[2019] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**LASHMONT FINANCIAL SERVICES LIMITED**	**1ST APPELLANT**
AND	**MYLES MCCLYMONT**	**2ND APPELLANT**
AND	**MORGAN'S HARBOUR LIMITED (IN RECEIVERSHIP)**	**RESPONDENT**

Stuart Stimpson and Ms Tashauna Grannum instructed by Hart Muirhead Fatta for the appellants

Sundiata Gibbs instructed by Hylton Powell for the respondent

18, 25 July and 20 December 2019

PHILLIPS JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion.

FOSTER-PUSEY JA

[3] Lashmont Financial Services Limited ("Lashmont"), the 1st appellant, was assigned a debenture over the assets of Morgan's Harbour Limited, the respondent. Lashmont took steps to enforce the security, including appointing receiver-managers.

[4] The receiver-managers worked with a view to selling the assets. Lashmont took certain steps in the course of the receivership. This included issuing a number of instructions to the receiver-managers, with which they disagreed. This led to a souring of the relationship between Lashmont and the receiver-managers, and Lashmont decided to terminate their services. The receiver-managers nevertheless proceeded to enter into an agreement with the entity identified as the preferred bidder for the purchase of the assets.

[5] The receiver-managers went to court to, among other things, challenge their termination. Edwards J (as she then was) found that the termination was ineffective, as it was pursued arising out of bad faith by Lashmont as debenture holder.

[6] The issues which arise for determination on this appeal are:

a. Whether a debenture holder (Lashmont, in this instance) is bound to exercise its powers (including a power to terminate receiver-managers), in good faith;

b. Whether there were issues in dispute which ought to have been resolved by way of cross-examination of the affiants, before Edwards J could have

concluded that Lashmont, in seeking to terminate the receiver-managers, had acted in bad faith; and

c. What is the status of the agreement entered into between the preferred bidder and the receiver-managers?

As a corollary matter, it will also be necessary to address the matter of the occupation of the Morgan's Harbour Hotel property.

[7] Later on, when the grounds of appeal and arguments are examined, it will be observed that issue (a) reflects the arguments made in the matter in respect of grounds of appeal (b) and (c). Unfortunately, the arguments made and the grounds outlined by the appellants, are somewhat different. This judgment addresses the arguments made in the course of the hearing.

Background

[8] The relevant facts were helpfully outlined in the judgment of Edwards J from whose decision this appeal has been made. I have taken the liberty of adopting aspects of that very detailed outline of facts for the purposes of the background in this matter.

[9] Morgan's Harbour Limited is the current long term lessee of six 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 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.

[10] Lashmont 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's lands (Brown Lands), as a sub-lessee from 2013. The sub-lease was to have terminated by effluxion of time on 11 March 2015. Myles McClymont ("the 2nd appellant") is the principal of Lashmont.

[11] The National Investment Bank of Jamaica ("NIBJ"), now the Development Bank of Jamaica ("DBJ"), had provided to Morgan's Harbour Limited a facility amount of JA$50,000,000.00. This was secured by a debenture dated 6 May 2005 over the assets of Morgan's Harbour Limited.

[12] In 2013, Lashmont agreed to purchase the leasehold rights to the properties, but this sale agreement was later cancelled. Morgan's Harbour Limited and Lashmont, thereafter entered into what was, effectively, a sub-lease agreement for 18 months with an option to purchase. After this sub-lease expired, Lashmont offered to purchase the leasehold rights at a price unacceptable to the directors and shareholders of Morgan's Harbour Limited. The 2nd appellant, who is the majority shareholder and managing director of Lashmont, later informed the directors of Morgan's Harbour Limited, that Lashmont 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.

[13] Although the sub-lease expired on 11 March 2015, Lashmont continued to "hold over" beyond its expiry. During the period of holding over on the property, Lashmont, (now also 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 served by Lashmont on Morgan's Harbour Limited. Lashmont also took the further step of, by deed of agreement dated 23 September 2015, appointing joint receiver-managers over the assets of the company. The receiver-managers took control of the company and its assets with a view to selling the assets and realizing Lashmont's security as the debenture holder.

[14] In the meantime, the receiver-managers entered into a short term arrangement with Lashmont for a further sub-lease, as it appeared to them that the continued operation of the hotel by Lashmont, for and on behalf of the receiver-managers, would allow for it to secure a higher sale price. The hotel, situated on Brown Lands, was being operated by Lashmont under the name of Grand Port Royal Hotel Marina and Spa. The 2nd appellant is described as the owner/manager in a site visit report dated 7 October 2015 and prepared by the Tourism Product Development Company ("TPDCo").

[15] The receiver-managers 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/Lashmont. This included packaging the assets to improve their marketability so as to realize the best price available in the market. A broad range of activities were outlined in the affidavits by the receiver-managers, commencing in

October 2015 and leading up to and including January 2017. The work included the following:

i. Engaging the TPDCo to conduct an assessment of the hotel;

ii. Acquiring written approval from the National Land Agency ("NLA") for the sub-letting of the property;

iii. Engaging valuators to value the property;

iv. Engaging the NLA to confirm the boundaries of the properties;

v. Preparing a teaser document;

vi. Finalizing an information memorandum;

vii. Issuing advertisements in respect of offers for the assets;

viii. Conducting preliminary due diligence on interested parties;

ix. Reviewing the six bids received as at 5 December 2016, one of which was from NURU, a shareholder of which was the 2nd appellant, principal shareholder of Lashmont; and

x. Ranking the bids.

[16] At this point it is useful to provide some more information on NURU. Lashmont, having placed the company in receivership, and having appointed receiver-managers, sought itself to purchase the assets of the company it had placed in receivership. Cautioned by legal advice that such a move might not be prudent and may not survive close scrutiny, the appellants then arranged for the bid to be made by an affiliate company called NURU. The second appellant, a principal of Lashmont, is also the principal of NURU. NURU participated in the competitive bidding process.

[17] The receiver-managers indicated that it was the first time that they had experienced an appointer of receiver-managers participating in the bidding process for sale of assets, through an entity created by the appointer. In order to maintain the integrity of the bidding process, they decided that some details of the receivership and the bidding process would not be shared with Lashmont.

[18] On 25 January 2017 the receiver-managers received a request from Lashmont's attorneys-at-law that they should "hold off' on selecting a preferred bidder. On 3 February 2017 the receiver-managers advised the appellants that they were finalizing the selection of the preferred bidder. They proceeded to complete evaluation of all the bids. The preferred bidder was selected, was advised of its selection, and negotiations commenced.

[19] The receiver-managers then advised Lashmont, in its capacity as their appointer, as well as all unsuccessful bidders, that a preferred bidder had been selected.

[20] NURU was not selected as the preferred bidder. It was instead, the third highest bidder and, by virtue of the criteria set by the receiver-managers, was the second preferred bidder.

[21] By letter dated 20 February 2017, the preferred bidder sought clarification on the proposed deed of assignment and short term lease agreement. The preferred bidder then asked to abandon the short term lease agreement and indicated that it would await perfection of the deed of assignment before taking possession. Negotiations continued, aspects of which also required the receiver-managers to receive legal advice. At one stage, the preferred bidder sought a cure letter in respect of certain licenses and permits which were required by the hotel. The matter was however resolved without a cure letter being provided.

[22] The preferred bidder visited Jamaica over the period 7 to 9 May 2017, and met with various stakeholders including the NLA, which verbally agreed to the assignment of the lease to the preferred bidder. At that point there was an agreement in principle to all the terms of the deed of assignment.

[23] Whilst the amendments to the draft agreement were being made to facilitate the execution of the final agreement, on 8 June 2017, the receiver-managers received a request from Lashmont's attorneys-at-law that they suspend further action for the disposal of the assets, on the basis that Lashmont "may have reached an agreement with the shareholders of" Morgan's Harbour Limited.

[24] By electronic correspondence on 8 June 2017, the receiver-managers advised Lashmont that there was no compelling basis to suspend disposal of the assets and

the sale was too far advanced to be halted. On 9 June 2017 the receiver-managers received a letter from Lashmont's attorneys-at-law terminating their appointment with the termination to take effect within 30 days from 8 June 2017. The receiver-managers were asked to provide a list of outstanding expenses and their fees. It was also indicated; "For the avoidance of doubt we ask that you immediately cease any further negotiations for sale of the assets over which you were appointed receiver-managers".

[25] The receiver-managers indicated that, while they would seek legal advice on the matter, they were not of the view that they could just stop the process, especially in light of the fact that they had made a public offer, a winning bidder was selected and they were in a very advanced stage of finalising the terms of the offer. In addition, Lashmont's affiliated company, NURU, was a bidder whose bid was not successful, legal documents were with the successful bidder for execution and various agencies had been advised of the pending assignment of the lease to the successful bidder. They refused to accept their termination as lawful at that stage of the exercise of their power of sale and proceeded with their work in receivership. An agreement was entered with the preferred bidder, who also paid a deposit.

[26] In so far as the lease agreement between the receiver-managers and Lashmont is concerned, by letter dated 26 October 2017, the receiver-managers wrote to Lashmont indicating that the lease agreement had long expired and "must be formally reviewed". In addition, they advised Lashmont that the amount then due under the lease agreement, after prior payments of US$140,200.00, was US$110,275.00.

[27] The receiver-managers indicated that they provided 10 written updates/reports to Lashmont on the receivership process, including the progress of the assignment to the preferred bidder.

[28] Having refused to accept their termination, the receiver-managers, by fixed date claim form filed 24 November 2017, went to the court for directions and for certain orders to be made.

[29] The 2nd appellant swore affidavits on Lashmont's behalf. He referred to the fact that the date for publication of the information memorandum was extended on several occasions and it was eventually published six months after the date originally agreed. In relation to NURU, he stated that it was disclosed in the bid document which it submitted, that he was its principal.

[30] In relation to the request from Lashmont that the receiver-managers hold off selecting a preferred bidder, he indicated that this was with a view to Lashmont obtaining certain information regarding the work of the receiver-managers. The request for the holding off was necessary due to the lack of reports and updates from the receiver-managers. Further, given the lack of reports "it was important to get a clear understanding from the receiver-managers as to how the debt would be calculated and settled on conclusion of an assignment of the hotel's assets…".

[31] Lashmont's attorneys-at-law made several requests to see the deed of assignment to be signed by the preferred bidder, all of which were refused by the receiver-managers. Lashmont needed to see the document so as to ensure that the documents did not deviate from any document that had been included in the

information memorandum inviting bids. In Lashmont's understanding, all potential bidders were to be on a level playing field, and subsequent amendments to any bid document after the selection of a preferred bidder would mean that the bidding process would have been tainted.

[32] The 2nd appellant stated that, until the receiver-managers filed the court claim in this matter, they had not seen any of the correspondence that had come from the preferred bidder. Having had sight of the letter of 20 February 2017, which had been written by the preferred bidder, Lashmont expressed the view in its affidavit evidence, albeit belatedly, that there had clearly been some irregularity in the bid process, which the receiver-managers had not disclosed. One example was the fact that the preferred bidder stated in the said letter that its bid was based "upon placing the funds into an agreed escrow account for release upon clean transfer of leasehold rights". However, the information memorandum had been clear that the bid letter was to be accompanied by "an unconditional offer for the leasehold rights…". In its view, a bid to place all sums in escrow pending clean transfer of leasehold rights amounted to a conditional offer.

[33] In May 2017 when the deed of assignment was still unsettled between Morgan's Harbour Limited and the preferred bidder, with no timeframe provided for completion and the completion date long passed, Lashmont said that it instructed the receiver-managers to move on to the 2nd or 3rd ranked bidder. However, these instructions were not followed.

[34] Lashmont indicated that the request for suspension of the process was made following an update from the receiver-managers in which it was indicated that they

did not expect agreements to be signed until the following week. Lashmont stated that they had been so advised on several previous occasions. One day following their having been advised that the finalizing of the agreements would not be expected before the following week, Lashmont was then told that the documents were with the successful bidder for execution. Lashmont did not feel comfortable relying on that report and therefore issued the termination letter dated 8 June 2017.

[35] Lashmont expressed the view that the receiver-managers did not exercise their best judgment in their handling of the bidding process. Furthermore, since Lashmont was the appointer of the receiver-managers, it was entitled to know crucial information which was likely to impact on its ability to recover the debt due to it under the debenture. This included:

i. Proof of the ability of the preferred bidder to complete the transaction; and

ii. Amendments to the assignment and other documents in the bid package which would result in a prejudicing of the bidding process and potentially affect the timeframe for recovery of debt by the debenture holder.

[36] Lashmont indicated that its relationship with the receiver-managers had broken down, they had lost confidence in them and no longer wished for them to act. A new receiver-manager had therefore been appointed effective 8 December 2017, and that receiver-manager had taken conduct of the receivership of Morgan's Harbour Limited.

[37] Mr Neville Blythe, on 17 January 2018, filed an affidavit in the matter in support of the application by the receiver-managers. He was the chairman of the board of directors of Morgan's Harbour Limited and a majority shareholder. His principal allegation was that the appellants intended to, and schemed to acquire the hotel without giving due consideration to the owners/shareholders.

The claim

[38] The claim was brought by the receiver-managers in the name of Morgan's Harbour Limited (In Receivership). The joint receiver-managers are Mr Wilfred Baghaloo and Mr Caydion Campbell of Price Waterhouse Coopers. They sought against the appellants, 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 the Preferred Bidder and the Joint Receiver-Managers;
>
> 3. A declaration that the First [appellant] vacate and quietly yield and fully deliver up its occupation of the Leasehold Properties as occupier;
>
> 4. A declaration that the First [appellant] 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 [appellant] 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 of 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 [appellant] 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 termination, 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 [appellant] 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 [respondent];

and

iv. That on or before the effective date of termination of the appointment of the Joint Receiver-Managers, the First [appellant] 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 [appellant] 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."

[39] The claim was made pursuant to section 79 of the Insolvency Act, which enables a receiver-manager or other interested party to apply to the court for directions.

The proceedings below and the orders granted by Edwards J

[40] The matter was heard on 18 and 29 January 2018.

[41] At the hearing of the matter, two directors and shareholders of Morgan's Harbour Limited attended, accompanied by their attorneys-at-law. The learned judge ruled that they could remain, however they took no part in the proceedings. As indicated earlier, Mr Neville Blythe had filed an affidavit in support of the application

by the receiver-managers. However, later in this judgment, we will comment on how this evidence was treated.

[42] On 12 February 2018, Edwards J made the following orders:

> "IT IS HEREBY ORDERED AND DECLARED THAT:
>
> 1. The First [appellant] as a Debenture Holder has no automatic right to ownership of the assets covered by the Convertible Debenture and is only entitled to repayment of monies in satisfaction of the debt due to it after realization of the assets covered by the Convertible Debenture in accordance with the Companies Act.
>
> 2. The Joint Receiver-Managers were validly appointed pursuant to the Convertible Debenture.
>
> 3. The Joint Receiver-Managers are permitted to continue with the powers of sale exercised by them pursuant to the Convertible Debenture under which they were duly appointed.
>
> 4. The Joint Receiver-Managers are permitted to exercise their powers of sale to conclude the sale of assets to the Preferred Bidder pursuant to the signed Deed of Assignment between the Preferred Bidder and the Joint Receiver-Managers.
>
> 5. The Joint Receiver-Managers are permitted to comply with the terms of the duly executed Deed of Assignment which require the Joint Receiver-Managers to deliver vacant possession of the Leasehold Properties to the Preferred Bidder.
>
> 6. The First [appellant] is ordered to 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.
>
> 7. The First [appellant] is ordered to vacate and quietly yield and fully deliver up its occupation of the Leasehold Properties as occupier.

8. Costs of this Claim is awarded to the [respondent] against the [appellants] to be agreed or taxed.

9. ….

10. Leave to appeal is denied."

[43] The appellants have indicated that, while they are challenging orders 3 to 8, orders 1 and 2 are not disputed. Orders 1 and 3 to 7, which were granted by Edwards J, mirrored paragraphs 1 to 6 of the fixed date claim form which had been filed by the respondent through the receiver-managers.

[44] Upon review, it is seen that orders 6 and 7 are somewhat inconsistent. Order 7 required the appellants to vacate the "Leasehold properties" unconditionally, while order 6 has linked the obligation to vacate the properties to the completion of the sale to the preferred bidder.

The appeal

[45] The appellants have appealed the judgment by way of amended notice of appeal filed on 9 April 2018. Several aspects of the notice of appeal were withdrawn at the commencement of the appeal hearing, and in the end, only the following grounds were pursued with certain orders being sought:

"3.

(a) …

(b) The learned judge erred in her construction of the contract of appointment when she implied into the terms of the contract that the services of the receiver-managers may only be terminated if they were in breach of their duties to the Respondent or the 1st Appellant.

(c) The learned judge erred in law in implying that a receiver can only be terminated from his duty by his appointer if there is a valid reason for doing so.

(d) The learned judge failed to have the witnesses cross-examined on issues which were in dispute before accepting the witnesses evidence as fact.

4. ORDERS SOUGHT:

1. The appeal be allowed and the orders of the learned judge be set aside.

2. A Declaration that the Joint Receivers breached their duty of good faith to the debenture holder.

3. A Declaration that the Notice of Termination tendered by the Appellants' Attorneys-at-Law be found to be valid.

4. A Declaration that, by virtue of the Notice tendered by the Appellants' Attorneys-at-Law, the joint Receivership has been validly terminated.

5. A declaration that the New Receiver appointed by the Debenture Holder has been validly appointed.

6. That the Deed of Assignment between Preferred Bidder and Receiver be determined null and void.

7. Costs of the appeal to the Appellant, and costs below to be costs in the claim."

[46] Mr Stimpson, counsel for the appellants, acknowledged that the orders outlined at numbers 2 to 6 above had not been sought by the appellants in the court below, and consequently, could not be sought from this court. The grounds which therefore remained, and which were argued, were 3(b) and 3(c) and as an alternative ground 3(d).

The main legal conclusions to which Edwards J arrived

[47] At the end of her detailed judgment, at paragraph [127], Edwards J outlined her conclusions on the issues as follows:

"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."

[48] The appeal is therefore focused on challenging the legal conclusions at paragraphs (i) and (iii) above, and then, as indicated earlier, separately raises the question as to whether cross-examination was required before Edwards J could have arrived at her conclusion that the debenture holders had acted in bad faith.

Status of occupation of the hotel property and the sale

[49] There is no stay of execution in place. The appellants had applied for a stay of execution of the orders made by Edwards J. That application was refused by Pusey JA (Ag) on 16 July 2018. See the judgment at [2018] JMCA App 20. Pusey JA (Ag) concluded that the appeal had no reasonable prospect of success and the balance of

convenience did not lie with the appellants. At paragraph [29] of the judgment he stated:

> "Therefore as debenture holder it must be in the [appellants'] interest that the long outstanding sale be completed, and consequently the balance of convenience for the [appellants] and the respondents, is for the sale to proceed."

According to Mr Stimpson, the appellants, however, remain in possession of the property as they believe they are entitled to do so, in light of the wording of order 6, which requires that they vacate the premises "within thirty (30) days of completion of the sale to the Preferred Bidder". Mr. Stimpson has indicated to the court that the sale is yet to be completed, hence the appellants are still on the property.

The appellants' submissions

[50] In arguing grounds (b) and (c) together, Mr Stimpson submitted that the crux of the appeal is whether the notice of termination served on the receiver-managers by the appellants was valid and effective. In determining this issue, the court will need to consider whether the terms of the deed of appointment of the receiver-managers should have been the sole basis on which the learned judge made her decision. He argued that clause 7 of the deed of appointment establishes that the only requirement for termination of the receiver-managers, is the giving of 30 days' notice. There is no need for a reason to be given. Questions as to the motive for the termination and whether the termination was justified, fair or reasonable in the circumstances, were irrelevant, given the clear terms of the provision in the deed of appointment for termination of the receiver-managers. Upon receipt of the notice of termination, the receiver-managers ought to have proceeded to immediately wind up the work that they were carrying out.

[51] The learned judge, to the contrary, disregarded article 7 of the deed of appointment or gave it far less weight than she should have. In fact, the learned judge took into account circumstances which preceded the notice of termination, and decided the question of its validity and effectiveness on the basis of equitable principles. Mr Stimpson argued that Edward J's approach was incorrect because the contract that governed the hiring and firing of the receiver-managers did not require justification for their termination and did not incorporate equitable principles. He further argued that only the actions of the receiver-managers can be reviewed in light of equitable principles. Further, while the receiver-managers are agents for both the company and the debenture holder, they are primarily agents for the debenture holder. The learned judge, therefore, erred in finding that there was bad faith on the part of the debenture holders, and finding, further, that the notice of termination was ineffective.

[52] Counsel further argued that the assets in question could either have been taken over by the debenture holder or sold. Either option could have been pursued by the receiver-managers. Instead, the receiver-managers chose to put up the property for sale. He argued that it was not in dispute that at the time when the notice of termination was issued, there was no contract for sale between the preferred bidder and the receiver-managers. There was no evidence before the court that the proposed deed of assignment with the preferred bidder had been sent for execution. Up to the time when the notice was issued, no contract had been concluded. What would have been necessary for a contract to be in place was a signed agreement, not advanced negotiations. The receiver-managers, even after receipt of the notice of termination, continued trying to conclude negotiations with the preferred bidder. Counsel noted,

however, that the learned judge had stated that it was irrelevant as to whether, at the time when the notice of termination was issued, a contract of sale was completed.

[53] Mr Stimpson urged that the learned judge ought to have found that no reason needed to be given for the termination of the services of the receiver-managers and the motive for termination was irrelevant. Furthermore, equitable principles were not applicable. In support of this position, he relied on the case of **Downsview Nominees Ltd and Anor v First City Corporation Ltd and Anor** [1993] AC 295, a Privy Council decision emanating from New Zealand.

[54] If, however, the court was to feel that it was appropriate for the learned judge to have considered issues of equity, bad faith and whether the termination of the receiver-managers was justified, fair and reasonable, Mr Stimpson urged that the learned judge erred in failing to test the credibility of the witnesses before she concluded that the debenture holders had been acting in bad faith. This was crucial in light of the assertions of the receiver-managers. Counsel argued that calling the witnesses to be cross-examined would have allowed for a better assessment of the case by the learned judge before the imputing of mala fides on the part of the appellants, who were acting within the parameters of the deed of appointment.

[55] It was submitted by counsel that there can be no bad faith if the instances of termination were contemplated and agreed between the parties. Furthermore, the learned judge erred in accepting untested evidence of the receiver-managers that an agreement had been duly and validly entered into with the preferred bidder, and that said agreement would be sufficient to guarantee repayment of the debt.

[56] He referred to the affidavit of Neville Blythe which was filed in the proceedings, in which Mr Blythe imputed a certain motive to the appellants. He highlighted the fact that the 2nd appellant disputed aspects of Mr Blythe's affidavit and said they were untrue.

[57] The learned judge, counsel further submitted, could not have declared bad faith on the part of the receiver-managers, as she was not asked to resolve that issue in any of the pleadings.

[58] In the circumstances, counsel argued that there were disputed facts which were important to the consideration of the court. As a consequence, cross-examination should have taken place and the matter would need to be remitted to the Supreme Court for a re-hearing. He relied on the case of **Chin v Chin** [2001] UKPC 7 in support of his arguments.

The respondent's submissions

[59] Mr Gibbs, on behalf of the respondent, commenced by arguing that there were certain important and undisputed facts to which regard was to be had:

> i. For all intents and purposes, the proceedings in question were between Lashmont and Morgan's Harbour Limited, and the receiver-managers were not parties to the proceedings in their capacity as receiver-managers. Lashmont is a creditor of Morgan's Harbour Limited, also a sub-lessee. The lease has come to an end. Lashmont has no other legal interest in the property itself. While Lashmont

has tried to acquire the property by different routes it has no legal right to do so.

ii. Morgan's Harbour Limited has entered into a leasehold interest with a third party who is not a party to and was not represented in these proceedings. There is no claim against the preferred bidder who has partially performed under the contract, as a deposit has been paid. At the time of the hearing, the preferred bidder had signed the deed of assignment. There were no pleadings before the court which indicated that the contract, partially performed by the preferred bidder, was at risk of being set aside. In such circumstances, the preferred bidder would not even apply to intervene.

[60] Mr Gibbs indicated that Lashmont, on its own evidence, has indicated that it has always been interested in acquiring the property. Lashmont created an entity, NURU, so as to participate in the bidding process being carried out by the receiver-managers. The learned judge in her reasons did not refer to any allegation of Lashmont seeking to acquire the property at a "depressed price".

[61] Moving on from the implications which must be considered in respect of the preferred bidder, and Lashmont's interest in acquiring the property, Mr Gibbs referred to section 79 of the Insolvency Act. He submitted that the section provided for the exercise of discretion by a judge, and such an exercise of discretion should not be set

aside, unless the judge was plainly wrong. In his view, section 79 of the Insolvency Act empowers a judge to take control of the receivership and make such directions as he or she sees fit in the circumstances. The learned judge had a discretion to order the receiver-managers to continue their work, regardless of the purported termination of their services by Lashmont.

[62] Mr Gibbs then specifically addressed the grounds of appeal. The appellants, pursuant to ground (b), complained that the learned judge "implied into the terms of the contract that the services of the receiver-managers may only be terminated if they were in breach of their duties to Morgan's Harbour or Lashmont". Counsel argued, however, that this statement mischaracterizes the basis of the learned judge's decision. He argued that Edwards J made no such finding. In his view the learned judge made the following two points:

> i. A debenture holder is akin to a mortgagee exercising a power of sale and must exercise a power of sale in good faith and for a proper purpose. These equitable duties, which are not affected by whether you have a contractual right to terminate, are to be also followed by the receivers appointed by a debenture holder. Lashmont acted in breach of those duties. (See **Downsview Nominees Ltd and Anor v First City Corporation Ltd and Anor** [1993] AC 295). If the debenture holder acts in breach of its equitable

duties, by, for example, purporting to exercise the power to terminate the receivers for an improper purpose and in bad faith, the court can intervene. The court could exercise its powers under section 79 of the Insolvency Act, including reappointing or appointing receivers.

ii. The receiver-managers were agents of Morgan's Harbour Limited, and if an agent partially performs an authorized act on behalf of his principal, the principal cannot then revoke the authority if the agent is then exposed to liability.

[63] Mr Gibbs argued that the learned judge was correct to find that equitable principles applied to the exercise of the debenture holder's power to terminate the receiver-managers.

[64] Neither of the above findings related to the learned judge implying a term into the deed of appointment. Mr Gibbs, therefore, submitted that both grounds of appeal (b) and (c) misrepresented the learned judge's findings.

[65] Mr Gibbs then addressed ground (d) which concerned whether cross-examination ought to have taken place before the learned judge could have found that there was bad faith on the part of the appellants. Counsel agreed that cross-examination is appropriate where there are disputes of fact. He submitted, however, that all the facts outlined in paragraph [108] of the learned judge's decision, which

led to her conclusion of bad faith, were agreed by affidavit evidence. He referred to various paragraphs in the affidavits of the 2nd appellant, in support of his submissions. Counsel argued:

a. there was no dispute that the appellants, through an affiliated company, joined the pool of purchasers participating in the bidding process for the Morgan's Harbour Property;

b. there was no dispute that Lashmont was insisting on being shown information which it was doubtful they ought to have seen since they were now a part of the bidders;

c. there was no dispute that Lashmont requested that the sale to the preferred bidder be suspended;

d. there was no dispute that Lashmont offered to match the sale price of the preferred bidder;

e. there was no dispute that in May 2017 Lashmont instructed the receivers to move on to the 2nd ranked bidder, which was their affiliate company with the third lowest bid;

f. there was no dispute that the appellants interfered in the sale process being conducted by the receivers;

g. Lashmont had indeed sought to terminate the receivers on questionable grounds; and

h. Lashmont had sought to appoint a new receiver-manager.

[66] Counsel submitted that the above were undisputed and would not require cross-examination to take place.

[67] He then argued that, in any event, even if there were disputed facts affecting the learned judge's decision, it was for the appellants to apply for permission to cross-examine pursuant to rule 30.1(3) of the Civil Procedure Rules (CPR). The appellants could have applied to cross-examine the affiants, but, he argued, it appears that Lashmont did not see a disputed fact on which it wished to cross-examine.

[68] Mr Gibbs noted that the second basis on which the learned judge relied to arrive at her decision concerned agency, and related to legal principles and not factual issues. That decision would therefore not be affected by any factual determination of bad faith by the appellants.

The appellants' response/further points

[69] Mr Stimpson agreed that the learned judge was exercising a discretionary power pursuant to section 79 of the Insolvency Act. He stated that the court sought to give directions in respect of the duties of the receiver-managers, had considered the effect of the notice of termination of the receiver-managers and concluded that there had to be a justification for termination. He argued that section 79 of the

Insolvency Act must have a purpose and it would not be proper for the court to exercise its discretion to override contractually agreed terms between the parties.

[70] In response to arguments touching on the possible impact on the preferred bidder, counsel urged that the relevant time for the court to consider in determining the propriety of the actions of the debenture holder, was the 8 June 2017 letter of termination, at which time there was no contract between the receiver-managers and the preferred bidder. Otherwise, in his view, the effluxion of time would frustrate the powers of the court. He argued that the receiver-managers sought to get the court to validate the actions they took subsequent to the termination letter, by attempting to have the court say that they were improperly terminated. If the receiver-managers acted without authority to execute an agreement post their termination, that agreement, he submitted, should not be seen as valid. Upon receipt of the notice of termination, the receiver-managers should have immediately wound up their activities. While the court can accept that by 22 June 2017 the agreement was signed in part, there was no clear evidence as to when the deposit was paid and no evidence of when the contract became binding. If the appeal is successful, the preferred bidder will be impacted. The preferred bidder will have to be compensated for any alleged breaches under its contracts with the receiver-managers. The innocent third party would be protected by the terms of the deed of assignment. The preferred bidder's recourse would have to be indemnified by Lashmont.

[71] He further argued that the question of motivation and justification should have been determined by cross-examination, in the course of which the demeanour of the witnesses would have been taken into account.

The convertible debenture of 6 May 2005

[72] This debenture was originally granted by Morgan's Harbour Limited to the NIBJ. The NIBJ then assigned it to Lashmont through a deed of assignment on 2 May 2014. There are certain provisions of the debenture which I will highlight as they assist in understanding the powers of the debenture holder and the receiver-managers which they may appoint.

[73] Clause 12(d) addresses the power of the debenture holder to appoint a receiver. It provides:

> "That the power of sale and distress and of appointing Receiver and/or Manager…shall be conferred upon and be exercisable by NIBJ under this Debenture…"

[74] Whenever reference is made to a receiver, it is deemed to include a reference to "a receiver and/or manager" who has various powers including the power to take possession of the mortgaged property, to manage the business, to sell or lease any of the tenancies of the business, as well as to "do any act or thing which a receiver appointed under section 32 of the Companies Act would have power to do" (clause 18 of the debenture).

[75] A receiver and/or manager appointed by the debenture holder is deemed to be an agent of the company. The company is "alone responsible and liable" for its acts, defaults and remuneration (clause 19 of the debenture).

[76] Clause 24 of the debenture is very important in light of certain submissions which were made in relation to the protection and status of a third party purchaser. It provides:

> "**No purchaser** mortgagor mortgagee or other person or company **dealing with** NIBJ or **any Receiver and/or Manager** appointed by it…**shall be concerned to enquire whether the power exercised or purported to be exercised has become exercisable or whether any money remains due on the security…or as to the necessity or expediency of the stipulations and conditions subject to which any sale shall have been made or otherwise as to the propriety or regularity of any sale** calling in collection or conversion or to see to the application of any moneys paid to NIBJ or such Receiver and/or Manager **and in the absence of male fides on the part of such purchaser** mortgagor mortgagee or other person or company **such dealings shall be deemed so far as regards the safety and protection of such purchaser** mortgagor mortgagee person or company **to be within the powers hereby conferred and to be valid and effectual** accordingly and the remedy of the Company and its assigns in respect of any impropriety or irregularity whatsoever in the execution of such trusts shall be in damages only." (Emphasis supplied)

Discussion and analysis

The statutory framework

[77] The claim was made pursuant to section 79 of the Insolvency Act, which states, inter alia, that:

> "(1) A receiver or other interested party, may apply to the court for the 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-
>
> (a) appointing, replacing or discharging a receiver or receiver-managers and approving his accounts;
>
> (b) 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**." (Emphasis supplied)

[78] The parties are agreed that section 79 of the Insolvency Act confers a discretionary power on the court. I agree that the section confers a discretion on the court to give such directions as it considers proper to a receiver and in respect of a receivership. The power appears to be quite broad and flexible especially in light of the wording of section 79(2)(f). The legal principles that apply when this court is reviewing the exercise of discretion by a judge are therefore relevant. This court will not lightly disturb a judge's exercise of discretion unless there is a demonstration of a misunderstanding of the law or the evidence before him, or his decision is such that no judge regardful of his duty would have reached it (see **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

[72] Neither party has argued that the learned judge exercised her discretion in an arbitrary or irrational manner or misunderstood the evidence before her. The

appellants' argument is that the learned judge erred in law when she took into account and applied equitable principles in assessing the actions of the debenture holder.

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

> "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 directions of the Court."

This provision indicates that when a receiver is appointed by an instrument (and not the court), he is bound to comply with the conditions imposed under that instrument of appointment. Separate and apart from these conditions, he is nevertheless required to act in accordance with any directions of the court.

[74] Section 74 of the Act outlines various duties of a receiver. It states:

> " A receiver shall-
>
> (a) not later than fourteen days after being appointed receiver, publish a notice of his appointment in the form prescribed in one issue of a local daily newspaper in circulation throughout Jamaica;
>
> (b) take into his custody or control the collateral in accordance with the security agreement or order providing for his appointment;
>
> (c) **deal with any property of the debtor in his possession or control in a commercially reasonable manner;**
>
> ....

(g) indicate on every business letter, invoice, contract, or similar document used or executed in connection with the receivership, that he is acting as a receiver; and

(h) **act honestly and in good faith**." (Emphasis supplied)

I have highlighted the fact that a receiver must deal with the debtor's property "in a commercially reasonable manner" and must "act honestly and in good faith".

The deed of agreement between Lashmont and the receiver-managers

[75] By the deed of agreement dated 23 September 2015 ("the deed"), Lashmont appointed Caydion Campbell and Wilfred Baghaloo, chartered accountants, who were entitled to practice as licensed trustees ("the receiver-managers"), to undertake duties as joint receiver-managers of the company. Contemporaneously, Lashmont also signed a deed of indemnity out of the charged assets in favour of the receiver-managers.

[76] The receiver-managers were required to carry out the receivership:

> "…with due diligence and efficiency…so as to maximize realization of all the present and future undertakings and assets of the Company charged under the Securities…".

[77] They were also obliged to act honestly and in good faith (article 1 of the deed). It is therefore seen that the receiver-managers, both pursuant to statute, and in this case by virtue of the deed of agreement, were duty-bound to act honestly and in good faith in the carrying out of their duties. This is, however, not the question in dispute. The question raised by the appellants is whether a debenture holder is also required to act in good faith.

[78] Article 7 of the deed takes centre stage of the arguments at this point. It states:

> "7.1 The Receivers and/or Appointor may terminate this Deed of Agreement upon not less than thirty (30) days written notice PROVIDED that should the Appointer terminate the appointment of CAYDION E. O. CAMPBELL and WILFRED B BAGHALOO as the Receivers upon the giving of appropriate notice as aforesaid;
>
> 7.1.1 The Appointor shall allow the Receivers reasonable time to carry out and complete their statutory duties and obligations under, *inter alia*, the Insolvency Act and the Companies Act and to give proper accounts in respect of the Receivership; and
>
> 7.1.2 Upon receipt of a notice mentioned in Article 7.1 by either party, the Receivers and Appointor shall take immediate steps to bring this agreement to a close in a prompt and orderly manner and reduce expenditure to a minimum.
>
> 7.2 Upon termination of this Deed of Agreement pursuant to Article 7.1 above, the Receivers shall be entitled to recover from Appointor all expenses incurred and all fees outstanding from the date of appointment up to and including the date of termination pursuant to the terms of the Deed of Indemnity in favour of the Receivers to be given by Appointor in the form appended hereto."

The deed of indemnity

[79] The appointer signed a deed of indemnity ("the indemnity") as agreed. The receiver-managers were indemnified on a full indemnity basis from and against actions, losses etc. The proviso to the indemnity, however, required the receiver-managers to "first seek to satisfy any claim hereunder out of the charged assets or any instrument(s) of mortgage or other collateral charges or securities". It did not cover liabilities incurred by reason of the receiver-managers' failure to exercise their powers or perform their duties carefully, prudently and diligently. In addition, the

indemnity remained in full force notwithstanding the discharge of the receiver-managers' appointment.

Further analysis

Grounds (b) and (c)

[80] It is correct, as Mr Stimpson has argued, that article 7 of the deed of appointment does not, in its terms, require that a reason be given as to the basis of the termination of the appointment of the receiver-managers. However, is the debenture holder required to act in good faith in exercising its powers, including its power to terminate the receiver-managers? Mr Stimpson has argued that, while a receiver is required to act in good faith, there is no such obligation imposed on a debenture holder.

[81] How did Edwards J treat with this question? In addressing this issue it is important to highlight various aspects of the judgment. The learned judge stated:

> "[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 [appellant] 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 [appellants'] affiliate NURU.
>
> …
>
> [108] The entire manner in which the 1st [appellant] as the debenture holder and the 2nd [appellant], 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 realize 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 [appellants], 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 receiver-managers;
>
> (g) Terminating the receivers on very questionable grounds; and
>
> (h) Appointing a new receiver-managers in those circumstances.
>
> ...

[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 [appellants] 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.

…

[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.

…

[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 [appellants] 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 [appellants] 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 [appellant], 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 [appellants] were allowed to do that which they have purported to do. The [appellants] 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 [appellants'] 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." (Emphasis supplied)

[82] The learned judge in her analysis of the issue also said at the following paragraphs of her judgment:

> [122] The [respondent] had no choice but to make this application and is entitled to succeed. The [appellants] were determined to force them to act in bad faith and to the detriment of the company. All the costs of what the [appellants] 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…"

[83] She then made these conclusions at the following paragraphs:

> "**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." (Emphasis supplied)

A debenture holder and good faith

[84] Was Edwards J correct to refer to equitable principles in assessing the conduct of the debenture holder(s)? Interestingly, both parties relied on the Privy Council case of **Downsview Nominees Ltd and Another v First City Corporation Ltd and Another** [1993] AC 295 in support of differing positions on the issue. This was a case on appeal from the Court of Appeal of New Zealand. The facts of the case are quite involved. I have found the headnote of the case to be extremely helpful in this regard and outline it below:

> "A company issued a first debenture to a bank and a second debenture to the first plaintiff. Pursuant to its powers under the second debenture the first plaintiff appointed receivers and managers of the company. The first debenture was assigned to the first defendant, which was controlled by the second defendant, who was appointed receiver and manager under that debenture not for the purpose of enforcing the security thereunder but to disrupt the receivership under the second debenture and to prevent the enforcement of the second debenture by the first plaintiff. The receivers appointed by the first plaintiff relinquished control to the second defendant. Four days later the first plaintiff offered to purchase the first

debenture from the first defendant at a price equivalent to the amounts outstanding and secured under the debenture, but that offer was not accepted. The company continued trading and during the second defendant's receivership substantial losses were incurred. Eventually, as directed by the court, the first defendant assigned the first debenture to the first plaintiff and the second defendant ceased to act as receiver. The first plaintiff assigned the second debenture to the second plaintiff. In an action by the plaintiffs the judge held that the defendants were liable in negligence for breach of duty to the plaintiffs, and awarded damages against both defendants. The Court of Appeal of New Zealand allowed the defendants' appeal in part and quashed the judge's orders in so far as they related to the first defendant and the second plaintiff.

On the defendants' appeal and the plaintiffs' cross-appeal to the Judicial Committee: -

Held, dismissing the appeal and allowing the cross-appeal, that a mortgagee and a receiver and manager appointed by him owed no general duty in negligence to subsequent encumbrancers or the mortgagor to use reasonable care in the exercise of their powers and in dealing with the assets of the mortgagor; but that **equity imposed on a mortgagee and a receiver and manager specific duties including the duty to exercise their powers in good faith for the purpose of obtaining repayment** although, subject to that duty, the exercise of their powers might cause detrimental consequences to the mortgagor; that **the equitable duty was owed both to the mortgagor and to any subsequent encumbrancer, whether he was a mortgagee, debenture holder or charge holder**; **that, accordingly, since the receivership of the second defendant had been instigated by him for improper purposes and conducted in bad faith, and the first defendant had been in breach of its duty in failing to transfer the first debenture to the first plaintiff when so requested by the first plaintiff, both defendants were liable to both plaintiffs**; **and** that since the proper measure of damages for breach of their equitable duties was the same as that which would have been applicable if they had been liable in negligence, the judge's award of damages would be restored." (Emphasis supplied)

The judgment of their Lordships was delivered by Lord Templeman. 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 owe to a second debenture holder. Their Lordships, however, also outlined certain general principles which will assist in the resolution of the issues raised in this appeal.

[85] In the course of the hearing, the first and second defendants submitted to their Lordships that they owed no duty to the first plaintiff (the second debenture holder) because the first plaintiff was only a debenture holder and not a mortgagee. Their Lordships described this submission as "untenable". In examining forms of security for the repayment of debts, their Lordships stated at page 311 of the judgment:

> "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 the 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 supplied)

[86] The second argument put forward before their Lordships by the first and second defendants was that although a mortgagee owes certain duties to the mortgagor, he owes no duty to any subsequent encumbrancer; so they owed no duty to the first plaintiff. This argument their Lordships also described as "untenable" (see page 311 of the judgment).

[87] Importantly, for the purposes of the instant appeal, their Lordships examined the question of the nature and extent of the duties owed by a mortgagee and a

receiver and manager respectively to subsequent encumbrancers and the mortgagor. At page 312, it read:

> "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 repayment 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 disadvantageous to the borrower. **These principles and rules apply also to a receiver and manager appointed by the mortgagee**." (Emphasis supplied)

[88] In examining the considerations which applied to the first defendant, who was the first debenture holder, the court stated at page 317:

> "A mortgagee owes a general duty to subsequent encumbrancers 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 manager, knowing that the receiver and 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." (Emphasis supplied)

[89] Their Lordships emphasised that the first defendant, as first debenture holder, was liable to the first plaintiff/second debenture holder, because of its breach of duty in failing to transfer its debenture to the first plaintiff at the end of March 1987. Had

this been done, the second defendant whom it had appointed would have ceased to be receiver-manager of the business in question and certain losses would have been avoided.

[90] Their Lordships also indicated that, a mortgagee who appoints a receiver-manager knowing that the receiver-manager intends to exercise his powers for an improper purpose, or who fails to revoke the appointment of a receiver-manager who he knows is abusing his powers, may himself (in his capacity as mortgagee) be guilty of bad faith.

[91] The learned editors of the Halsbury's Laws of England Volume 77 (2016) at paragraph 394 have also opined that a mortgagee owes duties in equity to the mortgagor. They state:

> "A mortgagee owes duties in equity to the mortgagor arising out of the particular relationship between them. This duty extends to any subsequent encumbrancer or surety…
>
> The mortgagee does, however, owe a general duty to exercise his powers in good faith for the purpose of obtaining repayment which flows from the equitable principles for the enforcement of mortgages and the protection of borrowers, that a mortgage is security for the repayment of a debt and that a security for repayment of a debt is only a mortgage. He also owes specific duties once he exercises his powers. It has been said that he owes a duty to act fairly towards the mortgagor."

[92] There are certain principles which are of significance to highlight, arising out of the **Downsview** case, as well as the views of the editors of Halsbury's Laws of England. These are:

i. A mortgage is security for the repayment of a debt and a security for repayment of a debt is only a mortgage;

ii. Equity developed certain principles for the enforcement of mortgages and the protection of borrowers;

iii. A debenture holder is in a similar position as a mortgagee;

iv. Powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment; and

v. A mortgagee owes a general duty to subsequent encumbrancers **and** to the mortgagor to use his powers for the sole purpose of securing repayments of the moneys owing under his mortgage **and has a duty to act in good faith** (emphasis supplied)."

[93] I have taken careful note of the fact that, a refusal by a debenture holder/mortgagee to revoke the appointment of a receiver-manager who is abusing his powers, could possibly be a sign of bad faith, although their Lordships made it clear that they were not required to explore the possibility in the **Downsview** case. In my view, it follows that if a debenture holder revokes or purports to revoke the appointment of a receiver-manager for ulterior motives, and for purposes other than to secure the repayment of the moneys owing under the debenture, it can be found to be a sign of bad faith and can lead to liability, as well as the setting aside of the purported termination.

[94] It is clear from the examination of the legal principles outlined in the **Downsview** case, that Mr Stimpson's submission that equitable principles do not come into play in the exercise of the powers of a debenture holder, including a power to terminate a receiver-manager, is unsustainable. In fact, this submission goes against the grain of long established legal principles which remain current today. To the contrary of his submissions, the principles developed by equity occupy a prominent feature when a debenture holder is exercising its powers for the enforcement of the

security. These principles are overarching and apply regardless of, or in addition to, the provisions of the written contract between the receiver-manager and the debenture holder.

[95] It is therefore my view that the learned judge was correct when she invoked the principles of equity in examining and determining the propriety of Lashmont's termination or purported termination of the receiver-managers. Grounds (b) and (c) as argued, should therefore fail.

[96] In light of the above discussion, and the findings of the learned judge, I agree with counsel for the respondent, that in grounds of appeal (b) and (c), the appellants mischaracterized the decision of the learned judge. As will also have been seen, the appellants' arguments did not focus on asserting that the learned judge had implied terms into the deed of appointment. They instead focused on the issue just recently explored.

Ground (d)

Whether there were issues in dispute which ought to have been resolved by way of cross-examination of the affiants, before Edwards J could have concluded that Lashmont, in seeking to terminate the receiver-managers, had acted in bad faith

[97] The case of **Chin v Chin** has been relied on by the appellants in support of their submissions that the learned judge erred in relying on disputed facts in the affidavits, that were not tested by way of cross-examination. The case of **Chin v Chin** concerned an appeal from a judgment of this court. The ownership of a renowned company was a main issue in the appeal. The parties in the case had divorced and this had led to property disputes. The evidence before the court was based on affidavits only. In an affidavit sworn on 31 January 1994, Mrs Chin, claimed that she

was beneficially entitled to one half of the value of the company. She said at paragraph 13; "… at all material times … believed that [her] husband and [herself] were working as joint owners of the company …".

[98] On the other hand, Mr Chin, in an affidavit in response sworn on 2 December 1994 stated that Mrs Chin had been merely an employee of the company. At paragraph 8, he said that he had offered her the position of manager of the company at the same salary she had been receiving from her previous employers. At paragraph 9, he said 249,999 shares in the company had been allotted to him and only one share to Mrs Chin, and she was well aware of this. Further at paragraph 24 he said:

> "… I deny that the Applicant is entitled to one half of the value of Lasco Foods Limited and her only interest is that of a shareholder owning 1 share which I gave to the Applicant."

[99] On 22 June 1995, Mrs Chin responded to this affidavit. In this affidavit she outlined that she and Mr Chin had together taken part in the negotiations that led to the setting up of the company and the acquisition of valuable business contracts. At paragraph 44, she stated that she had never received a salary, but had drawn from the company sums as she would have needed from time to time. She noted at paragraph 22 that; "it was always our intention to own the company equally and for me to operate the company as Managing Director".

[100] Mr Chin then again responded by affidavit sworn on 26 October 1995. He agreed, at paragraphs 5 to 13, that Mrs Chin had been with him at some of the negotiations relating to the setting-up of the company, but said that she had been present simply as the prospective manager of the business rather than as a

prospective joint owner. At paragraph 22, he said that the allotment to him of the additional shares had been authorised by a resolution passed by Mrs Chin and himself at a meeting of the board of directors of the company. And at paragraph 32, that he never at any time had the intention of giving Mrs Chin a shareholding in the company equal to his. She was simply a salaried employee. But at paragraph 34 he stated that; "the Applicant did not actually receive each month a regular monthly salary".

[101] On this issue, I note the conclusion of the Board of the Privy Council. At paragraphs 9, 10, 11 and 14 of the judgment of the court delivered by Lord Scott of Foscote, it was stated:

> "**[9]** The affidavits showed clearly enough that the issue between the parties was whether they had intended that Mrs Chin would be a joint owner of the company with her husband. But when the case came before Panton J for trial he made no finding on that issue. He said, simply:
>
> > "If there is an error in the allotment of the shares, these proceedings that are before me cannot correct that error."
>
> **[10]** He had in mind s.115 of the Companies Act which enables an application to be made to the court for rectification of the share register. But that was not the issue. **The issue was whether Mrs Chin was beneficially entitled to half of the issued shares...**Perhaps that order could have been made without formally joining the company as a party. Or there were other forms that consequential relief might have taken. **But first it was necessary to decide whether Mrs Chin's claim to be a joint owner of the company was well-founded.**
>
> **[11]** The judge did not decide this critical issue. **He was not in a position to do so for there was no cross-examination of the deponents.** Mrs Chin had given sworn evidence that the intention at the time the company was acquired was that she and her husband would be joint owners. Her evidence was that the company was to be the vehicle for a joint enterprise. Her husband was to put up

> the money and she was to be responsible for management. Mr Chin, on the other hand, had given sworn evidence that it had never been the intention that the company should be jointly owned. He had never intended that she should be more than an employed manager. The issue as to joint ownership could not be resolved without the evidence, or at least a significant part of the evidence, of one or other of them being rejected. But the judge never grappled with the conflict of evidence. He did say this:
>
> > 'The evidence of the applicant does not indicate any investment by her in the incorporation of the company or in its operations, other than the fact that she worked for reward for the company; such reward she has already received.'
> >
> > …
>
> **[14]** Although the Court of Appeal was, in their Lordships' respectful view, directing its attention to the right issue, **the Court of Appeal, in the absence of any factual findings made at the trial and there having been no cross-examination at the trial, was in no better position than Panton J had been to assess the respective credibility of the parties. The normal and proper function of an appellate court is that of review. An appellate court can, within well-recognized parameters, correct factual findings made below. But where the necessary factual findings have not been made below and the material on which to make those findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact-finding exercise. It should remit the case for a re-hearing below**." (Emphasis supplied)

[102] The principle that I have extracted from the case of **Chin v Chin**, is that, where there are critical issues in dispute to be resolved, and which depend on the credibility of the witnesses, cross-examination ought to be conducted, failing which the matter will be remitted to the court below for rehearing. But is this principle applicable in the circumstances of the case at bar?

[103] It is of importance to outline that rule 30.1(3) of the CPR makes provision for any party in a proceeding to apply for an order for the deponents to attend for cross-examination. It explicitly states:

> "Whenever an affidavit is to be used in evidence, **any party** may apply to the court for an order requiring the deponent to attend to be cross-examined." (Emphasis supplied)

[104] It is my observation that neither party took advantage of this in the proceedings below. When counsel was asked by the court whether the duty rests solely on the learned judge, counsel admitted that the parties also had a duty to seek to test the veracity of the facts before the court.

[105] It cannot be overemphasised that trial judges, in addition to litigants, have a duty to ensure that, where appropriate, cross-examination is conducted. My learned sister, McDonald-Bishop JA (Ag) (as she was then) in the case of **Pameleta Marie Lambie v Estate Leroy Evon Lambie (Deceased)** [2014] JMCA Civ 45, also examined this principle. She said at the following paragraphs:

> "**The failure to cross-examine**
>
> [38] **It is quite evident that there was a serious dispute as to fact between the parties that could only have been resolved on their credibility and that of their witnesses. This notwithstanding, there was, surprisingly, no cross-examination.** There is nothing on the record of appeal to indicate whether or not this was the choice of the parties that was expressed to the learned trial judge. The absence of cross-examination was, however, observed by the learned trial judge when he indicated in his judgment the difficulty that confronted him in treating with the evidence of the Lambies (see paragraph [52] below). In the circumstances that obtained, cross-examination seemed to have been desirable. It might have assisted in better testing the case presented by each of the parties by providing material that

could have been useful in assessing their respective credibility.

[39] **Litigants and trial judges, alike, should always give serious consideration to the utility of cross-examination in cases of such nature where there is marked and substantial divergence on the facts.** It would be useful to note in this regard the observations of Rattray P in **Whittaker v Whittaker** (1994) 31 JLR 503, 505 and of their Lordships of the Privy Council in **Lascelles Chin v Audrey Chin** [2001] UKPC 7.

[40] The learned trial judge was, therefore, deprived of valuable assistance in this case by not hearing the affiants even though he saw them. He, nevertheless, in those circumstances, proceeded to decide the case entirely on paper and managed to arrive at his findings of fact and law. It means that this court is in the same position as the learned trial judge with only the paper evidence for consideration.

…

[52] The learned trial judge, after examining the evidence of Mr and Mrs Lambie, noted:

> 'Even though the parties were both present at the hearing for cross-examination it is always difficult to determine the truth when the evidence is so divergent. I found great assistance in the evidence of the supporting witnesses and the documents that were exhibited.'

He then proceeded to examine the evidence of Mr Lambie's witnesses, who themselves, were not cross-examined, and reasoned as follows:

> 'The question of when Mr. Lambie lived at Farringdon was addressed by Mr. Hugh Levy Attorney-at-Law (in his Affidavit filed [sic] November 26, 2007, where he spoke of visiting the Lambies at Farringdon before and after their wedding. Ms. Verona Hoo spoke of attending social gatherings including birthday parties and anniversary celebrations between 1990 and 2005 at

Farringdon. Documents such as the Marriage Certificate and letters from the lawyer were addressed to both parties at Farringdon. In fact even Mrs. Lambie's own document, the agreement of October 1995 between the Lambies and Irma Tully which was exhibited in her affidavit of 22nd April 2008 states the joint address of the parties as Farringdon.

In fact, the documents exhibited both in relation to Ms. Tully and a loan obtained from Workers Savings and Loan Bank in 1998 for use in their business, indicate that there was a level of partnership between the parties. As a result on a balance of probabilities, I prefer Mr. Lambie's evidence that Farringdon was the family home.

Consequently, I find that Farringdon was the family home. I accept that the parties lived in that house before and after the marriage. I accept that Mr. Lambie contributed financially and otherwise to the building of the house and it was the principal family residence for the duration of the marriage. I do not accept that the construction and maintenance of the house was Mrs. Lambie's private project and that she had no input from Mr. Lambie.

Having found that Farringdon is the family home the provisions of the Property (Family [sic] Rights of Spouses) Act have to be applied to this case. The fact that Farringdon was owned by Mrs. Lambie before the parties [sic] means that the Court should consider whether this is a proper case for a variation of the equal share rule'." (Emphasis supplied)."

[106] Having assessed the case, this court allowed the appeal and remitted the matter to the Supreme Court for re-hearing before another judge. McDonald-Bishop JA (Ag) at paragraph [107] found that:

> "Mr Harris should be given an opportunity to file his response (be it by way of affidavit evidence, submissions or both) and the original parties, that is Mrs Lambie and Mr Lambie's personal representatives, should be at liberty to respond to any evidence adduced by him. Consideration should be given to cross-examination of the affiants although it is recognised that Mr Lambie is no longer available for cross-examination. This issue could be addressed at a case management conference in the court below following the service of processes on Mr Harris, if the parties consider it necessary to do so. This would better facilitate the making of the necessary orders for a fair disposal of the matter at the re-hearing."

[107] Are there similar circumstances as those seen in the **Pameleta Lambie** case evident here? In my view, no. The undisputed evidence before the court is that the debenture holder was desirous to purchase the assets of the company. A competitive bidding process was done, and NURU (a company where the 2nd appellant is the principal), participated. At the end of the selection process, NURU was not selected, but another bidder was. Thereafter, the 2nd appellant directed the receiver-managers to suspend the sale. The receiver-managers refused and were subsequently terminated by the debenture holder.

[108] In the matter at bar, the learned judge concluded that the appellants acted in bad faith in the manner in which they conducted their business. She concluded further that, at every step they have shown that their interest in appointing the receiver-managers was not in having the debt repaid, but in actually securing the assets for themselves. At paragraph [108] of the learned judge's judgment, she outlined the

conduct of the appellants that amounted to bad faith. These are repeated here for ease of reference:

> "(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] It is important to examine each of the above bases of the decision of the learned judge, so as to determine whether there were issues in dispute which needed to be resolved by way of cross-examination of the affiants, before she could have concluded that Lashmont had acted in bad faith.

Joining the pool of purchasers

[110] This was not in dispute. See paragraph 12 of the affidavit of Myles McClymont filed 12 January 2018 where he deponed that; "it was disclosed in the bid document submitted by NURU International that I was a principal thereof".

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

[111] There is no dispute that the appellants were insisting on being shown certain information which would normally be restricted from other bidders, but which they were insisting that they be shown in their position as debenture holders. The appellants were clearly in a conflicted position in light of the fact that they had established a company, NURU, with the 2nd appellant also as principal, for the purpose of participating in the bidding process being conducted by the receiver-managers (see paragraphs 18, 19, 34 and 35, of the affidavit of Myles McClymont filed 12 January 2018 in respect of Lashmont's requests). In those paragraphs it is indicated that Lashmont made several requests to have sight of the deed of assignment to be signed by the preferred bidder. Lashmont stated that this was to ensure that the documents "did not deviate from any document that had been included in the Information Memorandum inviting bids". Lashmont also said that it needed to see certain crucial information so that they could see proof of the ability of the preferred bidder to complete the transaction as well as the nature of any amendments to the assignment and other agreements so as to prevent a "prejudicing of the bidding process". The comment that the learned judge made in respect of this behaviour was open to her on the facts. Certain of the concerns expressed by the appellants were indeed more relevant to a potential purchaser as against a debenture holder.

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

[112] There is no dispute that the appellants instructed the receiver-managers to suspend the sale (see paragraph 31 of the affidavit of Myles McClymont filed 12

January 2018) in which it was stated that "… the request for suspension was made following an update from the [respondent] on June 7, 2017 via email that it was not expected that the agreements would be signed until the following week". The question as to whether at the stage at which the work by the receiver-managers had progressed, this was in the interest of the debenture holder, or NURU as potential purchaser, was a matter in respect of which it was open to the learned judge to draw an inference in light of the proven facts.

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

[113] There is no dispute that the appellants indicated to the company that they would match the price offered by the preferred bidder (see paragraph 7 of the affidavit of Myles McClymont filed 26 January 2018 where, in response to the affidavit of Neville Blythe, he stated; "[t]hat there is no desire on our part to acquire the hotel 'without giving due consideration'. That Mr. Blythe knows that his statement is untrue as if it were our desire to depress the sale price we would not have made him a written offer to match the sale price offered by the Preferred Bidder". It was open to the learned judge to find that this action was more in keeping with that of a potential purchaser as against a debenture holder whose interest is to realise the assets.

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

[114] The appellants instructed the receiver-managers to move on to the 2nd ranked bidder which was their affiliate company (see paragraph 24 of the affidavit of Myles McClymont filed 12 January 2018 where he stated; "That in May 2017 when the deed

of assignment was still unsettled between [the respondent] and the Preferred Bidder and no time frame was provided for completion and the completion date had long passed, we instructed the Receiver-Managers to move on to the 2 or 3 ranked bidder"). It was open to the learned judge to conclude that such a move would not have been in the interest of the debenture holder, but instead in the interest of the potential purchaser and participant in the bidding process-NURU.

Interfering in the sale process being conducted by the receivers

[115] I agree with Mr Gibbs that the actions previously outlined could properly be seen as interference in the sale process. It was open to the learned judge to find that this constituted interference.

Terminating the receivers on very questionable grounds and appointing a new receiver in those circumstances

[116] The appellants outlined various reasons on the basis of which they saw it fit to terminate the receiver-managers (see paragraphs 31, 32, 38, 46 and 47 of the affidavit of Myles McClymont filed 12 January 2018). Lashmont outlined various reasons for terminating the receiver-managers including that the finalization of the agreement was taking too long, it was not satisfied with how the receivers handled the process, the receivers failed to act honestly and in good faith and they had lost confidence in them. At paragraph 47, the 2nd appellant indicated that a new receiver had been appointed. The learned judge, on reviewing all the circumstances, concluded that the reasons given were insincere. This was clearly open to her in the circumstances.

[117] Although Mr Stimpson referred to an allegation made by Mr Blythe, which was disputed by Lashmont, the learned judge did not refer to or rely on that allegation in

her conclusions, that is, that Lashmont was seeking to depress the sale price of the hotel so that they could acquire it at an undervalued price. The learned judge only referred to matters from Mr Blythe's affidavit where they were undisputed by Lashmont (for example the offer made by Lashmont to the company that Lashmont would match the offer made by the preferred bidder and the fact that the hotel property had been up for sale since 2013).

[118] Upon a review of the bases outlined by the learned judge in arriving at her conclusion that Lashmont had acted in bad faith, it will be seen that they were either in respect of undisputed facts or justifiable inferences drawn from proved and undisputed facts. In this matter, there was no need for cross-examination to take place to allow for Edwards J to arrive at the conclusions outlined. The circumstances in this case are therefore distinguishable from those in the **Chin v Chin** and the **Pameleta Lambie** matters.

[119] In addition, there was clearly evidence on the basis of which the learned judge was justified to arrive at the conclusions which she outlined in the matter. As such, it is my view, that this ground of appeal should fail.

The preferred bidder

[120] In light of the proposed failure of the above grounds of appeal, it is not strictly necessary to go on to consider the position of the preferred bidder although both parties made submissions on the issue. Clause 24 of the debenture is repeated here for ease of reference, in respect of the protection and status of a third party purchaser. It provides:

> "**No purchaser** mortgagor mortgagee or other person or Company **dealing with** NIBJ or **any Receiver and/or Manager** appointed by it… **shall be concerned to enquire whether the power exercised or purported to be exercised has become exercisable or whether any money remains due on the security…or as to the necessity or expediency of the stipulations and conditions subject to which any sale shall have been made or otherwise as to the propriety or regularity of any sale** calling in collection or conversion or to see to the application of any moneys paid to NIBJ or such Receiver and/or Manager **and in the absence of male fides on the part of such purchaser** mortgagor mortgagee or other person or company **such dealings shall be deemed so far as regards the safety and protection of such purchaser** mortgagor mortgagee person or company **to be within the powers hereby conferred and to be valid and effectual** accordingly and the remedy of the Company and its assigns in respect of any impropriety or irregularity whatsoever in the execution of such trusts shall be in damages only." (Emphasis supplied)

[121] It is clear that even if the termination of the receiver-managers by Lashmont had been found to be valid and effective, a third party purchaser, and the transaction entered into, would be protected, unless mala fides is proved on the part of the purchaser. Mr Stimpson is therefore incorrect in his submission that, were the notice of termination to have been found to be effective, the instrument of assignment entered into with the preferred bidder, would have been invalid.

[122] Mr Stimpson also made arguments concerning the status of the transaction with the preferred bidder as at the date of the notice of termination sent to the receiver-managers. In light of the matters addressed above, I agree with the position of the learned judge that it was irrelevant whether a contract of sale had been completed.

Possession of the property

[123] As I had noted in paragraph [44] above, there is an inconsistency between orders 6 and 7 which were sought by the respondent and granted by Edwards J. On the one hand, order 7 requires Lashmont, the debenture holder, to vacate and quietly yield and fully deliver up its occupation of the leasehold properties as occupier. On the other hand, order 6 attaches a condition. It requires Lashmont to 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". It will be recalled that Lashmont was placed in possession of the hotel property as a result of a short term arrangement by way of a further sub-lease. Lashmont was not in possession of the property by virtue of any right emanating from its status as debenture holder. Mr Gibbs has argued that the leasehold with the appellants has been terminated and so there is no basis on which the appellants should remain in possession of the property. The letter dated 26 October 2017 from the receiver-managers to Lashmont, as previously mentioned, did refer to the fact that the lease agreement had long expired and needed to be reviewed. It therefore appears that, unless a new lease agreement has been subsequently entered with Lashmont, it is again in a holding over situation, the sub-lease agreement having long expired. I agree with the submissions of Mr Gibbs that there is no basis on which Lashmont should remain in possession of the hotel property.

[124] The ambiguity that has been created by orders 6 and 7 needs to be addressed. Rule 2.15 of the Court of Appeal Rules refers to the powers of this court on the hearing of a civil appeal. It states:

"In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition-

(a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and

(b) power to-

(a) affirm, set aside or vary any judgment made or given by the court below;

(b) give any judgment or make any order which, in its opinion, ought to have been made by the court below;

(c)…(g)

(h) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.

...

(4) The court may exercise its powers in relation to the whole or any part of an order of the court below."

[125] To remove the ambiguity in the order made by Edwards J, I would therefore order that order 6 of the judgment be removed and the appellants, in their capacity as occupier and or operator, should vacate the property forthwith if they have not already done so and certainly within a period not exceeding 30 days from the date of this judgment. Order 7 should therefore remain with the adjustment as indicated.

[126] It is therefore my view that the appeal should be dismissed with costs to the respondent to be agreed or taxed. Furthermore, order 6 of the decision of Edwards J should be deleted.

PHILLIPS JA

ORDER

1. The appeal is dismissed.

2. The decision of Edwards J made on 12 February 2018 is affirmed, save as appears below.

3. Order 6 of the decision of Edwards J is removed.

4. The original order 7 is adjusted to read as follows:

> The first appellant is ordered to vacate and quietly yield and fully deliver up its occupation of the Leasehold properties as occupier and or operator for and on behalf of the joint receiver-managers, forthwith and in any event within a period not exceeding 30 days from the date of this judgment.

5. Costs to the respondent to be agreed or taxed.