their conduct in;

(a) Joining the pool of purchasers;

(b) Insisting on being shown information which it was doubtful they were entitled to see as debenture holders and were certainly not entitled to see as potential purchasers;

(c) Requesting to suspend the sale when this was not in the interest of the debenture holder but only in the interest of NURU as a potential purchaser;

(d) Offering to the company to match the price of the preferred bidder, which was the action of a potential purchaser and not a debenture holder;

(e) Instructing the receivers in May 2017 to move on to the 2nd ranked bidder, which was their affiliate company with the third lowest bid which was not in the interest of the debenture holder but in the interest of a potential purchaser;

(f) Interfering in the sale process being conducted by the receivers;

(g) Terminating the receivers on very questionable grounds; and

(h) Appointing a new receiver in those circumstances.

[109] The duties and rights of the debenture holder are equitable. He who comes to equity must come with clean hands. It is clear that the defendants have forgotten the basis upon which receivers are appointed or have wilfully refused to acknowledge that the only basis for an appointment of a receiver or receiver-manager is to realize the assets of the company to pay off the debt to the debenture holder who appointed him. The new receiver-manager allegedly appointed by the debenture holder, if allowed to act, no doubt is expected by the appointer to cancel the agreement with the preferred bidder at the cost to the company and thereafter either move to the second bidder, which is the defendants' affiliate or enter into a direct contract with that affiliate, all to the benefit of the defendants. That receiver-manager cannot in any way be expected

to act independently and according to law and the rules of equity, if he is required to act on the direct instructions of the debenture holder.

[110] I have concluded on all the evidence that in purporting to terminate the receivers at the point where they had begun to exercise the power of sale, the defendants have acted in bad faith and for improper purpose. The receivers owe a duty to the debenture holder but they also owe a duty to the company. The receivers have not breached their duties to either.

[111] The power of sale is exercised when the mortgagee enters into an unconditional contract for sale. The mortgagee effectively exercises the power of sale once he or she enters into a binding contract for the sale of the mortgaged property. See **Forsythe v Blundell** [1973] 129 CLR 477. Once the preferred bidder was selected and informed of his selection the exercise of the power of sale had commenced. Once the contracts are exchanged, the equity of redemption is suspended and it is binding on the mortgagor even before completion. Up until the exchange, the mortgagor's equity of redemption and equitable right to redeem continues to exist. See **Waring (Lord) v London and Manchester Assurance Company (1935) Ch 310** and **Property and Bloodstock Ltd v Emerton (1968) Ch 94.** If the contract for sale is completed, the equity of redemption is terminated.

[112] A mortgagor who exercises his power of sale himself, may well be able to terminate the sale at any time and stand the consequences of his own actions. But even a mortgagee must act in consideration of his duty to the mortgagor and his actions must be for the protection of his own interest. If the mortgagee appoints a receiver to exercise the power of sale, different considerations apply, because the receiver's powers are unfettered, except by statute and by the terms of his contract. As agent of the mortgagor he owes specific duties both to the mortgagor and his appointer, and his governed by rules of equity and to a lesser extent rules applicable to agents.

[113] The transaction entered into with the preferred bidder by the receivers was so far progressed at the point of their purported termination, that the mortgagor's power to redeem would have been suspended. Since the execution of the agreement, the power to redeem is now extinguished. Why then should equity allow the debenture holder to terminate the receivers in a manner in which it is clear the interest of the mortgagor was being sacrificed to the interest of a third party? In **Forsythe v Blundell** the court found that the mortgagee had not acted in good faith and had recklessly sacrificed the interest of the mortgagor in the conduct of the sale.

[114] In any event apart from equity, under the law of agency, revocation of authority of an agent after partial execution of the authority may well be ineffective: See **Day v Wells (1861) 30 Beav 220,** where the proposition was left open, *semble,* that a vendor cannot, after real estate has been knocked down at an auction, and before the signature of the written contract, revoke the authority of the auctioneer. See also **Rhodes v Fielder, Jones and Harrison** [1919] 89 LJKB 15; and 148 LTJo 158, on appeal in the Kings Bench division before Lush and Sankey JJ, where Lush J said:

> *"[It] was argued that where the country solicitor instructs his London agents to brief counsel, and in the usual way the London agents, without their authority being in anyway fettered, have consultations with counsel and incur liabilities towards counsel, the country solicitor can revoke his authority to his London agents and leave them either to default or pay the counsel's fees out of their own pockets. I can only say that, in my opinion, such a position is entirely unsustainable. It is true that the London agents could not be sued by counsel for their fees, but that does not dispose of the question. If the London agents did not pay these fees they would be placing themselves in a very serious position. A solicitor having undertaken to pay fees to counsel and then refusing to pay them, would be guilty of misconduct. It is, therefore, impossible for the country solicitor to say after instructing his London agents that he can revoke his authority.* ***The defendants did what they did at the request of the plaintiff and made themselves responsible as***

> ***honourable members of their profession for the payment of these fees.*** *I think, therefore, that the master was perfectly right in holding that there was no power to revoke the authority given, and that the appeal must be dismissed with costs." (emphasis added)*

The principal in such a case was held to have no power, in such circumstances, to revoke the agent's authority.

[115] In **Luxor (Eastbourne) Limited and Others v Cooper** [1941] A.C. 108 Viscount Simon L.C considered that there may exist a class of case in which property is put into the hands of an agent to dispose of for the owner, and the agent accepts the employment and, it may be, expends money and time in endeavouring to carry it out. Such a form of contract, he said may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial effort and expense and certainly not after he has succeeded in finding a purchaser.

[116] In this case the receivers acted properly under the authority conferred on them by the deed of debenture and the deed of appointment in realizing the assets and exercising the power of sale. They chose to do so by a bidding process and accepted a preferred bidder. Their authority to realise the assets and sell was unfettered. They were the agents of the company and not of the debenture holder who appointed them. The convertible debenture specifically so stated. Nothing in the deed of appointment said anything to the contrary. Their expenses and remuneration was to be paid from the company's coffers. The debenture holder merely appointed them with the consent of the company. The debenture holder also had the power to terminate with the consent of the company, but they had no consent or authority to terminate in bad faith to the detriment of the company and in breach of their duty to the company.

[117] None of the matters complained of by the defendant's amounted to dishonesty, bad faith or improper purpose by the receivers. I accept the evidence of the receivers as to the manner in which they conducted the sale and the reasons for

the delay. I also accept that the defendants' only "lost confidence in the receivers" after NURU lost the bid and the receivers refused to suspend the sale.

[118] Whether or not the Deed of Assignment Agreement was executed before the purported termination of the receivership is irrelevant for this purpose, because up to the point where the deed had been sent to the preferred bidder for execution, the 1st defendant, as debenture holder, could not terminate the appointment of the receivers; this is because the purpose for which they were appointed, that is, to realize the assets and exercise the power of sale, would have already been far advanced in train. Up to 8 June 2017 when the request for suspension of the sale was made by the debenture holder, the Deed of Assignment Agreement had already been sent to the preferred bidder for execution and the debenture holder was so informed. The termination letter came immediately, thereafter.

[119] The consequences to the receivers' reputations as honourable men, and the financial costs to the company in receivership would be entirely disproportionate, grave and disastrous, if the defendants were allowed to do that which they have purported to do. The defendants' have complained of delay in the sale and paying off the debt, but this complaint is void of sincerity, when the course of action they have undertaken is likely to result in even greater delay; and the costs to be borne lies almost entirely with the company in receivership. It is further evidence that the defendants' ultimate goal is not for the debenture holder to be repaid but to own the asset of the company in receivership, whatever the detrimental effect the route to achieving this objective may have on the company. It is clear that they are perfectly willing to wilfully and recklessly sacrifice the interest of the company for the purchaser's interest. This, a court of equity will not allow.

[120] A conflict of interest arose between the position of the debenture holder and the position of its principal as the potential purchaser. This led them into the unfortunate position where they failed to act in good faith and for proper

purposes. Although the authorities say that in a conflict of interest between the mortgagor and mortgagee the duty owed by the mortgagee to the mortgagor is subordinated to his right to act in his own interest; see **Cuckmere Brick and Co),** this does not give the mortgagee the right to subordinate the interest of the company for that of an affiliate company to the mortgagee. If the mortgagee is duty bound to accept an offer to redeem the secured debt and thereby extinguish the debt to him, I see no reason why the mortgagor, once he has appointed a receiver to exercise the power of sale, should not be held to be duty bound to accept that a receiver has found a suitable buyer for the company at the best price available which will extinguish the debt, once the receiver as acted in good faith and for proper purpose.

[121] A mortgagee or a receiver when exercising the power of sale owes a duty to the mortgagor to take reasonable care to obtain a proper price. Where there is sufficiency of assets to cover the debts, the mortgagee has nothing to complain of. Therefore, any lack of due diligence in the management of the company or the conduct of the sale will not accord to the detriment of the mortgagee but to the mortgagor.

[122] The claimant had no choice but to make this application and is entitled to succeed. The defendants were determined to force them to act in bad faith and to the detriment of the company. All the costs of what the defendants were determined to do would have to have been borne by the company in receivership. Any liability for breach of contract with the preferred bidder would have to be borne by the company. The indemnity agreement with the receivers indemnifies them out of the company assets and the debenture holder was liable to pay only to the extent that the sums exceeded what the company was able to pay. The Companies Act 2004 provides at section 349 (1) that:

> *"S. 349 (1) A receiver or manager of the property of a company appointed under the powers contained in any instrument shall, to the same extent as if he had been appointed by order of a court be personally liable on any contract entered into by him in the*

> *performance of his functions, except in so far as the contract otherwise provides, and entitled in respect of that liability to indemnity out of the assets; but nothing in this subsection shall be taken as limiting any right to indemnity which he would have apart from this subsection, or as limiting his liability on contracts entered into without authority or as confirming any right to indemnity in respect of that liability."*

Conclusion

[123] A receiver appointed under a debenture expressly stating he is the agent of the company is personally liable for all transactions entered into by him but may be indemnified by the company. Although he is appointed by the debenture holder, he is an agent for the company and owes equitable duties to both the company and the debenture holder who appoints him. The receiver is appointed to realize the assets of the company in receivership with the purpose of repaying the company's debt to the debenture holder. In doing so his duty is to act in good faith and for proper purposes.

[124] The debenture holder, who exercises his power of sale, owes a duty to the mortgagor to use reasonable care to obtain a fair value. His duty is also to act in good faith and for proper purpose of repaying his debt and returning the surplus to the company. The exercise of the power can be challenged on the ground of bad faith, and improper purpose. The receiver appointed by the debenture holder owes the same duties.

[125] On the evidence, the clear intent of the debenture holder, was to own the assets of the company in receivership, rather than to have it sold to repay the debt, and the manner in which they have gone about achieving this end, portrays an element of bad faith and improper purpose. The refusal to accept that there is a valid preferred bid accepted by the receivers and the termination of the receivers for failing to follow their instructions to suspend the sale to the preferred bidder, as well as claiming that the receivers were in breach of their duty to act honestly and in good faith, is evidence of the defendants' bad faith.

[126] The power of sale had been partially executed at the time of the purported termination and it is doubtful as a matter of principle under the laws of agency whether the debenture holder could terminate at this point, in any event.

[127] I have therefore, concluded on the issues in this case that:

i) The debenture holder has the right to terminate a receiver appointed by him but in doing so he must act bona fide in good faith and for proper purposes. The right to terminate must not be exercised, for example, for the purpose of wilfully sacrificing the interest of the company in receivership for the interest of a third party purchaser of the company's assets.

ii) A receiver acting honestly and in good faith is duty bound to seek the direction of the Court, if he is terminated in such circumstances.

iii) Where the Court has found that the debenture holder was acting in bad faith and for improper purposes in terminating a receiver who was exercising his power of sale in carrying out his duty to the debenture holder, the court will hold, on equitable grounds that such a termination is invalid and a court of equity will set it aside.

iv) There is also authority on which I am inclined to rely, to the effect that the authority given to an agent (of which a receiver is one such) cannot be withdrawn at the point where the power of sale was being executed or had been executed. Therefore any withdrawal by termination of such authority was at least improper and at most invalid.

Disposition

[128] The claimant is entitled to and has succeeded in this claim for the declaration and orders in paragraph 1-6 of the fixed date claim form filed November 24, 2017. The attorneys-at-law for the claimant are at liberty to settle the exact form of these orders as per the minute of orders. The claimant is entitled to costs as against the defendants to be agreed or taxed.