

June 8, 2008  
Civil



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CAUSE NO: 752 OF 2003

IN THE MATTER OF the Registered  
Land Law (1995 Revision)

BETWEEN **SCOTIABANK (CAYMAN ISLANDS) LTD.** PLAINTIFF  
A N D TREASURE ISLAND RESORT (CAYMAN) LTD. DEFENDANT

Appearances:

Mr. Ward Sykes of Appleby Spurling Hunter for the Plaintiff  
(with him, the Receiver, Mr. Coyne)

REASONS FOR DECISION

The plaintiff bank holds security for a loan it provided to the defendant. Its security is two-fold separately by way of a debenture and a charge over the assets of the defendant.

These assets include a hotel property located along the Seven Mile Beach of Grand Cayman.

The debenture and the charge were granted by the defendant as the registered legal owner of the property. Upon default by the defendant in the performance of the loan agreement, the plaintiff, in exercise of powers and rights given by its security, appointed a receiver, Mr. Coyne, on 15<sup>th</sup> September, 2003.

As receiver, Mr. Coyne has taken possession and control of the hotel property in respect of which extensive repairs to recent hurricane damage have been effected. He has thus been able to continue to operate the hotel as a going concern. He has also since been able

1 to negotiate the sale of the hotel and, in exercise of powers and rights specifically given  
2 by the charge, sought the sanction of this Court under the Registered Land Law for the  
3 sale by way of private treaty.

4  
5 By order made on the 7<sup>th</sup> March, 2005, and for reasons then expressed, the application for  
6 sale by way of private treaty at a reserved price of US\$14.9 million was approved.

7  
8 Mr. Coyne has been notified by the attorneys for certain trade creditors of the defendant,  
9 that they have instituted in Court and shortly will be presenting, a petition for the winding  
10 up of the defendant, on the ground that it is unable to pay its debts.

11  
12 These attorneys have in correspondence proposed that the sale of the defendant's  
13 property should await their petition, which they anticipate will shortly result in the  
14 appointment of a liquidator over all the assets of the defendant. This would suggest that  
15 the assets of the defendant, including the debentured and charged assets which are the  
16 subject of the proposed sale; should be seen as coming within the liquidation estate and  
17 so available for meeting the liabilities of the defendant generally to all its creditors.

18  
19 Mr. Coyne is concerned to remove any doubt about his rights as receiver, to dispose of  
20 the assets of the defendant which are covered by the debenture and the charge. Hence  
21 this application.

22 Sections 98 and 156 of the Companies Law (2004 Revision) ("the Law"), arise for  
23 consideration and respectively provide:

24  
25  
26  
27

**"98. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."**

1  
2           **“156. Where any company is being wound up by the Court or**  
3           **subject to the supervision of the Court, all disposition of the**  
4           **property, effects and things in action of the company, and**  
5           **every transfer of shares, or alteration in the status of the**  
6           **members of the company made between the commencement of**  
7           **the winding up and the order for winding up shall, unless the**  
8           **court otherwise orders, be void.”**  
9

10  
11 Against that background of the circumstances and the provisions of the Law, Mr. Sykes,  
12 on behalf of Mr. Coyne, seeks orders as follows:

- 13           1.       For a declaration that the sale approved by the court by order dated 7<sup>th</sup>  
14                   March, 2005, is not a disposition of the defendant’s property under section  
15                   156 of the Law.
- 16           2.       Alternatively, for an order that the aforesaid sale is authorised and  
17                   validated by this Honourable court.
- 18           3.       Costs on the indemnity basis, in accordance with the terms of the  
19                   plaintiff’s charge over the property.

20  
21 The primary issue which arises for determination and which appears not to have been  
22 definitively settled before in this jurisdiction, although there is convincing English case  
23 law on the point, is as follows:

24           **Whether a sale or other disposition of a company’s property, to be**  
25           **effected during its winding-up but in exercise of rights and powers**  
26           **vested by a debenture or charge obtained prior to the company being**  
27           **put into winding up, is contemplated by section 156 of the Law.**

1 The primary purpose of section 156 is, of course, to preserve the assets of the company  
2 in winding up for the protection of its creditors. The effect of section 156 is that in a  
3 winding up by the Court, any disposition of the property of the company, including  
4 choses in action and other incorporeal movables and any transfer of shares or alteration  
5 of the status of members after the commencement of winding up, is void unless otherwise  
6 ordered by the Court. See **Palmer's Company Law, para 15.702**, discussing the effect  
7 of the equivalent section 127 of the English Insolvency Act ("the I.A.").

8  
9 Since a winding-up by the Court is deemed by section 98 of the Law to commence on  
10 presentation of the petition (or on the passing of an earlier resolution for voluntary  
11 winding up where the winding-up continues under the supervision of the Court), sections  
12 98 and 156 affect transactions taking place between the date of presentation and the date  
13 of the order for winding-up, whether or not the donee was aware that the petition had  
14 been presented: **Hollcourt (Contracts) Ltd. (In Liquidation) v Bank of Ireland** *The*  
15 *Times, November 11, 1999, TLR 831; [2000] BCC 237*

16  
17 According to **Palmer's** (op. cit) "disposition", (in the equivalent section 127 of the I.A.)  
18 connotes alienation of the company's property – citing **Re Barn Court Ltd.** [1994] BCC  
19 **381, 385**. It follows therefore, that unless the proposed alienation of the defendant's  
20 property here would not be a disposition within the meaning of section 156 of the Law, it  
21 would be void, unless sanctioned by the Court: **Re Gray's Inn Construction Co. Ltd.**  
22 [1980] 1 All E.R. 814. It also follows that a putative donee can obtain no valid right  
23 or title as the result of such an unsanctioned disposition: **Mond v Hammond Suddards**  
24 [1994], reported in **Palmer's In Company Issue 6**, 1995; *June 14, 1995 p.5*.

1  
2 Having already so declared, for the reasons which follow; I am satisfied that such  
3 concerns do not govern the proposed disposition of the hotel and related property here.

4  
5 A charge is defined by section 2 of the Registered Land Law (the RLL) as a “disposition”  
6 of property to which it attaches. Section 37 of the RLL governs the manner in which land  
7 which is the subject of a charge given under section 64 may be disposed of; that is:  
8 expressly only pursuant to the provisions of the RLL itself. In this respect the RLL  
9 provides a mandatory statutory code: See **Paradise Manor Ltd. V Bank of Nova Scotia**  
10 **[1984-85] CILR 437**. In relying on its charge given under section 64 of the RLL, it is the  
11 statutory charge over the realty that the plaintiff primarily invokes; notwithstanding its  
12 recourse available by way of the further equitable charge created by its debenture over  
13 the same property.

14  
15 By section 72 of the RLL the plaintiff, as statutory chargee, became entitled to appoint a  
16 receiver of the income of the charged property or to sell the charged property when the  
17 defendant defaulted and remained in default in repayment of the loan, despite the service  
18 of the statutory notice to remedy.

19  
20 By section 75 the chargee in those circumstances is allowed to sell by public auction.  
21 This is the power that was varied to allow sale by private treaty at the aforementioned  
22 reserved price, by the sanction of the Court given pursuant to section 77.

23  
24 From these and the other relevant provisions of the RLL, it is clear that while the legal  
25 title in the hotel property remained in the defendant, the plaintiff had acquired an  
26 overriding statutory legal and beneficial interest in the property, to the extent of the value

1 of the loan secured by the statutory charge. This overriding interest including the power  
2 to appoint a receiver and the powers and duties of Mr. Coyne as receiver, became vested  
3 as of the date of his appointment on 15<sup>th</sup> September, 2003 (disregarding for present  
4 purposes the fact that officers of the plaintiff bank had been briefly earlier appointed and  
5 succeed by Mr. Coyne).

6  
7 As already noted, the plaintiff's debenture provides a separate form of security according  
8 to its terms. These terms include the typical provisions which create, at the outset, a  
9 floating charge over all the assets of the defendant; including all present and future  
10 receivables and amounts from time to time standing for the credit of the defendant in any  
11 bank account. And, of special significance to the present application - **“the benefit of  
12 any present or future insurance policies, all proceeds thereof and all things in action  
13 which may give rise to any debt, revenue or claim and any other rights relating  
14 thereto”**.

15  
16 When the relevant event(s) of default occurred, this charge created by the debenture  
17 crystallised and became fixed upon the assets.

18  
19 Relying on these provisions, rights and powers, Mr. Coyne recovered proceeds of an  
20 insurance claim through a policy of insurance which the defendant had in place in respect  
21 of the hotel property. Further proceeds of the claim are expected to be paid.

22 The repairs so far carried out to the property have been funded from these proceeds and  
23 the proposed sale agreement contains provisions for the assignment to the buyer, of any  
24 such proceeds recovered but which would have not yet been expended on repairs at the  
25 time of completion of the sale.

1  
2 Mr. Coyne seeks the orders for declaratory relief in respect also of all such proceeds and  
3 other assets coming into his receivership as the result specifically of the exercise of  
4 powers given by the debenture.

5  
6 Importantly in this respect, the debenture also contains the provisions, which, as already  
7 noted, converted the floating charge created by the debenture over assets including the  
8 land, into a fixed charge upon the event of default.

9  
10 The legal effect of the charge so crystallised vis-à-vis the assets of a company  
11 subsequently put into winding-up, is a matter which may now to be seen as settled also  
12 by judicial pronouncement.

13  
14 In summary, one can glean from these pronouncements the following principle as it  
15 would apply to this case: A disposition of assets, real or incorporeal, executed by a  
16 receiver in the name of and on behalf of a debtor company will be valid and, in the case  
17 of land, can properly be accepted for registration, even though the debtor company is in  
18 winding up, provided that an express power to effect disposition of the relevant type is  
19 given to the receiver by the debenture or charge pursuant to which he is appointed.

20  
21 In **Sowman v David Samuel Trust Ltd. (in Liquidation)** [1978] 1 All. E.R. 616, a case  
22 very much on point here; it was held that a receiver could execute a contract to sell a  
23 freehold property comprised in his debenture notwithstanding the making of a winding-  
24 up order. The winding up did not affect the power of the receiver to hold and dispose of  
25 the company's property, including the power to use the company's name for those  
26 purposes; although the winding up had deprived the receiver of power to bind the

1 company personally by acting as its agent. Goulding J. (at page 623 Letter C) explained  
2 that the disposition by way of debenture was binding on the company and those claiming  
3 through it (such as unsecured creditors) as well in liquidation as before liquidation;  
4 except of course where the debenture is otherwise susceptible of being set aside under  
5 some other provision of the Companies Act.

6  
7 In arriving at this conclusion Goulding J. applied the earlier more authoritative decision  
8 of the English Court of Appeal in Gough's Garages Ltd. V Pugsley [1930] 1 KB 615.

9 In that case, a receiver exercising powers under a debenture had begun county court  
10 proceedings in the name of a company to obtain a new lease of business premises, and  
11 shortly afterwards a winding-up order was made. The landlord objected to the action on  
12 the ground, inter alia, that an order having been made to wind up the company, the  
13 receiver could no longer continue the action. It was held that the right to apply for a  
14 renewal of the lease under the Landlord and Tenant Act was a right given by the  
15 company to the debenture holders as part of their security; and that the receiver was  
16 entitled to enforce that right notwithstanding the liquidation of the company.

17  
18 Romer L.J. explained the principles in these terms (at p.626):

19 **“It’s perfectly true (and it has been laid down over and over again)**  
20 **that where, as happened in this case, the debenture or trust deed**  
21 **securing the debenture contains the usual clause, that the receiver**  
22 **appointed under the deed shall be deemed to be the agent of the**  
23 **company, that the winding up of the company, or the compulsory**  
24 **liquidation of the company puts an end to the agency. But it does not**  
25 **put an end in any way to the powers of the receiver. In my opinion,**  
26 **when this liquidation order was made, the right of the receiver to**  
27 **proceed in the name of the company in the county court was in nowise**  
28 **affected.”**  
29

1 In accordance with that view of the law, section 156 of the Law can apply only to  
2 dispositions of property which belong not only legally, but also beneficially to the  
3 company and it has also been expressly held that after the appointment of a receiver the  
4 charged property belongs beneficially in equity to the debenture holders: George Barker  
5 (Transport) Ltd. V Eynon [1974] 1WLR 462 at 467.

6  
7 That view of the law in relation to debentures also predicated the outcome of a recent  
8 case before the House of Lords. In Re Leyland Daf Ltd., Butcher and Another v  
9 Talbot and Others [2004] U.K. H.L. 9, the question was whether assets covered by a  
10 floating charge created by a debenture and which had become crystallised and fixed upon  
11 those assets, were nonetheless available to meet the liquidation costs of the debtor  
12 company subsequently placed into liquidation. It was held that none of the costs or  
13 expenses of the liquidation were payable out of the assets subject to the debenture, until  
14 after the whole of the principal and interest debt charged under it had been paid.

15  
16 The rights of the debenture holder and those of the unsecured creditors, were juxtaposed  
17 and explained by Lord Hoffmann in the following terms:

18 **“When a floating charge crystallises, it becomes a fixed charge**  
19 **attaching to all the assets of the company which fall within its terms.**  
20 **Thereafter the assets subject to the floating charge form a separate**  
21 **fund in which the debenture holder has a proprietary interest. For**  
22 **the purposes of paying off the secured debt, it is his fund. The**  
23 **company has only an equity of redemption; the right to retransfer of**  
24 **the assets when the debt secured by the floating charge has been paid**  
25 **off. It is this equity of redemption which forms part of the fund held**  
26 **on trust for the company’s creditors which arises upon a winding up.**

27  
28 **Putting aside any fixed charges, the position is therefore that if a**  
29 **company is in both administrative receivership and liquidation, its**  
30 **former assets are comprised in two quite separate funds. Those which**  
31 **were subject to the floating charge (the debenture holder’s fund)**

1 belong beneficially to the debenture holder. The company has an  
2 equity of redemption. Those which were not subject to the floating  
3 charge (the company's fund) are held in trust for unsecured creditors.  
4 In the usual case in which the whole of the company's assets and  
5 undertaking are subject to the floating charge, the company's fund  
6 will consist of the equity of redemption in the debenture holder's  
7 fund.

8  
9 In principle, each fund bears its own costs. The expenses of the  
10 administrative receivership are borne by the debenture holder's fund.  
11 The expenses of winding up are borne by the company's fund. The  
12 debenture holder has no interest in the winding up and the unsecured  
13 creditors have no interest in the administrative receivership. So there  
14 is no reason why either group should contribute to the expenses of the  
15 other. Occasionally (for example, if no receiver has been appointed) a  
16 liquidator will realise an asset forming part of the debenture-holder's  
17 fund. As the debenture holder is entitled to the proceeds, it is right  
18 that he should pay the cost of realisation (see *Re Regent's Canal*  
19 *Ironworks Co, Ex p Grissell* (1876) 3 Ch D 411). But the debenture  
20 holder has no liability for the general costs of the winding up."  
21

22  
23 The principle that secured assets do not fall within the scope of a liquidation estate is  
24 even more generally explained in the following applicable terms by Lord Millett (at p.  
25 295 C - G):

26 "Bankruptcy and companies' liquidation are concerned with the  
27 realisation and distribution of the insolvent's free assets among the  
28 unsecured creditors. They are not concerned with assets which have  
29 been charged to creditors as security, whether by way of fixed or  
30 floating charge. Secured creditors can resort to their security for the  
31 discharge of their debts outside the bankruptcy or winding up. Assets  
32 subject to a charge belong to the charge holder to the extent of the  
33 amounts secured by them; only the equity of redemption remains the  
34 property of the charger and fall within the scope of the charger's  
35 bankruptcy or winding up. As James, LJ. observed in *Re Regent's*  
36 *Canal Ironworks Com. Ex p. Grissell* (1876) 3 Ch D 411 at 427, charge  
37 holders are creditors 'to whom the [charged] property belongs with a  
38 specific right to the property for the purposes of paying their debts'.  
39

40 Such a creditor is a person who –

41 "is to be considered as entirely outside the company,  
42 who is merely seeking to enforce a claim, not against

1 the company, but to his own property (see Re David  
2 Lloyd & Co. Lloyd v David Lloyd & Co. (1877) 6 Ch D  
3 339 AT 344 per James LJ.”  
4

5 The 1883 and 1888 Acts [(the early English Acts under which those  
6 Victorian cases were decided and primogenitors to the Companies  
7 Law)] were concerned with the distribution “of the assets of any  
8 company being wound up”. They were not concerned with assets to  
9 the extent to which they belonged to secured creditors, and  
10 accordingly did not affect assets over which the company had given a  
11 charge whether fixed or floating. Preferential creditors were thus  
12 given priority over other unsecured creditors in the distribution of the  
13 company’s free assets, but like them, were postponed to the expenses  
14 of the winding up and had no right to be paid out of any charged  
15 assets.”  
16

17 Having regard to those statements of now settled principle, the assets in question here  
18 clearly do not fall within the general scope of section 156 of the Law.

19  
20 Mr. Coyne has, however, recognised a potential overriding liability for the claims of  
21 employees of the hotel in respect of salaries and pensions by having regard to the  
22 provisions of section 162 of the Law. Indeed, this is even notwithstanding the fact that in  
23 giving priority expressly only to preferential liabilities for outdatedly modest amounts of  
24 wages and salaries, section 162 does not expressly include pension liabilities. To the  
25 extent that they are recognised and given preferential status, the employee liabilities are  
26 given priority even over the debenture or charge holder in the following terms by section  
27 162 (b):

28 “So far as the assets of the company available for payment of general  
29 creditors to meet (payments for wages and salaries) (they shall) have  
30 priority over the claims of holders of debentures under any floating  
31 charge created by the company and be paid accordingly out of any  
32 property comprised in or subject to that charge”  
33

1 The opinion of Lord Nicholl in Re Leyland Daf (above) at p. 287 explains the literal  
2 effect of the earliest expresstion of the equivalent provision in section 2 of the 1897  
3 Preferential Payments in Bankruptcy Act in England:

4 **“To my mind the effect of section 2 admits of no doubt or ambiguity**  
5 **in the relevant respect. Thenceforth preferential debts as defined in**  
6 **(the Act), were to be paid out of the property comprised in a floating**  
7 **charge so far as the non-charged assets were insufficient to discharge**  
8 **those debts. The proprietary rights of a debenture holder were to that**  
9 **extent bitten into.”**

10  
11 In response to what was termed “the spirit” if not the letter of section 162 (b), Mr. Coyne  
12 has undertaken to meet the liabilities for employee’s claims including for pensions, out of  
13 the assets which he controls and in priority to the debts owed to the plaintiff.

14  
15 The declaratory order was granted in the first form propounded (see above), with all the  
16 foregoing in mind.

17  
18 Mr. Sykes, not being completely happy even with that form of order, argued further for  
19 an order – “alternatively” as he put it - in terms of the second form propounded. His  
20 reasoning was that in the event I am proven to be wrong in granting the form of  
21 declaratory relief given; I should, in the exercise of the discretion vested in the court by  
22 the final clause of section 156 of the Law, declare that because it is a secured creditor and  
23 it is just so to declare; the plaintiff, through its receiver, is in any event entitled to a first  
24 call upon the assets of the defendant. And further, even if they do fall within the  
25 liquidation estate as contemplated by section 156, the receiver has been entitled to treat  
26 with those assets in the way he has and intends to do.

27

1 It was immediately plain to me that that would not be a proper exercise of the  
2 discretionary power; even if such an order, entirely anticipatory of the winding-up, could  
3 be made. A rhetorical statement of the proposition readily exposed its flaws: **“On what  
4 basis would it be just to exempt the assets in question from all the incidences of the  
5 liquidation, if the proposition that they are already exempt by virtue of the  
6 debenture and charge is wrong?”** It was hardly surprising that Mr. Sykes was unable  
7 to cite either rationale or precedent in support. Indeed there is highly persuasive  
8 authority to the contrary. In **Re Gray’s Inn Construction Co. Ltd.** (above), transactions  
9 on a company’s bank account allowed by its bank to occur after the company had, known  
10 to the bank, been put into winding up; were found to be dispositions contemplated by  
11 section 227 of the Companies Act 1948 (the precursor to the I.A. section 127, and the  
12 earlier equivalent of section 156). On the bank’s application for the Court’s discretionary  
13 sanction nonetheless of the transactions, the following statement of principle was  
14 pronounced (as taken from the head note at p. 815 b):

15 **“The Court’s discretion under section 227 should be exercised in the  
16 context of the liquidation provisions of the 1948 Act and the Court  
17 should not, in exercising that discretion, validate any transaction  
18 which would result in a pre-liquidation creditor being paid in full at  
19 the expense of other creditors, who would only receive dividends  
20 unless to do so would benefit the unsecured creditors as a whole.”**

21  
22 As in the case of the bank in **Re Gray’s Inn Construction Co. Ltd.** (above) - not being  
23 permitted as it sought to redeem the advances it allowed on the company’s account in  
24 priority to the unsecured creditors’ claims; there simply could be no justification here for  
25 allowing the plaintiff bank the preferential treatment it would obtain. Were the discretion  
26 to be exercised on the hypothesis that the bank here is not a secured creditor relying on  
27 assets which it already controls free from competing claims by virtue of its debenture and

1 charge, I could see no basis for pre-empting the liquidation process including all its  
2 incidences of costs of winding up as it would otherwise apply to the assets.

3  
4 Finally, Mr. Sykes also sought an order for the plaintiff's costs of the present application  
5 to be paid on the indemnity basis from the assets covered by the debenture and charge.

6  
7 I refused that order on the simple basis that the application for the declaratory relief  
8 which the receiver sought and obtained, although being akin to *quia timet* relief, while  
9 justifiable only from the purely pragmatic and business point of view, was nonetheless  
10 not brought about by any threat or obstacle put in the plaintiff's way by the defendant  
11 itself.

12 The proper costs of obtaining the earlier order for sale by way of private treaty were, by  
13 contrast, allowed from the assets on the full indemnity basis provided for by the loan  
14 agreement and charge.

15  
16 My view is that the plaintiff should be able to recover the costs of this application only  
17 and insofar as they might be contemplated by the debenture deed itself. Only in that  
18 event, did I contemplate when I ordered, that they might properly be costs recoverable in  
19 the receivership.

20  
21  
22  
23  
24 Hon. Anthony Smellie  
25 Chief Justice  
26 Dated this 8<sup>th</sup> day of June 2005

