IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

CAUSE NO. 24 OF 1985

The 8th June, 1989

BETWEEN:	James E. MacDonald, Jr.	PLAINTIFF
AND:	(1) Executive Air Services Ltd.	
	(2) Edmund Bodden	
	(3) Edward Bodden	DEFENDANTS

Mr. Angus Foster for the Plaintiff
Mr. P. LaMontagne Q.C. for the 1st and 3rd defendants

COLLETT C.J. JUDGEMENT

On 30th March 1989 by order of this Court made on the plaintiff's application Mr. Robert Jenkinson was appointed "as Receiver and Manager of all the undertaking, business, assets and property of the first defendant, with power to manage the undertaking and assets and carry on the business of the first defendant generally and to do all acts reasonably incidental thereto and without prejudice to the foregoing generality the said Receiver and Manager shall have the following powers without need for further sanction or intervention of the Court." There followed some ten specifically enumerated sub paragraphs two of which, (b) and (c), contain power to pay all expenses relating to the management out of monies coming to Mr. Jenkinson's hands and available for that purpose and to pay himself and his staff at set rates of remuneration and to pay all disabusements out of monies coming to his hands as Receiver and Manager.

On 25th April 1989 by further order of this Court expressed to be made with the consent of the plaintiff and the first and third defendants the order of 30th April 1989 was discharged. The receivership of the first defendant was thus

terminated. In these circumstances the Receiver now claims to be indemnified by the first defendant in respect of all expenses and liabilities properly incurred by him as Receiver and Manager during the period of the receivership. He has also sought a direction that sums due in respect of services rendered to third parties by the first defendant company during that period be paid to him direct.

These claims are disputed by the first defendant who has filed a cross summons seeking an order for the immediate return to its custody of its business files and other assets and property of the company now held by the former Receiver and Manager and over which he is claiming a lien for payment of the sums comprised in the alleged indemnity.

The first issue for determination is whether or not the claim for indemnity is good. It is not in issue that as a general proposition of law the Court appointed receiver and manager of any undertaking is entitled, in the absence of an express direction in the Court order itself, to be indemnified against all liabilities which he properly incur in carrying on the business concerned. A receiver does not lose this indemnity simply because his office comes to an end. In addition to the indemnity he has a lien over the receivership property against all those interested in it. These propositions are set out in The Law Relating to Receivers and Managers by Hubert Picarda at pages 337 and 338 . Kerr or "Receivers", 16th Edition, p.220 is to the same effect. Levi v. Davis (1900) W.N. 174 and Bertrand v. Davis (1862) 31 Beav. 429 lend support to those propositions while the recent decision of the English Court of Appeal in Evans v. Clayhope Properties Ltd (1988) BCLC 238 impliedly accepts that such an indemnity exists and will extend to all the assets of the company which are under the control of the Court.

In this case counsel for the defendants has based his submission upon the wording of the order of 30th March 1989 and in particular the terms of subparagraphs (a) to (b) of paragraph 1 thereof already mentioned. He has sought to find in that

terminology an 'express direction' that the usual indemnity shall not be available to Mr. Jenkinson in respect of this receivership. I am however wholly unable to discern in the wording of these two sub-paragraphs any 'express direction' or even any implied direction (although that would not be sufficient) to this effect. The words 'without prejudice to the foregoing generality' appear to me to negative any such construction of paragraph I read as a whole. The purpose of the specification of particular powers in sub-paragraphs (b) and (c) appears to be the desirability of spelling out the authority of the Receiver and Manager to pay the day to day running expenses of the business without the need for repeated application to the Court for directions.

As a fall-back position the defendants counsel contends that even if the Receiver and Manager can still assert an indemnity and a lien over the assets of the company in his hands, such a lien ought not to be held to extend to its files and documents as opposed to the spare parts, tools, receivables and other assets under control of the Court which have economic value. That distinction should be drawn because the lien asserted is, he submits, an equitable one unlike the lien at common law which arises automatically in favour of attorney over the documents of a client in his possession as regards his proper fees and disbursements and which includes no power of sale.

I have no doubt that counsel is correct in his description of the lien asserted by the Receiver and Manager as equitable rather than common law in origin. Nevertheless, I cannot see why that circumstance should lead the Court to draw any distinction between saleable assets of the company and property unlikely to be saleable, such as documents when defining the scope of the lien in question here. No such distinction is even hinted at in the authorities to which I have been referred and there would seem to be no logic in denying to the Receiver Manager a lien over property of any description of the company in his hands the detention of which may induce those who have resumed control of the company to discharge it by satisfying the

indemnity which the law imposes. As to the power of sale that is a matter for the Courts direction if the application made in paragraph 2 of the plaintiff's summons should eventually be proceeded with. It would then be open to the judge who heard it to exclude, if he thought fit, the files and documents from any resulting order for sale.

For these reasons there will be an order in terms of paragraphs 1 and 3 of the plaintiff's summons of 24th May 1989. The first defendant's summons of 29th May, 1989 is dismissed. The costs incurred in regard to these matters will be the plaintiff's in any event.

The other matter before the Court is the first and third defendants' application contained in paragraph 3 of their summons of 17th April 1989 for leave to file and serve a defence out of time. Such applications are readily granted by the Court and the circumstances of delay in this case have been sufficiently explained to induce this Court, apart from the particular objection advanced by counsel for the plaintiff, to accede to the present application. But counsel for the plaintiff has resisted the application upon the basis that the draft statement of defence which counsel for the defendants proposes to file if leave be granted is such that the Court would, even if it were already filed, strike it out as disclosing no reasonable cause of action or alternatively as frivolous and vexatious and an abuse of process.

Counsel for the plaintiff has drawn attention to the judgment delivered in chambers on 11th May 1985 in relation to an interlocutory application seeking discharge of a mareva injunction granted in these proceedings against the third defendant. I there had inter alia, that it is open to an agent who contracts with a third party on behalf of an undisclosed principal to recover in an action upon that contract if his principal does not sue upon it, wherefore the failure of the plaintiff to disclose the existence of an undisclosed principal in his earlier affidavit was not to be regarded as the

non-disclosure of a material fact upon his ex parte application. Paragraph 4 of the proposed defence seeks to plead facts which would raise at the trial an issue whether or not the plaintiff here could recover upon the basis of the lease contract made with the first defendant in respect of an aircraft owned by a corporation which had authorised him to contract on its behalf. Thus, counsel suggests, the defendants are seeking to re-litigate an issue which has already been concluded against them by a judgment of this Court. In support he has cited Stephenson v. Garnett (1898) 1 Q B. 677 a decision of the English Court of Appeal.

In that case the plaintiff sought in High Court proceedings to sue upon a deed which had already in other proceedings in a County Court between him and the defendant been held by a judge to have been obtained by misrepresentation. Although the Court Of Appeal recognised that a plea of res judicata could not have been maintained by the plaintiff in answer to that High Court action, they nevertheless held that the action ought to have been struck out as an abuse of process since a suitor should not be allowed to litigate over again the same question which had already been decided against him. Although the judgment given on 11th May 1989 was given against the defendants here in these same and not in different proceedings between the parties as in Stephenson v. Garnett, I cannot myself see any good reason in principle why that case should be distinguishable on that account. The fact is that paragraph 4 of the proposed defence will not avail the defendants here at all unless they can persuade the trial judge to hold that in consequence of what is there averred the plaintiff has no right of action under the contract of lease. The clear implication of my judgment of 11th May, 1989 delivered after hearing argument upon both sides of the question is that he does have such a right. The defendants counsel urged upon me that to regard this paragraph as an abuse of process might tend deprive the defendants of any opportunity to test my finding of law on appeal. The answer to that submission is that the defendants had a right of appeal, but having initially given notice of appeal

against that decision, they have subsequently chosen to withdraw it for reasons of their own.

Had the proposed defence rested upon this issue alone I would therefore have felt obliged to refuse leave to file it out of time. There are, however, comprised in it at least two other lines of defence as well as a counterclaim. The first of these raised by paragraph 9 is an allegation of waiver. I have looked at this and it appears upon its face to be a maintainable plea, not one which it would be right to strike out as disclosing no reasonably cause of action. Although the facts and circumstances surrounding it were to some extent canvassed at the hearing of the interlocutory application there was no finding by the Court that this allegation was unfounded, nor in such interlocutory proceedings could there have been such a finding. That issue is therefore fit for trial.

In addition there is as counsel for the plaintiff concedes, material averments in the draft statement of defence which challenge the quantum of damages claimed in the statement of claim. It would clearly be unjust for the defendants to be deprived of an opportunity to be heared upon that issue which is also fit for trial.

Finally as to the counterclaim; although I am doubtful whether or not the defendants can justify a counterclaim for an enquiry as to damages to be ordered since that is a matter within the Court's discretion as held in the unreported case of Fletcher Sutcliffe Wild Ltd v. Burch (1982) FSR 64 on 18th June 1981 by Gibson J, the matter is not so clear upon the authorities that I would feel justified in striking it out upon that ground alone. Of course in these circumstances, unless the defendants were to succeed upon the other issues at the trial and to obtain a judgment in their favour, the question of ordering an enquiry as to damages would be in practice, otiose see Ushers Brewery Ltd v. P.S. King and Co Finance Ltd (1972) Ch. 148.

This leaves a draft defence one part of which may if

pleaded be regarded as an abuse of process but the remainder of which in my judgment could properly be pleaded within the scope of the applicable rules of Court. In these circumstances it would not, I think, be right to refuse the leave sought to plead a defence out of time. This is not a case where the defendants should be driven from the judgment seat. They should, I think, be given leave especially since rule 41 of the Grand Court Civil Procedure Rules appears to give the Court no jurisdiction to strike out part only of a pleading if for any reason the whole of it cannot be properly struck out.

In terms of paragraph 3 of their summons of 17th April 1989 the first and third defendants are given leave to file and serve a defence within seven days of the date hereof. The costs of and related to that issue shall be costs in the cause.

Dated 26th June, 1989.

CHIEF JUSTICE.