[2012] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 122/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

IN THE MATTER OF SECTION 213A OF THE COMPANIES ACT

AND

IN THE MATTER OF AN APPLICATION BY MADAM A FOR AN ORDER IN RESPECT OF CASH PLUS LIMITED

BETWEEN	**CASH PLUS LIMITED (In Liquidation)**	**APPELLANT**
AND	**MADAM A**	**RESPONDENT**

Hugh Wildman for the appellant

Mrs Melrose Reid and Mrs Kayann Balli for the respondent

John Vassell QC, Courtney Williams and Mrs Julianne Mais-Cox instructed by DunnCox for the former co-interim receiver-managers of Cash Plus Ltd

16, 17, 18, 19, 20 April and 5 October 2012

HARRIS JA

[1] I have read, in draft, the judgment of my brother Brooks JA and agree with his reasoning and conclusion. There is nothing I wish to add.

PHILLIPS JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[3] In order to protect her identity, for reasons of personal safety, a former employee of the appellant, Cash Plus Limited (Cash Plus), was allowed to use the pseudonym, "Madam A", to maintain a claim that she had filed against Cash Plus, in the Supreme Court. In that claim, which was also said to have been filed, in part, to secure the personal safety of the employees of Cash Plus, Madam A asked the court to appoint receivers for the company. Two co-interim receivers were appointed in accordance with her request but the Trustee in Bankruptcy, who is liquidator of the company, (hereinafter called "the liquidator") and was subsequently appointed in place of the receivers, has challenged the appointment of the co-interim receivers, as being invalid. On 4 November 2011, Sinclair-Haynes J dismissed the challenge and Cash Plus, at the instance of the liquidator, has appealed against that decision.

[4] The essence of the liquidator's challenge is that the appointment of the receivers is in breach of the provisions of section 213A of the Companies Act (the Act) which

governs such appointments. The submissions made by Cash Plus, before this court, contained a number of threads. These included the complaint that the appointment was made without notice of the application having been given to Cash Plus, the complaint that part 51 of the Civil Procedure Rules (CPR), under which auspices the appointment was made, was inappropriate for such applications and the complaint that no security was given by the co-interim receivers in respect of their appointment. Cash Plus also complained that the learned judge was wrong in refusing to set aside a previous order of the court approving the fees of the receivers.

[5] The respondents to the appeal, Madam A and the former co-interim receivers, have strenuously resisted the appeal. Issue was joined in respect of all the matters outlined above.

The factual background

[6] Very few of the contested issues turn on the background facts of the instant case. It would, however, assist in understanding Madam A's motivation for filing the claim and the motivation of the liquidator for making the challenge, if a few facts were set out.

(a) Madam A's motivation

[7] Cash Plus has been described as providing alternative investment opportunities to those traditionally available on the financial landscape. It offered high interest rates to members of the public and used the funds acquired by that means, to finance

investments made by companies affiliated to Cash Plus. The income generated by the affiliates was to have provided the means by which Cash Plus would repay its creditors.

[8] Eventually, Cash Plus ran into severe difficulties. These, perhaps, started on 28 December 2007, when the Financial Services Commission issued a Cease and Desist Notice, ordering Cash Plus to cease transacting business with its lenders. In January 2008, National Commercial Bank (NCB) closed all the accounts that Cash Plus and its affiliates held with NCB. The situation facing Cash Plus on 31 March 2008, when Madam A filed her claim, was described by Sinclair-Haynes J, at paragraph [5] of her judgment:

> "During the period between the service of the Cease and Desist Order…and the 31st March 2008…[Cash Plus] was unable to transact business with its lenders. Consequently, no payments were made to its over [45,000.00] creditors."

[9] The amended fixed date claim form filed by Madam A stated as follows:

> "The Claimant Madam "A" Officer of the Defendant, of 10 Holborn Road, Kingston 10 in the parish of Saint Andrew claim (sic) against the Defendant, CASH PLUS LIMITED of 10 Holborn Road, Kingston 10, in the parish of St. Andrew an order under Section 213A of the Companies Act to rectify the matters that are oppressive and/or unfairly prejudicial to the officers and creditors of the Defendant."

[10] In the affidavit that Madam A filed in support of the claim, she deposed that the debt that Cash Plus owed to its creditors was "in excess of JA$26 Billion". She also stated that Cash Plus' chairman, Mr Carlos Hill, had previously, "made a public commitment to commence discharging this indebtedness on March 31, 2008". It was,

however, apparent to her that the funds to facilitate fulfilling that commitment would "not materialize in time for the commencement of the payment on the much publicised deadline, and that unless immediate arrangements [were] put in place under the supervision of the Court, the disappointed creditors may well take matters into their own hands and endanger both the staff and property of [Cash Plus] and its affiliates" (paragraph 5).

[11] With the large number of creditors, the amount of the debt and the tone of various telephone calls and approaches made to her by creditors, Madam A spoke of her "fears for the safety of the staff", the "threat of phyical danger" from irate creditors and the risk to the staff of criminal and civil prosecution. She was also of the view that the company's assets would be at risk from irate creditors. She opined that the conduct of Cash Plus' affairs was "oppressive in relation to me and other senior members of management" (paragraph 9). She, consequently, sought the appointment of interim receiver-managers until the determination of the claim.

[12] The application was placed before M. McIntosh J on 31 March 2008. No formal notice had been previously given to Cash Plus but its legal officer, who had filed the claim on behalf of Madam A, secured the attendance at the hearing, albeit at short notice, of Mr Christopher Goulbourne, Cash Plus' vice-president of operations. McIntosh J made the order appointing co-interim receiver-managers and granted an injunction preventing Cash Plus, for a period of 28 days, from disposing of its assets. McIntosh J

also ordered that all the court documents in the matter be served on Cash Plus within seven days of her order.

(b) The liquidator's motivation

[13] McIntosh J's order was amended on 7 April 2008, to, among other things, extend its reach to all the affiliates of Cash Plus. A number of applications were made to the Supreme Court during the progress of the claim and eventually the liquidator was appointed as provisional liquidator for Cash Plus and the affiliates. By order made on 28 October 2008, the liquidator replaced the co-interim receiver-managers as receiver for Cash Plus and the affiliates. There was, nonetheless, thereafter, some level of co-operation between the former co-interim receiver-managers and two successive holders of the office of Trustee in Bankruptcy.

[14] As a result of that co-operation, certain assets were disposed of and certain fees claimed and expenses incurred by the former co-interim receiver-managers were paid. These were, however, to be important issues leading to a breakdown of comity between the former co-interim receiver-managers and the third holder of the office of the Trustee in Bankruptcy.

[15] During the time of their appointment, between 31 March 2008 and 28 October 2008, the former co-interim receiver-managers had racked up fees of $39,422,704.75 and expenses amounting to $246,361,952.50. The overwhelming majority of those expenses was payable to PricewaterhouseCoopers Ltd, a Jamaican company, and PricewaterhouseCoopers (US) International LLC, having an address in the United States

of America. Both of these firms had an association with either one or both of the former co-interim receiver-managers.

[16] On a without notice application, heard on 11 November 2008, R. Anderson J approved those fees and costs. The sum of $100,000,000.00 has been paid, so far, in respect of those debts. On the application of the former co-interim receiver-managers, the affidavit in support of their application for the approval of their fees was ordered sealed.

[17] On 27 November 2008, at a hearing at which the liquidator was present, Anderson J ordered that the "fees charged, and to be charged, by the co-interim Receiver/ Managers...and all expenses, debts and liabilities incurred by [them]...be paid in priority, on an indemnity basis, out of the collective assets of [Cash Plus]..." (paragraph (a) of the order). The second of the three liquidators appointed to that post did not object to the calculation of the sums or to the liability to pay them.

[18] That individual was, however, succeeded by the third holder of the office of liquidator. Although he did join in an application by the former co-interim receiver-managers to sell one of the properties in order to pay the fees and expenses incurred by them, the successor was unable to reach agreement with the former co-interim receiver-managers in respect of a number of other issues, including the amount of the fees and expenses incurred. Having failed to reach any compromise, he instituted the application constituting the abovementioned challenge. If the thrust of his challenge, that the appointment of the former co-interim receiver-managers was void, were to

succeed, it could mean that they would have no proper claim, whatsoever, to any fees or expenses.

The challenge

[19] In order to properly analyse the challenge which was placed before Sinclair-Haynes J, it would assist if the major aspects of the application before her were set out. The challenge was contained in a notice of motion, dated 29 March 2011, which sought:

> "1. A declaration that the appointment of the Co-Interim Receiver/Managers under Order of the Court made on the 31st March 2008 was improper and therefore ineffective.
>
> 2. An Order that the Injunction granted on March 31, 2008 herein, as varied by Order dated April 7, 2008 and extended on April 28, 2008 until further order be discharged.
>
> 3. An Order that the Co-Interim Receiver/Managers provide the Trustee in Bankruptcy with copies of all documents including Sales Agreements and Statements of Account with respect to all transactions and dealings involving the assets of Cash Plus Limited, its subsidiaries and affiliates, including all properties disposed of during the Receivership.
>
> 4. An Order that the Co-Interim Receiver/Managers provide the Trustee in Bankruptcy with copies of all reports of their receivership.
>
> 5. An Order that the Co-Interim Receiver/Managers pay to the Trustee in Bankruptcy all sums held on account of Cash Plus Limited, its subsidiaries and affiliates forthwith.

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

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

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

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

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

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

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

[20] Sinclair-Haynes J, in her judgment, noted that the parties had agreed to the discharge of the injunction mentioned in paragraph 2 of the notice of motion. Despite finding that she had no jurisdiction to set aside the orders appointing the former co-interim receiver-managers, and approving their fees and expenses, she made orders that the former co-interim receiver-managers provide full disclosure to the Trustee in Bankruptcy. This included the reports by the former co-interim receiver-managers, the documents relating to the sale of properties by them and the documents relating to their fees and expenses incurred during their time in office.

The grounds of appeal

[21] The grounds of appeal were numerous; it is only necessary to set out the salient portions contained in the notice of appeal dated 8 November 2011:

"a) That the learned Trial Judge erred in law in holding that Section 213A(b) of [the Act] did not require the giving of Notice to the Company before the Judge exercised a discretion to appoint a Receiver/Manager….

b) The learned Trial Judge erred in law in holding that Part 51 of the [CPR] dealing with the appointment of Receivers precludes the need for the giving of Notice under section 213A of [the Act] prior to a judge making an Order appointing a Receiver Manager under the said Section…

c) The learned Trial Judge erred in holding that the Affidavit of Madam 'A' provided a basis on which the Court could have been satisfied that the conditions

existed for the appointment of a Receiver Manager on a Without Notice application.

d) - f…

g) The learned Trial Judge failed to give recognition to the principles [of natural justice] which principles were binding on the learned Trial Judge.

h) The learned Trial Judge failed to appreciate that there is no distinction in the application of the ultra vires doctrine in both public and private law: ***Credit Suisse v Allerdale BC*** [1996] 4 All ER 129.

i) The learned Trial Judge erred in law in holding that the appointment of the Receiver Manager under Section 213A did not require a specific finding by the Court for the requirement of the posting of a bond by the Receiver Manager to validate the appointment…

j) The learned Trial Judge erred in holding that in the circumstances of the present case, the Judge who heard the application for the appointment of the Receiver Manager must be presumed to have exercised a discretion to dispense with the posting of the bond by relying on Part 51.4(2) of the [CPR].

k) …"

[22] On 20 November 2011, Cash Plus filed nine additional grounds of appeal. Some of these grounds were, in large measure, variants of the grounds originally filed. There were some grounds which did, however, involve some new aspects. These were:

"4. The learned Trial Judge erred in law and in fact in that she failed to appreciate that in the absence of a Consent Judgment between the Appellant and the Respondent Madam "A", nothing purportedly said in the Respondent's Affidavit could result in a waiver of the Appellant's right to contest any of the issues raised under Section 213(A) of the Companies Act.

5. The learned trial judge erred in law in that she failed to appreciate that the subsequent service of the Orders made by the Court on the Appellant could not have cured what was a nullity in the ex parte application.

6. The learned Trial Judge erred in law and in fact as she did not appreciate that the purpose of the Affidavit of Mrs Teisha Grant-Morgan, exhibiting the invoices submitted for payment by the Receivers, clearly demonstrates that the sum of over Eighty Million Dollars ($80,000,000.00) was incurred by PriceWaterhouseCoopers, a body corporate, in breach of the principles of sub delegation *delegatus non potest delegare*, and contrary to Section 341(1) of the Companies Act.

7. The learned Trial Judge erred in law and in fact in declining to review the apparent excessive fees based on the principles enunciated in: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

8. …

9. The Learned Trial Judge erred in law in holding that the purported Receivers had the power of sale of the company assets."

The analysis

[23] Each of the issues raised in the appeal against Sinclair-Haynes J's refusal to set aside the prior orders, will be addressed in turn.

(a) <u>The absence of notice</u>

[24] The first issue to be dealt with is the decision of Sinclair-Haynes J in respect of the absence of notice. This issue comprises two elements. The first is that Cash Plus

contends that section 213A requires notice to have been given to a company that is to be affected by an order made under that section. Mr Wildman, for Cash Plus, submitted that it is only after notice has been given to the company and it has had an opportunity to be heard, that the court can be "satisfied" that the condition, stipulated by the section, exists. The second element is Cash Plus' submission that natural justice requires a court to give a company an opportunity to be heard, before it will make an order that adversely affects that company.

[25] In the analysis of the first element, it would be of assistance if the relevant provisions of section 213A were set out:

> "213A.-(1) A complainant may apply to the Court for an order under this section.
>
> (2) If upon an application under subsection (1), the Court is **satisfied** that in respect of a company or of any of its affiliates-
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company, **the Court may make an order to rectify the matters complained of**.

> (3) The Court may, in connection with an application under this section make any **interim** or final order it thinks fit, including an order-
>
> (a) restraining the conduct complained of;
>
> (b) **appointing a receiver or receiver-manager**;
>
> (c) – (n) ..."
> (Emphasis supplied)

[26] Mr Wildman's submission, in respect of section 213A, turned on the interpretation of the word "satisfied", as it is used in the section. Learned counsel alluded to the standard of proof in criminal cases, namely proof beyond reasonable doubt, as a partial backdrop for his submissions. In order to be satisfied in such cases, learned counsel argued, the court would have had to hear both sides and even if it rejected the accused's explanation, would have had to go back to the prosecution's case to see if it met the required standard.

[27] Against that background, Mr Wildman made this statement at paragraph 10 of his written submissions:

> "The state of mind of being **satisfied** involves the application of procedural and substantive law. Procedural law here involves giving the accused the opportunity of being heard. Where a Court is derelict in the application of those variables of procedural and substantive law, any conclusion of being **satisfied** is flawed and is liable to be quashed...."
> (Emphasis as in original)

[28] I am unable to agree with Mr Wildman's submission on this point. I do not accept that section 213A prevents a court from making an interim order, without notice having been given to the company to be affected by the order. The court may be satisfied as to the existence of a situation provided for in the section, without the relevant company having been alerted as to the existence of the application.

[29] The term "satisfied" has been variously defined in several decided cases and, depending on the context, been held to mean, among other things, "to be honestly satisfied in your own mind"; "*prima facie* satisfied"; "satisfied on reasonable grounds" and "satisfied beyond reasonable doubt" (see Stroud's Judicial Dictionary Fifth Edition pages 2236-7). In **Blyth v Blyth** [1966] 1 All ER 524, Lord Pearson at page 541F, said that the phrase, "is satisfied" meant, "simply 'makes up its mind'".

[30] None of these definitions implies any requirement to hear from parties having competing views. The question of whether the decision is reasonable is a different issue completely, but for the purposes of section 213A, I accept as correct the interpretation given to the phrase "is satisfied" by Sinclair-Haynes J. The learned judge said at paragraph 124 of her judgment:

> "The words 'is satisfied' cannot be construed to mean *inter partes*. The only logical requirement [of section 213A], in light of the court's authority to proceed *ex parte*, is that the evidence before the court must attain the required level of cogency and is sufficiently urgent."

[31] I also accept that to be able to make an order, a court may apply a different standard depending on whether the application is made without notice, or upon full

arguments from both sides. In the former case, the court may only need to be "prima facie satisfied" whereas in the latter, it would have "made up its mind".

[32] The fact that section 213A(3) allows for interim applications, in my view, means that Parliament contemplated that there may be urgent situations that require action by the court, without notice having been given to the relevant company. Admittedly, an interim order need not be an order made without notice. The term is neutral in that regard. In light of that neutrality, and in light of the fact that no other provision in the Act, including Part VI thereof, which deals with receivers and managers, specifies the method by which receivers are to be appointed, one may then look to the rules of procedure for assistance.

[33] At this point, it would be convenient to dismiss, as untenable, a submission by Mr Wildman that an application made pursuant to section 213A should be made by petition. The circumstances wherein a petition is required are specifically stipulated. That was the practice even before the advent of the CPR. Order 5/5 of the 1997 Supreme Court Practice (The White Book), which would have been incorporated into our Judicature (Civil Procedure Code) Law (CPC), by section 686 thereof, stated:

> "Proceedings may be begun by originating motion or petition **if, but only if**, by these rules or by or under any Act the proceedings in question are required or authorised to be so begun." (Emphasis supplied)

[34] In the dispensation of the CPR, rule 8.1 stipulates that civil proceedings in the Supreme Court must be started by the filing of a claim form. Rule 2.2 of the CPR, in

respect of company matters, only excludes "insolvency (including winding up of Companies)". The learned editors of Civil Procedure 2007 (The White Book) in addressing the equivalent to our rule 8.1 state at rule 7.2.1:

> "The plethora of originating process previously available in the High Court (writ, originating summons, originating motion, and petition)...are all abolished and replaced by the 'claim form'."

There is no provision in the Act which allows an application to appoint a receiver to be made by way of a petition.

[35] Having dealt with the issue of the commencement of the proceedings by petition, I shall now turn to the procedural rules by which the provisions of section 213A may be given effect.

[36] There is no provision in the CPR that excludes section 213A from its scope. Mr Wildman submitted that the appointment of a receiver under the section would fall within the scope of insolvency and therefore, rule 2.2 would exclude it from the operation of the CPR. I, however, cannot agree with that submission.

[37] Firstly, the arrangement of the Companies Act does not support that submission. Part V of the Act is concerned with winding up of companies while Part VI deals with receivers and managers. Secondly, whereas, in part V there is a specific reference to the rules governing winding up, there is no such provision in Part VI. At the very end of Part V, in section 340, the question of the applicable rules is addressed. Section 340(4) states that the applicable winding up rules are the English Companies (Winding Up)

Rules 1949, which, the section states, "shall be read and construed as part of" the Act. Section 340(5) makes it clear that the Judicature (Rules of Court) Act, under which aegis the CPR were promulgated, "shall not apply in relation to any matter for which provision is made in this section". There is no similar restriction imposed in respect of Part VI. In my view, there is no support for Mr Wildman's submission on this point. I find that the court may have reference to the CPR when considering the appointment of a receiver for a company. That reference will now be made.

[38] The rules of procedure in civil cases are governed, for the most part, by the CPR. Rule 11.8 of the CPR allows applications to be made without giving notice if this is permitted by a rule or a practice direction. There are rules provided in these circumstances. Rule 51.2 (3) allows an application for the appointment of a receiver to be made without notice in cases where there is an application for an immediate injunction. The applicability of this rule will be discussed below, and in the event that it is found to be applicable to circumstances such as those in the instant case, this rule would give guidance to applications made pursuant to section 213A. In addition to rule 51.2 another rule is relevant. Rule 17.3 (3) allows the court to grant interim remedies on applications "made without notice if it appears to the court that there are good reasons for not giving notice".

[39] Subject to the applicability of part 51 of the CPR to circumstances such as those in the instant case, there is, on that analysis, a prescribed procedural framework for a

without notice application to be made, in seeking the interim appointment of a receiver, pursuant to section 213A.

[40] The existence of such a framework for a remedy prescribed by Parliament makes untenable the elaborate submissions by Mr Wildman that the *audi alteram partem* (hear the other side) rule applies in applications made pursuant to section 213A.

[41] In respect of the second element of Mr Wildman's submission regarding the absence of notice, he submitted that the hearing by McIntosh J on 31 March 2008 "was a grave breach of fundamental law i.e. the right to a hearing" (paragraph 21 of his written submissions). He argued that the appointment of the co-interim receiver-managers was therefore a nullity and that Cash Plus was entitled to have it set aside *ex debito justitiae*, or as a matter of right. Along that line, learned counsel argued that where the order of the court is a nullity, the invalidity cannot be waived. Thus, he submitted, the fact that previous holders of the office of liquidator, co-operated with the former co-interim receiver-managers, could not validate the appointment of the latter. He cited a number of cases in support of these submissions including the decision of this court in **National Transport Co-operative Society Ltd v The Attorney General of Jamaica** SCCA No 117/2004 (delivered 6 June 2008).

[42] If, however, the right to make an order is given to the court on an application made without notice to the other side, then the natural justice point on which Mr Wildman seeks to rely, has been swept aside by Parliament, for these purposes. It is, undoubtedly, a frequent occurrence in the Supreme Court for injunctions, even

debilitating freezing orders, to be ordered without notice of the application having been given to the respondent. The CPR allow this procedure, albeit in specific circumstances. They go on to prescribe that the without notice order, once made, must thereafter be brought to the attention of the respondent (see rule 11.15).

[43] The critical flaw in Mr Wildman's submission is that it does not account for the fact that these are interim remedies. This is not a case where a party is condemned without having been given an opportunity to be heard. Mr Wildman's reliance on various administrative law principles and cases concerned with the principles of natural justice, such as **Board of Trustees of the Maradana Mosque v Badiuddin Mahmud and Another** [1967] 1 AC 13, is, in my view, misplaced, in the face of Parliamentary sanction for a procedure which allows interim applications to be made without notice.

(b) The applicability of part 51

[44] Closely connected to the issue of the absence of notice is Cash Plus' complaint that part 51 of the CPR does not apply to applications made pursuant to section 213A. Mr Wildman argued that the CPR, being subsidiary legislation, could not amend a statutory provision. He submitted at paragraph 35 of his written submissions:

> "Clearly, it was not permissible for the learned judge to construe Part 51 of the [CPR] inconsistent with or derogating from [section 213A] which is a primary legislation and must take precedence over the [CPR]."

[45] In order to assess Mr Wildman's submission, it is necessary to set out the relevant provisions of part 51.

> "Scope of this Part
>
> 51.1 This Part deals with the appointment of a receiver and **includes** an application to appoint a receiver to obtain payment of the judgment debt from the income or capital assets of the judgment debtor.
>
> Application for appointment of a receiver and injunction
>
> 51.2 (1) An application for the appointment of a receiver must be supported by evidence on affidavit.
>
> (2) The applicant may also apply for an injunction to restrain the judgment debtor or other respondent from assigning, charging or otherwise dealing with any property identified in the application.
>
> (3) **Where an application for an immediate injunction is made, the application for the appointment of a receiver and for an injunction may be made without notice**.
>
> (Rules 17.3 and 17.4 deal with applications for interim injunctions.)" (Emphasis supplied)

[46] After quoting the rules in part 51 in full, Mr Wildman submitted that they were of "limited application". Learned counsel then went on to submit, at paragraph 37 (the second of two paragraphs bearing that designation) of his written submissions, that part 51 "was not intended to apply to receivers under special statutory provisions such as the Companies Act". He went as far as submitting that under part 51:

> "...it is clearly stated that these rules governing the appointment of receivers are applicable in circumstances where the receiver is being **appointed to collect a judgment debt**. The applicant applies to the Court for a

> receiver to be appointed to protect that judgment debt....The appointment must be confined strictly to the collection of the judgment debt". (Emphasis as in original)

[47] It would be apparent from even a cursory reading of rule 51.1, that Mr Wildman is not on good ground with that submission. The rule is concerned with the court's authority to appoint receivers and in giving guidance as to the exercise of that authority, states that the guidance **includes** an application to appoint a receiver to collect judgment debts. There is no foundation for Mr Wildman's submission seeking to restrict the authority to the collection of judgment debts. It must fail.

(c) The 'Olint requirement'

[48] A reading of rule 51.2(3) harkens back to the earlier analysis of Cash Plus' contention that it was entitled to notice. If part 51 is the method by which section 213A(3)(b) is given effect, and I find that it is, then rule 51.2(3) is the provision which allows an application for the appointment of a receiver to be made without notice. It is for the learned judge, before whom the application is placed for hearing, to determine whether the circumstances warrant the application being heard without notice. This is a matter of a discretion to be exercised by that judge and this court will not lightly interfere with an exercise of discretion (see **Birkett v James** [1977] 2 All ER 801 at page 804).

[49] Mr Wildman, on this point, submitted that the last-minute summoning of Cash Plus' vice-president of operations, Mr Christopher Goulbourne, was a wholly inadequate method of giving notice to Cash Plus. He cited, in support of his submission, the

judgment of Lord Hoffmann in **National Commercial Bank Jamaica Ltd v Olint Corporation** [2009] UKPC 16, which exhorted the need to give notice, even short notice, to a respondent before considering applications for injunctions.

[50] McIntosh J heard the application in the instant case before their Lordships' decision in **Olint**. That fact does not nullify the principle enunciated by Lord Hoffmann. It would seem that counsel appearing for Madam A at the time, had the principle in mind when she secured Mr Goulbourne's attendance at the hearing. Mr Goulbourne, in an affidavit sworn to on 29 March 2011, deposed that Mrs Minett Lawrence, Cash Plus' director of corporate legal and regulatory affairs, asked him to attend the hearing. He stated that he was, however, ignorant of the nature of the application before the court and ignorant of the reason his presence was required.

[51] Mrs Reid for Madam A dismissed Mr Goulbourne's protestations of ignorance. Learned counsel pointed to the affidavit of Madam A sworn to on 1 February 2011 and that of Mr Carlos Hill sworn to on 26 May 2008. In the latter affidavit, Mr Hill deposed that, on Mrs Lawrence's advice, he had agreed to an application for the appointment of the receiver, albeit on specific conditions, which included that the appointment should affect Cash Plus only and not its affiliates. An affidavit of one of the former co-interim receiver-managers reveals that, prior to Madam A's application being filed, a meeting was held to discuss the role of the receiver-managers to be appointed. Present at that meeting were Mr Hill, Mrs Lawrence, Mr Richard Newman, who was a manager at Cash Plus and the proposed receiver/manager. Together, these affidavits made it clear, Mrs

Reid submitted, that this application had been made, as a part of a strategy by Cash Plus to avoid an untidy and unhappy situation with its creditors.

[52] Mrs Reid especially pointed to the fact that, on the day immediately before the application, Mr Carlos Hill had announced that he would seek to have a receiver appointed for the company. In a personal statement published in the Gleaner of Friday 11 April 2008, days after the appointment, Mr Hill vowed to "work with the Receiver/Manager to come up with a new payment schedule as soon as funds are in place". In the circumstances, Mrs Reid submitted, neither formal notice nor additional time was needed to bring Cash Plus into the picture. On her submission, Madam A and Cash Plus' legal adviser, in filing the application for the appointment of the receiver-managers were carrying out the bidding of Mr Carlos Hill.

[53] I accept, as accurate, the analysis of the relevant factual situation as set out at paragraph 33 of the written submissions for the attorneys-at-law for the former receiver-managers:

> "…there must be a hollow ring to a complaint about breach of natural justice by a company which through its Director of Legal and Corporate Affairs [Minette Lawrence] and its Chairman (Carlos Hill) and others in the Defendant planned, orchestrated and decided upon the application to seek the appointment of the Receiver of the Company; who knew of the timing issues involved, the urgency created by its own default in paying its creditors and which, immediately after the making of the order, adopted and advertised it, and sought to appease the public demands by reference to it."

[54] Despite Mr Goulbourne's protestations of ignorance, I find that there was evidence that Cash Plus was fully aware of and an abettor to, the application to appoint the receiver-managers. Sinclair-Haynes J was, therefore, entitled to find, as she did, that there was no breach of natural justice and no breach of the principle of notice as set out by Lord Hoffmann in **Olint**.

(d) Whether section 213A applied to the instant case

[55] Counsel for Madam A and for the former co-interim receiver-managers both argued that it was not in issue before Sinclair-Haynes J, whether Madam A had proved an oppressive situation in order to satisfy 213A. It is apparent, however, that the learned judge did consider the point in her judgment. She said at paragraph [118] of her judgment that the "contents of Madam 'A's' [sic] affidavit demonstrated that the 'requisite elements of both oppression and unfair prejudice were established'".

[56] Mr Wildman in his oral submissions and in a number of interjections while opposing counsel were addressing us, asserted that as the proceedings before McIntosh J were void, because of the absence of notice, there was no need to consider the content of the evidence leading to the order. Despite those assertions, ground (c) of Cash Plus' appeal focuses on that aspect of Sinclair-Haynes J's decision. Mr Wildman also made some submissions in support of that ground. It is therefore necessary to address it here. There are two elements to this issue. The first is whether Madam A had the standing to bring the claim and the second is whether the oppressive situation had been proved.

[57] Sinclair-Haynes, in addressing the issue, first set out the provisions of section 213A(2) and (3). These are the provisions that require the proof of oppression and stipulate the remedies available to the court. Having done so, she identified that Madam A was an officer of Cash Plus. She then noted that, on the authority of **In re H.R. Harmer Ltd** [1959] 1 WLR 62, the situations which constitute oppression for the purposes of the statute are "infinitely various". Finally, in arriving at her conclusion on the point, the learned judge considered the evidence that Madam A had provided before McIntosh J.

[58] The learned judge made a comprehensive analysis of the submissions before her. It does not appear from her analysis or from the written submissions before her, that there was any issue joined as to whether Madam A was a person entitled to bring the claim. She, therefore, did not seek to address that point as an issue.

[59] Mr Wildman submitted, in this court, that Madam A was not an officer of Cash Plus. He argued that her statement made at paragraph 2 of her affidavit filed on 31 March 2008, demonstrated that. There, she had deposed that she had "always worked under the instructions of the Chairman and other members of the Group's management team". On that basis, learned counsel submitted, Madam A had not proved that she fell within the categories of persons who were entitled to bring the claim against Cash Plus under section 213A.

[60] It is to the relevant provisions of the Act to which one must refer in order to analyse this issue. Section 213A authorises "a complainant" to make the relevant application. The term "a complainant" is defined in section 212(3) as follows:

> "(3) In this section and sections 213 and 213A, "complainant" means-
>
> (a) a shareholder or former shareholder of a company or an affiliated company;
>
> (b) a debenture holder or former debenture holder of a company or an affiliated company;
>
> (c) a director or officer or former director or officer of a company or an affiliated company."

The term "officer", for the purposes of the Act, is defined in section 2:

> "'officer' in relation to a body corporate includes a director, manager or secretary;"

[61] The evidence before McIntosh J in respect of Madam A in this regard may be found in Madam A's affidavit filed on 31 March 2008. At paragraph 9 of her affidavit, she described the situation set out above, in the section of this judgment describing her motivation, as "oppressive in relation to me and other senior members of management". At paragraph 11 thereof she said that the "staff, managers and other members of the company are unfairly prejudiced by [Cash Plus'] delay in making the appropriate financial arrangements for the discharge of the debt". In an affidavit filed on 5 May 2008, Madam A deposed that she was an "Accountant/Manager of CASH PLUS LIMITED". It is also to be noted, although this was not before McIntosh J, that at

paragraph 2 of her affidavit filed on 1 February 2011, Madam A deposed that she had been Cash Plus' accountant/chief financial officer.

[62] On the question of what could constitute oppression, it is to be noted that in **Butler v Butler** (1993) 30 JLR 348, a director had usurped the management of the company and was, among other things, neglecting to pay its just debts. Carey JA, in giving the judgement of this court, said, at page 353F:

> "…I am of the view that oppressive conduct under section 196 is constituted where the conduct is at least unfair or prejudicial to the interests of the member or members on whose behalf the petition is presented."

The learned judge was dealing with provisions under the previous Companies Act, but the sense of what would constitute oppression may be considered applicable to section 213A.

[63] In my view, not only did Madam A demonstrate that she was a member of the ranks of management but she also demonstrated that there was a situation of prejudice and danger in respect of the personnel employed at Cash Plus, in whatever capacity, and danger in respect of Cash Plus' property. Oppression had therefore been proved.

[64] Based on that analysis, I find that there was sufficient evidence by which McIntosh J could properly have come to the view that Madam A was a manager and officer of Cash Plus and therefore a proper complainant for the purposes of section 213A. For that reason, Sinclair-Haynes J was entitled to find that McIntosh J "was

therefore properly entitled to exercise her discretion to appoint [the former co-interim receiver-managers]" (paragraph 118 of the judgment).

(e) The failure of the former co-interim receiver-managers to provide security

[65] The next major issue raised by Mr Wildman is the fact that the former co-interim receiver-managers did not provide security in respect of their appointment. On learned counsel's submission, the failure to provide security voids the appointment and therefore, Cash Plus is entitled to have the appointment set aside, as of right. For these purposes, although Mr Wildman's primary submission is that no proper appointment could be made pursuant to part 51, the alternative submission, on my understanding of the submission, is that this particular appointment was in fact "contrary to the letter and spirit of Part 51" (paragraph 43 of the written submissions).

[66] The relevant rule is rule 51.4. It states:

> "**Giving of security by receiver**
>
> 51.4 (1) The general rule is that a person may not be appointed receiver until that person has given security.
>
> (2) The court may however dispense with security.
>
> (3) The order appointing the receiver must state the amount of the security.
>
> (4) The security must be by guarantee unless the court allows some other form of security.
>
> (5) The guarantee or other security must be filed at the registry." (Emphasis as in original)

[67] McIntosh J's order is silent as to the giving of security. In his submissions before Sinclair-Haynes J, Mr Wildman argued that where the court intends to dispense with the provision of security, it must do so expressly. Learned counsel for both Madam A and for the former co-interim receiver-managers, before us, submitted that the silence as to the provision of security, as well as the silence as to any amount of such security, must be interpreted as a decision by the court to dispense with the provision of security. Mr Vassell QC submitted that "[t]he non-imposition of the requirement is reliable evidence that the Court has dispensed with it" (paragraph 40 of his written submissions).

[68] No clear authority was cited for any of these submissions. Mr Vassell cited another case at first instance where the order was similarly silent. That, with respect to learned Queen's Counsel, does not advance the analysis of the issue. I am, however, inclined to disagree with Mr Wildman. I do so, on the basis that the court did not require the former co-interim receiver-managers to provide security and therefore their actions, in conformity with the order of the court, cannot be nullified for that reason.

[69] I am also convinced that since this was a discretion available to the court and that Cash Plus, through its previous liquidators co-operated with the former co-interim receiver-managers, as if their appointment was valid, Cash Plus may not now complain of the absence of the security. I adopt the reasoning of Bingham J (as he then was) in **In the matter of Burke Successors Ltd** (1989) 26 JLR 252 in respect of a similar point. He found, at page 257I, that a requirement for the provision of security of costs

was "effectively waived" by the company which was the subject of the winding up petition.

[70] Based on the above reasoning, I disagree with Mr Wildman's submission that the failure of the court to mention security in its order renders that order a nullity.

(f) The appointment of ineligible entities to the office of receiver

[71] Continuing with his complaints against the appointment of the former co-interim receiver-managers, Mr Wildman submitted that PricewaterhouseCoopers Ltd, being a corporate entity, could not properly act as a receiver, nor be delegated by the receivers to assist in their tasks. In this regard, Mr Wildman argued that the "fees incurred by PricewaterhouseCoopers are illegal for being in breach of [the Act]; and represents [sic] an unlawful act of delegation of the powers given by the Court to the [former co-interim receiver-managers]" (paragraph 61 of the written submissions). Learned counsel cited section 341(1) of the Act, which disqualifies a body corporate from being appointed as a receiver. Another submission made by Mr Wildman, which is connected to this point, was that "an examination of the invoices submitted reveals that a substantial part of the fees were incurred in the name of PriceWaterhouseCoopers [sic], a body corporate" (paragraph 45 of his written submissions).

[72] Since PricewaterhouseCoopers was not formally appointed by the court as the receivers, learned counsel stressed the aspect of delegation. He submitted that there was an "impermissible delegation of authority by the Receiver/Managers" to PricewaterhouseCoopers. Accordingly, Mr Wildman submitted, the fees incurred by

PricewaterhouseCoopers were incurred without authority and are not recoverable from Cash Plus. Sinclair-Haynes J did not address these submissions in her decision. In my view, had she done so, she would have been entitled to give them short shrift.

[73] The orders of the court below do not support Mr Wildman's submissions. The record shows that McIntosh J, on 7 April 2008, expressly authorised the former co-interim receiver-managers to employ the services of PricewaterhouseCoopers in carrying out their functions. The order stated in part:

> "3. For the purposes of carrying out their functions and exercising the powers, duties and obligations conferred upon them by the Court, for the duration of their appointment the co-interim Receiver/Managers is [sic] permitted, whether jointly or severally, to:
>
> i. retain the services of attorneys-at-law...
> ii. **engage and utilise the services of employees and consultants of PricewaterhouseCoopers in Jamaica and in the United States**;
> iii. – viii. ..." (Emphasis supplied)

[74] In the face of that express authorisation by the court, the former co-interim receiver-managers did not delegate a power that had been delegated to them. In the circumstances, the ground is cut from beneath Mr Wildman's submissions on this point and they must fail. **Ellis v Dubowski** [1921] 3 KB 621 and **Portman Building Society v Gallwey and Another** [1955] 1 All ER 227, which he cited in support thereof, are therefore, of no assistance to Cash Plus, as neither case dealt with an appointment by the court.

[75] It must also be pointed out that the invoices exhibited to the affidavit of Ms Teisha Grant-Morgan, sworn to on 12 August 2011, do not support Mr Wildman's submission. The invoices presented by PricewaterhouseCoopers, as exhibited, are all addressed to one or other of the former co-interim receiver-managers. They charge for professional services rendered.

[76] It is true that some of the documents exhibited, seem to suggest that PricewaterhouseCoopers was of the view that it was conducting the receivership. These documents are headed "Task Analysis – Hours Charged". The first item on each of these documents states "General Receivership management and oversight including reports to the court". It must also be pointed out that there is a similar document for each of the former co-interim receiver-managers. It does not seem, however, that these are invoices, considering that the invoices, mentioned above, bear an invoice number and cover similar periods to those covered in some of the "Task Analysis" documents. I am of the view, however, that even if these "Task Analysis" documents had been tendered as invoices, they could not, merely by being tendered as such, convert the status of PricewaterhouseCoopers from one of providing services to the former co-interim receiver-managers to one of usurping the role of receiver. There is nothing to indicate that PricewaterhouseCoopers approached the court or carried out any act, which suggested that it was, itself, acting in the role of receiver.

[77] Based on the above, there is nothing that required any intervention by Sinclair-Haynes J in respect of this aspect of the matter.

(g) The quantum of the fees and expenses incurred

[78] Mr Wildman argued that the fees charged by the former co-interim receiver-managers and PricewaterhouseCoopers were "outrageously unreasonable". He submitted that the learned judge who approved those fees acted "arbitrarily and unreasonably in approving those exorbitant fees" (paragraph 45 of the written submissions). Such charges, he submitted, were contrary to the terms of the appointment of the former co-interim receiver-managers.

[79] In respect of this complaint, Mr Wildman submitted that McIntosh J, "acted arbitrarily and unreasonably in allowing the Receiver/Managers to run up fees of over Two Hundred Million Dollars ($200,000,000.00) and granting an Order [sic] for them to sell properties of the company to realise those fees without any rational basis for supporting those fees" (paragraph 53 of the written submissions).

[80] It is to be noted that in the order made on 7 April 2008, McIntosh J also established the framework by which fees would be charged by the receiver-managers and their consultants. The relevant portion stated:

> 5. The regular charge out rates for PricewaterhouseCoopers staff and consultants in Jamaica and the United States be [sic] approved by this Honourable Court as their basis for charging for services rendered and for fees charged by the co-interim Receiver/Managers arising from or connected with the pursuit of this action and carrying out of the functions, duties and obligations as co-interim Receiver/Managers. Such charges for PricewaterhouseCoopers Jamaica and the United States staff, consultants and the co-interim

> Receiver/Managers to be determined on the basis of PricewaterhouseCoopers letters of engagement to the co-interim Receiver/Managers. Further, the terms contained in the said letters of engagement will govern this engagement insofar as the same are not contained in nor inconsistent with any order of this Honourable Court."

Paragraph 6 of the order stipulated that the letters of engagement should remain confidential and would only be disclosed to the court and on the order of the court.

[81] It is in pursuance of those orders that PricewaterhouseCoopers and the former co-interim receiver/managers submitted their respective invoices. As mentioned above, those invoices were approved and were ordered to be paid on a priority basis.

[82] Other than to state that the sums are so large that they must have been approved in "defiance of logic or accepted moral standards" (paragraph 53 of the written submissions), Mr Wildman has not demonstrated the flaw in the calculation of the fees. It is of significance that the second of the three liquidators appointed for Cash Plus did not oppose the level of fees and expenses that had been incurred. In his affidavit filed on 20 November 2008, that individual stated at paragraph 11 that he had been served with the court order in respect of the fees of $39,422,704.75 and expenses of $246,361,952.50. At paragraph 12 of the affidavit he stated:

> "**THAT** I am not opposed to the payment to the Co-interim Receiver managers of their fees and expenses and I recognise the priority of their claim. However, there are other fees and expenses including redundancy payments calculated by the Co-interim Receiver/Managers to be $41,596,165.93 for which there is a deadline of November 28, 2008 and for which funds are not readily available for the payment of same and as such, I would ask that an

> arrangement be made with the co-interim Receiver/Managers for the payment of their fees and expenses." (Emphasis as in original)

[83] In seeking to find a principle by which the validity of the fees and expenses may be assessed, it is clear that the view of the holder of the office of liquidator for the time being cannot assist. In the context of where rule 51.5 of the CPR specifically states that "[t]he receiver may be allowed such remuneration as the court may direct", I also find that Mr Wildman's reliance on administrative law cases cannot assist, in these circumstances, in assessing an order of a judge of the Supreme Court.

[84] Mr Wildman also submitted that the order charging Cash Plus' assets with the sums due to the former co-interim receiver/managers is also flawed. It is to be noted that where a receiver is appointed by the court, his right to remuneration is limited to the assets under the control of the court, and in case of a shortfall, cannot be otherwise enforced (see **Boehm v Goodall** [1911] 1 Ch 155). It cannot be unreasonable for the court, in protecting the interest of the receiver, which it has appointed, to secure the fund from which he will be paid. **Mellor v Mellor and Others** [1992] 4 All ER 10 is authority for the principle that the receiver is entitled to a lien over all the assets under the control of the court and not only those which he has taken into his possession. In order to succeed on the points on which it has based its complaints, Cash Plus has to do more to show that Sinclair-Haynes J was wrong in refusing to disturb the orders made in relation to the fees and expenses of the former co-interim receiver-managers. This ground must fail.

(h) The granting of a power of sale to the former co-interim receiver-managers

[85] Cash Plus also applied to Sinclair-Haynes J to set aside an injunction granted to the former co-interim receiver-managers preventing the liquidator from selling any of the properties owned by Cash Plus. Allied to that injunction is an order of Anderson J, made on 27 November 2008, whereby the former co-interim receiver-managers were granted the power to sell certain properties, belonging to Cash Plus, in order to satisfy the fees and expenses incurred during the time that they were in office. According to Cash Plus, the injunctions create for the former co-interim receiver-managers, a priority to which they are not entitled in law. As was mentioned above, Mr Wildman complained that McIntosh J's order of 7 April 2008, authorised the co-interim receiver-managers to "sell properties of the company to realise those fees without any rational basis for supporting those fees" (paragraph 53 of the written submissions).

[86] Sinclair-Haynes J refused to address this complaint on the basis that the orders were made by judges of co-ordinate jurisdiction. She did, however, in the context of the receivers' fees, refer to **Mellor v Mellor and Others**. That case, as shown above, is authority that protection should be granted to receiver-managers for their fees and expenses. Sinclair-Haynes J cannot be faulted for her approach in respect of this aspect of the challenge raised by Cash Plus. It should be noted that the injunctions, preventing the sale of the properties, were discharged by consent.

Sinclair-Haynes J's jurisdiction

[87] In her well-reasoned judgment Sinclair-Haynes J carefully examined all the arguments in respect of the elements concerning notice and correctly, in my view, decided that McIntosh J "was therefore properly entitled to exercise her discretion to appoint [the former co-interim receiver-managers]" (paragraph [118] of the judgement). In her concluding comments in respect of that issue as well as other issues dealt with by her, Sinclair-Haynes J made it clear that she had no authority to review the orders of judges of co-ordinate jurisdiction. That comment applied to the orders made by McIntosh J as well as to those made by Anderson J. The learned judge cited, in support of her stance, the case of **Leymon Strachan v The Gleaner Company Limited** [2005] UKPC 33.

[88] Counsel for all three parties made extensive submissions on the point of the jurisdiction residing in Sinclair-Haynes J in respect of the application that was before her. In light of the fact that, in my view, there was no want of authority in respect of any of the orders made by either McIntosh J or Anderson J, I find that Sinclair-Haynes J was correct in finding that there was no reason to disturb any of those orders. For that reason also, there is no need to embark on any examination of the issue concerning the authority that Sinclair-Haynes J would have had to allow her to disturb those orders, even if she had disagreed with any of them. A review of the effect of **Leymon Strachan v The Gleaner Company** is therefore not required for this judgment. This, therefore, concludes the analysis of the appeal. I now turn to the issues raised by the cross appeals.

The cross appeals

[89] Madam A and the former co-interim receiver-managers are dissatisfied with the fact that Sinclair-Haynes J ordered each party to bear its own costs. They have each filed counter notices of appeal seeking to have that aspect of the order varied. Each of those parties seeks an order that the costs of the proceedings before Sinclair-Haynes J be paid to them by Cash Plus.

[90] Sinclair-Haynes J did not provide an explanation for her costs award. She did, however, make orders that the former co-interim receiver-managers should provide full disclosure to the Trustee in Bankruptcy. On the face of those orders, therefore, Cash Plus would have had partial success in its application.

[91] Mrs Reid submitted that there is no evidence that the information, which was ordered to be disclosed, had been previously requested of Madam A and that she failed or refused to accede to the request. Learned counsel argued that in the circumstances, the usual principle that the successful party should have its costs, should apply. Although the learned judge has a discretion, learned counsel argued, that discretion should have been exercised in favour of Madam A who was the successful party. Mrs Reid relied, for support, on a number of authorities including the cases of **Bew v Bew** [1899] 2 Ch 467, **Donald Campbell & Co Ltd v Pollak** [1927] AC 732 and **Kierson v Joseph L. Thompson & Sons Ltd** [1913] 1 KB 587.

[92] Learned counsel for the former co-interim receiver-managers readily identified, as an issue, the fact that Cash Plus had succeeded on some of the issues before Sinclair-Haynes J. Mr Williams and Mrs Mais-Cox, also appearing for the former co-interim receiver-managers, submitted in this context, that Cash Plus had, despite that success, failed in respect of the central issues before the learned judge and, therefore, the discretion that she had, in respect of awarding costs, should have been exercised in favour of the former co-interim receiver-managers. Learned counsel stressed the fact that the application had been made over two years after the discharge of the order appointing the former co-interim receiver-managers and argued that its lateness should have been held against Cash Plus. Like Madam A, these counsel relied on rule 64.6(4) of the CPR and **Donald Campbell & Co Ltd v Pollak**.

[93] There was some dispute at the bar, before us, as to whether the items ordered to have been disclosed had been previously disclosed. Learned counsel for the former co-interim receiver-managers, did not, however, seek to suggest that all the information had been previously provided. It would assist the analysis if the relevant terms of the order, which Sinclair-Haynes J made, were set out.

[94] In respect of what was, undeniably, the major issue before her, Sinclair-Haynes J ruled in paragraph [144] that:

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

The learned judge then made the other orders sought by the notice of motion:

> "1. The Co-Interim Receivers/Managers [sic] provide the Trustee in Bankruptcy with copies of all documents including Sales Agreements and Statements of Account with respect to all transactions and dealings involving the assets of Cash Plus Limited, its subsidiaries and affiliates, including all properties disposed of during the Receivership (paragraph 2);
>
> 2. The Co-interim Receiver/Managers provide the Trustee in Bankruptcy with copies of all reports of their receivership (paragraph 3).
>
> 3. The Co-Interim Receiver/Managers pay to the Trustee in Bankruptcy all sums held on account of Cash Plus Limited, its subsidiaries and affiliates forthwith (paragraph 4).
>
> 4. The Co-interim Receiver/Managers provide the Trustee with a detailed accounting of their fees and the fees for all legal consultancy and other services commissioned by them during their receivership of Cash Plus Limited, its subsidiaries and affiliates (paragraph 6).
>
> 5. Each party is to bear its own costs."

[95] In considering the question of the appropriate order as to costs, in the context of those orders, the following points of law are relevant:

a. Where the question of costs lies in the discretion of a judge, a Court of Appeal will assume that the judge has exercised his discretion and will not disturb his decision unless it is satisfied that he has not exercised that discretion judicially (see **Donald Campbell & Co Ltd v Pollak**).

b. The general rule is that the court "must order the unsuccessful party to pay the costs of the successful party" (rule 64.6(1) of the CPR).

c. The court must have regard to a number of issues in considering the award of costs (rule 64.6(4) of the CPR).

[96] The introduction of the CPR has, to some extent, modified the pre-existing rule that "costs follow the event". There is now more of an adherence to a broader range of precepts. It is undesirable to lay down any fixed guidelines so as to fetter the discretion residing in the court. The task of the court, deciding on the issue of costs, to use the words of Lightman J in **Bank of Credit and Commerce International SA v Ali** (No 3) (1999) 149 NLJ 1734 (as cited in Blackstone's Civil Practice 2012 at paragraph 66.12), is:

> "...to take an overview of the case as a whole...and reach a considered conclusion on two questions, first who succeeded in the action, and second (taking into account the answer to the first issue) what order for costs justice requires."

[97] That approach was used in **Re Elgindata Ltd (No 2)** [1993] 1 All ER 232. In that case, the successful parties' case had failed, for the most part, but they were the eventual victors because of impropriety on the part of the unsuccessful party. The judge at first instance ordered the successful parties to pay costs to the unsuccessful party in respect of the issues in which the successful parties had failed. The English Court of Appeal set aside that decision, as to costs. It did so on the basis that the judge at first instance had disregarded the principle that a successful party, who had not improperly or unreasonably raised any issue or made any allegations which failed,

ought not to be ordered to pay any part of the unsuccessful party's costs. Despite that finding, the Court of Appeal held that although the successful party should not pay any part of the unsuccessful party's costs, it should be deprived of half of the costs, payable to it by the unsuccessful party.

[98] Similar reasoning has been reflected in the provisions of rule 64.6(4). In outlining the factors a court should consider in making an award of costs, it states:

> "(4) In particular [the court] must have regard to –
>
> (a) the conduct of the parties both before and during the proceedings;
>
> (b) **whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings**;
>
> (c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);
>
> (d) whether it was reasonable for a party –
>
> (i) to pursue a particular allegation; and/or
> (ii) to raise a particular issue;
>
> (e) the manner in which a party has pursued –
>
> (i) that party's case;
> (ii) a particular allegation; or
> (iii) a particular issue;
>
> (f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim.

(Rule 65.8 sets out the way in which the court may deal with the costs of procedural hearings other than a case management conference or pre- trial review.)" (Emphasis supplied)

[99] In cases where a party has had partial success, there is a growing body of cases in which that party has been awarded only a percentage of its costs. As an example, in **Attorney General of Jamaica v Clarke** SCCA No 109/2002 (delivered 20 December 2004) an appellant was successful, on appeal, in reducing the amount awarded at first instance in a contested assessment of damages. This court, after reducing the award, ruled that the appellant be awarded "one-third and the respondent two-thirds of the taxed or agreed costs both here and in the court below".

[100] There is also to be considered the principle that where a judge departs from the ordinary order as to costs, it is incumbent on the judge to give reasons for that departure (see **Brent London Borough Council v Aniedobe (No. 2)** (1999) LTL 23/11/99). Where no reasons are given an appellate tribunal is entitled to consider the matter afresh (see **Aspin v Metric Group Ltd** [2007] EWCA Civ 922).

[101] In departing from the principle that is set out in rule 64.6(1) that the unsuccessful party must pay the successful party's costs, Sinclair-Haynes J erred in not explaining her reasons for so doing. Did she, for instance, consider Madam A's status in the matter separately from that of the former co-interim receiver-managers? Despite the fact that an award of costs is in the discretion of the trial judge, in the absence of an explanation as to the departure from the norm, this court is at liberty to make a

replacement order as to costs if it finds it appropriate so to do. In that regard, Madam A's position should be considered separately from that of the former co-interim receiver-managers.

[102] In my view, Madam A, however, must be considered as having been completely successful before Sinclair-Haynes J. No order was made against Madam A and, in respect of the major issues, namely the questions concerning notice and those associated with the appointment of the former co-interim receiver-managers, Madam A was completely successful. Nothing has been said about her conduct, as a litigant, that would prevent the general rule, set out in rule 64.6(1) from being applied. Madam A should not be deprived of her costs. For this reason Sinclair-Haynes J's order, in regard to Madam A, must be set aside and in place thereof, costs awarded to Madam A.

[103] The former co-interim receiver-managers are, however, in a different position from Madam A. Unlike other questions which were resolved by consent before Sinclair-Haynes J, it is not apparent whether the former co-interim receiver-managers resisted the order for disclosure. What is clear from their earlier application, which was granted, for the method of quantification of their fees and the bills actually quantifying the fees to be sealed, is that transparency was not one of their priorities. There is no gainsaying, however, that the issue of disclosure was not the major issue before Sinclair-Haynes J. As was outlined above, the liquidator's motive for filing the application was to attempt to avoid paying the large fees and expenses that the former

co-interim receiver-managers had incurred. The liquidator clearly failed in his bid. Cash Plus should pay for that failure.

[104] Since, however, it did succeed in one aspect of the application, Cash Plus should be relieved of some of the burden of the costs incurred by the former co-interim receiver-managers. In the circumstances, relief by way of a 25% reduction would fit the justice of the case. It should only be ordered to pay 75% of their costs.

Conclusion

[105] Having reviewed the judgment of the court below, the relevant provisions of section 213A of the Companies Act and part 51 of the CPR, McIntosh J was entitled to appoint the former co-interim receiver managers although no formal notice had been given to Cash Plus. The fact that no order was made concerning the former co-interim receiver-managers providing security for their appointment does not invalidate their appointment. Even if there was a defect in the order, in failing to specifically mention security, the fact is that the former co-interim receiver-managers were acting pursuant to an order of the court, which must be presumed to be valid. In addition, while so acting, they secured the co-operation of the previous holders of the office of liquidator. None of those actions could, practically, be invalidated at this stage.

[106] Sinclair-Haynes J was entirely correct in holding that McIntosh J had the authority to appoint the former co-interim receiver-managers and that Anderson J had the authority to approve their remuneration. Sinclair-Haynes J was also correct in finding that she had no authority to interfere with those orders.

[107] Having found in favour of Madam A and the former co-interim receiver-managers, Sinclair-Haynes J was, however, in error in departing from the norm of awarding costs to the victor, without giving an explanation for that departure. In light of that error, this court is entitled to disturb her decision in respect of costs. Madam A, being an entirely successful party, should not be deprived of any of her costs. The former co-interim receiver-managers were successful in the major issues before Sinclair-Haynes J. Since the former co-interim receiver-managers did not, however, succeed in all the issues, Cash Plus should receive the benefit of its success on the secondary issue. It should be ordered to pay 75% of the costs of the former co-interim receiver-managers.

[108] Based on the above, I would dismiss the appeal and affirm the judgment of Sinclair-Haynes J except in relation to the order as to costs. The cross appeals should, however, be allowed and Cash Plus be ordered to pay the costs of the hearing before Sinclair-Haynes J. The former co-interim receiver-managers should be awarded only 75% of their costs while Madam A is entitled to full costs. Cash Plus should also pay the costs of the appeal and the cross appeals. All costs are to be taxed if not agreed.

HARRIS JA

ORDER

1. The appeal is dismissed and the judgment of Sinclair-Haynes J is affirmed except in relation to the order as to costs.

2. The cross appeals are allowed. Cash Plus is ordered to pay the costs of the hearing before Sinclair-Haynes J. The former co-interim receiver-managers are awarded 75% of their costs of the motion heard by Sinclair-Haynes J while Madam A is entitled to her full costs in respect of that motion.

3. Cash Plus should also pay the costs of the appeal and the cross appeals.

4. All costs are to be taxed if not agreed.