BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
Civil Jurisdiction

No. 1130 of 1988

BETWEEN

CANADIAN IMPERIAL BANK OF COMMERCE Plaintiff

AND

GYPSY INTERNATIONAL LTD First Defendant
ROYSTON BEEPAT Second Defendant

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court

2003: December 5 and 7;
2004: October 29;
2006: May 18, 21, 22, 23, 29;
September 25, 26 and 27;
2008: May 26;
2010: July 12;
2012: May 29.

Mr. Roger Forde Q.C. with Mrs. Sherica Mohammed-Cumberbatch of Messrs Carrington & Sealy for the Plaintiff.
Sir Richard L. Cheltenham K.A., Q.C. with Mr. Alrick Scott for the First and Second Defendants

DECISION

[1] This is an application filed on the 16th day of August 1988, in which the plaintiff, **Canadian Imperial Bank of Commerce (CIBC)**, sought damages for breach of contract by **Gypsy International Ltd (Gypsy)** and **Royston Beepat (Beepat)**, the first and second defendants respectively.

[2] The plaintiff, CIBC, is a bank incorporated in Canada with its office and main place of business and branches located at Trafalgar and Marhill Streets in the City of Bridgetown. The first defendant, Gypsy, was a limited liability company incorporated and registered under the provisions of the ***Companies Act*** **Cap 308** with its registered office located at Units 1 & 2, Six Roads Industrial Park in the parish of Saint Philip. The second defendant, Royston Beepat, resided at Lot 32 Long Bay in the parish of Saint Philip and was a director and manager of Gypsy.

Brief Background

[3] The first defendant Company was involved in the business of manufacturing jeans at Six Roads Industrial Park, in the parish of Saint Philip in this Island. Loan facilities were granted to the first defendant by the plaintiff and secured by a debenture (the debenture). A guarantee was also executed in favour of the plaintiff by the second defendant dated 24th November 1982 (both securities are hereinafter referred to in the pleadings).

[4] On the 25th day of March 1984, a fire occurred at the first defendant's place of business. The second defendant was subsequently arrested in connection with this matter and charged, but these charges were later discontinued. On the 10th day of April 1984, the plaintiff appointed Mr. Grenville Phillips as receiver of the Company under the provisions of the debenture. The receivership ended on the 30th day of May 1988.

[5] On the 30th day of May 1988 the receiver presented to the Registrar of Companies a notice of his cessation to act as receiver of Gypsy International Limited; a copy of the said notice was sent to the plaintiff Bank with a copy of a Statement of Receipts and Disbursements for the period 10th April 1984 to 17th December 1985. A supplementary statement of Receipts and Disbursements for the period 18th December 1985 to 31st May 1988 (CIBC 12) was subsequently filed on the 31st of May 1988.

[6] By registered mail, dated 22nd June 1988 (CIBC 13) and posted and addressed to the second defendant on the said date, the plaintiff demanded payment from the second defendant of the sum of $109,969.18 plus interest of $214,096.60. The terms of the letter are now reproduced.

"Registered Letter

June 22,

Mr. Royston Beepat,
Lot 32 Long Bay
St. Philip.

Dear Mr. Beepat

We refer to the guarantee dated November 24 1982 whereby you guarantee payment of the liabilities of Gypsy International Limited to the Bank. Under the terms of this guarantee you agree to make payment to the Bank of the amount of your liability under the guarantee forthwith after demand upon you is made in writing.

We find it necessary to call upon you under your guarantee and accordingly we hereby demand from you payments forthwith of the indebtedness of Gypsy International Limited to us, which as at the date hereof amounts of $109,969.18 plus interest of $214,091.60.

Please acknowledge receipt of this letter by signing and returning the duplicate copy which is enclosed.

Yours truly
Signed: H. A. Cobham
Manager

HAC/ww"

THE PLEADINGS

Statement of Claim

[7] The plaintiff's statement of claim was filed on 16th August 1988. The plaintiff pleaded in paragraphs 1, 2 and 3 of the statement of claim those facts set out in paragraph 2 of this decision. In paragraph 4 of the statement of claim, it is further pleaded that on or about the month of December 1982, the plaintiff granted to the first defendant an operating loan facility together with interest thereon at an agreed rate of 12.75 per centum per annum. By a contract in writing (paragraph 5) dated 24th November 1982, in consideration of the plaintiff granting to the first defendant the loan facility, the second defendant agreed to grant to the plaintiff a "continuing" guarantee for the payment of the liabilities to it which the first defendant had incurred or would incur in the future, whether arising from dealings between CIBC and Gypsy, or from any other dealings under which Gypsy would become liable to the Bank.

[8] Over a period of time from November 1982, the plaintiff advanced to Gypsy amounts totaling $109,969.18 together with interest totaling $214,091.60 up until 22nd June 1988. This meant the total liability as of that date stood at $324,060.78. It was further alleged that it was a term of the agreement between the plaintiff and first defendant that interest would be payable on the principle outstanding at a rate of 12.75 per centum per annum (paragraph 7).

[9] The plaintiff pleaded that it was an express term of the contract that the second defendant would make payment to the plaintiff of the amount of the first defendant's liability forthwith after demand was made therefor in writing. It was further pleaded that a written demand dated 22nd June 1988 for payment of $109,969.18 plus interest thereon of $214,091.60 was posted to the second defendant but the second defendant had refused and/or neglected to pay the same or any part thereof. The plaintiff sought damages as against the first and second defendants jointly and/ or severally in the sum $324,060.78 together with interest on $109,969.18 at the rate of 12.75 per centum per annum from 23rd June 1988 until payment. They further claimed costs in the proceedings.

Amended Defence and Counterclaim

[10] In their amended defence and counterclaim filed 22nd November 2002, the defendants pleaded that Gypsy's assets were at all material times sufficient to pay the debt which was secured by the debenture. The plaintiff purported to appoint a receiver who did not pay CIBC's claim despite being in funds to do so from an insurance payment in the sum of $750,000.00. The defendants further stated that the plaintiff and the receiver were joint trespassers against the first defendant's assets and caused the assets to be wholly sacrificed or dissipated without having paid the plaintiff any debt which was owed to it.

[11] It was further alleged that the dealings of the plaintiff and its unlawfully appointed receiver with the assets of the first defendant lacked *bona fides* and were in breach of their duty to both defendants. The existence of any debt after the first defendant's insurance claim was paid and its assets were realized was caused solely by the plaintiff and its receiver and the second defendant was in the premises relieved of its liability to the plaintiff.

[12] It was also pleaded that the first defendant executed a deed of debenture in favour of the plaintiff and the said deed was duly recorded in the Registration Office. On the 25th day of March 1984 the first defendant suffered a fire at its premises and in April of 1984, the

plaintiff purporting to act under the Deed of Debenture and without demand or warning purported to appoint the receiver and manager of the first defendant.

[13] The defendants stated that under the terms of the debenture, it was expressly agreed that the money secured would only become payable immediately by the company to the bank on the happening of certain specified events that were set out in paragraph 10 of that debenture. It was also expressly stated that a receiver could only be appointed in the circumstances set out in the debenture. The defendants contended that none of the circumstances had arisen which would have allowed the bank to invoke the provisions of the debenture and that the bank breached the agreement when they appointed a receiver. They were never notified or informed of the intended appointment.

[14] The receiver, it was alleged, further collected the first defendant's monies from an insurance claim in the sum of $750,000.00 and sacrificed the assets of the first defendant without paying the plaintiff as he was able and under a duty to do if he was validly appointed, which is denied. This caused the first defendant's entire business to be destroyed and/or dissipated by the sale of its assets at gross undervalue when there was no need for any sale; the debenture holder's debt being in the region of $342,000.00 when the receiver was appointed.

[15] The defendants pleaded further that they were prevented from carrying on business as a manufacturer of clothing and thereby suffered loss and damage. The receiver appointed by the plaintiff collected the insurance monies and in addition sold and dissipated assets comprising equipment, materials and finished products and mismanaged the first defendant's business. The first defendant lost money expended on the factory in which it carried on business and was not allowed to collect debts owed to it. The receiver, it is alleged, usurped and exercised an authority which he had neither under the debenture, in law nor in equity to collapse and destroy the company thereby causing the first defendant the most severe loss inconvenience and damage.

Particular of Loss and Damage

Assets	
Building Materials	$ 89,358
Plant and Machinery	$ 357,111
Motor Vehicles	$ 85,612
Office Equipment	$ 39,614
Factory Furniture and Equipment	$ 56,942
Stocks, Work-in-progress & finished goods	$1,187,026
Foreign receivables (after provision of $20,000)	$1,043,958
Local Receivables	($10,379)
Loans	$ 9,680
Training Grant Receivable	$ 22,441
	$2,881,363
Liabilities	
Share Capital	$1,025,780
Accumulated Deficit	($344,219)
Long-term loan	$ 400,000
Foreign Payables	$ 530,473
Local Payables	$ 99,223
Bank Overdraft	$ 390,550

Bills Discounted	$ 732,911
Commission Payable	$ 46,645
	$2,881,363

[16] The defendants pleaded further that CIBC and Gypsy entered into a collateral agreement whereby credit was to be maintained and the debenture security was not to be enforced by the bank against Gypsy whilst bank accounts were maintained as the bank demanded from time to time by agreed repayments to them on account of Gypsy's debts including unsecured debt.

[17] In breach of that collateral agreement, the bank appointed a receiver without warning and without Gypsy being in default of the said demands and requirements. In the circumstances, pleaded the defendants, the bank was not entitled under the collateral agreement to exercise its right to appoint a receiver under the debenture unless the first defendant was in default. Further and/or alternatively, "that the (bank) nor its receiver were not to apply (Gypsy's) moneys which were collected in a manner inconsistent with the collateral agreement or the terms of the debenture so as to leave the debenture debt unpaid".

[18] When the insurance claim was collected, the bank and its receiver paid debts which were unsecured and/or non-preferential and which were already being repaid or serviced by the first defendant as agreed. The monies ought to have been used to terminate the secured debt and to terminate the receivership.

[19] In the result, the defendants sought *inter alia*

(a) a declaration that the second defendant was not liable to the plaintiff as guarantor of the first defendant's debt
(b) damages
(c) interest and costs

Reply to Counterclaim

[20] The plaintiff in its reply pleaded that Gypsy was in default of its obligations under the debenture in failing to pay moneys thereby secured as they became due and payable. Gypsy threatened or threatened to cease business following the fire at its premises on 25th March 1984 and thereafter the money secured became payable immediately in accordance with clause 10 (d) of the debenture.

[21] The plaintiffs stated that they were not required under the terms of the debenture to notify the defendants of their intention to appoint a receiver and further and/or alternatively, that the defendants by words and conduct were estopped from alleging that they were never notified or informed of the intended appointment of a receiver or that such appointment was invalid.

[22] The particulars of that estoppel are that (1) Gypsy communicated with the receiver during the period of the receivership; (2) Gypsy assisted the receiver during the receivership; (3) that Beepat acting by himself or as agent of Gypsy entered into discussions with the bank relative to the course of receivership; (4) that Beepat acting by himself or as agent of Gypsy sent a letter addressed to the **Barbados Development Bank (BDB)** and copied to CIBC relative to the receivership; and (5) that by letter dated 9th August 1984, the first defendant's Attorneys-at-Law wrote CIBC in relation to the receivership.

[23] The plaintiff contended that it was not responsible or liable for the actions or defaults (which were denied) of the receiver and that such matters were issues solely for Gypsy and the receiver. The defendants therefore claimed loss and damage erroneously.

[24] The plaintiff further denied that it entered a collateral agreement with the first defendant and that the defendant's cause of action of breach of collateral agreement occurred more than 3 years before the commencement of the instant action. Accordingly the defendant's claim was barred by operation of law pursuant to section 20 ***Limitation of Actions Act* 1997.** The plaintiff therefore denied that, in the circumstances, the defendants were entitled to damages, loss and interest as claimed.

The evidence

[25] The main evidence for the plaintiff was given by Mr. James Archibald Ross, Head of Special Service Department, First Caribbean International Bank (predecessors of CIBC); Mr. Grenville Phillips, the receiver and Mr. Horace Cobham, a former bank manger of the Trafalgar/Marhill Street branch of CIBC and the expatriate Director of First Caribbean International Bank.

[26] The evidence for the defendant was given by the second defendant, Royston Beepat; Mr. Chandraballi Bisheswar, a chartered accountant in the Republic of Guyana; and Mr. Gregory De Gannes, Managing Director of the National Bank of Dominica and the former Deputy Manager of CIBC in Barbados.

[27] The relevant evidence of several witnesses, however, appears in the submissions of counsel and the discussion contained in this decision.

Issues for decision

1) A synthesis of the written submissions of the plaintiff and of the first and second defendants reveals that the central issue is whether or not the appointment of Mr. Grenville Phillips as Receiver of the First Defendant was valid.

2) If the appointment was invalid, then did the receiver act in accordance with the law in relation to the duties of a receiver?

[28] The other issues are dependent upon the resolution of these issues and are, in the event that the court holds the said appointment to be invalid, as follows:

3) Is the plaintiff vicariously liable for the acts or omissions of the receiver?

4) Is the second defendant liable to the plaintiff for the balance of the debt owed by the first defendant under and by virtue of the guarantee executed by the second defendant in favour of the plaintiff?

5) Is the first defendant entitled to recover damages from the plaintiff; and if so,

6) The quantum if any to be awarded?

7) Even if the appointment of the receiver was invalid, were the defendants estopped in equity from denying the validity of the said appointment of Mr. Grenville Phillips as receiver?

Was the Appointment of the Receiver Valid?

[29] The plaintiff submitted that the appointment was valid; that its validity was to be determined by the provisions of the debenture which set out the terms and conditions under which a receiver could have been and was, in this case, appointed. It was also submitted that the first defendant defaulted in its obligations to the plaintiff under the provisions of the debenture by virtue of which default the money payable to the plaintiff became payable immediately to the plaintiff.

[30] The first and second defendants submitted that the debenture was, in its terms a demand debenture. They relied on the evidence of Mr. De Gannes and Mr. Phillips that the debenture was a demand debenture and urged the court to find that no demand was ever made on the first defendant for payment. Sir Richard relied upon clause 1 (clause1) of the debenture mortgage which is reproduced later in this decision and which provided as follows:

> "The Company hereby covenants with the Bank to pay to the Bank on demand all moneys and liabilities now or hereafter due and owing to the Bank by the company whether in respect of moneys advanced or paid ..."

[31] He submitted that on a true construction of the clause, the obligation to pay arose only on demand. Thus Clause 1 made a demand a "condition precedent" to the first defendant's liability to pay the amount due. He submitted further that clause 10 of the debenture, whilst specifying certain events entitling the plaintiff to immediate payment, did not obviate the requirements for a demand under clause 1. If it did, he suggested, the requirement of clause 1 for a demand would be meaningless. In summary, his position was that upon a default being made in the obligations under clause 10, the plaintiff must have made a demand under clause 1 and, if there was a failure to pay after a reasonable time was given for repayment, a receiver may have been appointed. A demand for payment therefore, was "essential to the right of the plaintiff to appoint a receiver".

[32] In support of his proposition and the further submission that a reasonable time must be given to allow the Company to pay, he cited **Kevin McGuinness "*Canadian Business Corporation Law*" 2nd Edition Para 8.148** where the author states:

> "The requirement for reasonable notice on demand is often called the rule in **Lester v Dunlop.** The rule may be summarized briefly:
>
> > Where a contract provides that payment of a sum owing is to be made "immediately upon demand" "forthwith" or in like terms, these words are construed to mean "within a reasonable time following demand."

[33] Sir Richard continued that the rule as stated presupposed that a demand must have been made. Reasonable time to pay could not be given unless a demand had been made for payment. The rule undoubtedly applied to demand debentures and extended to all debt-evidencing or creating documents. The debenture in this case, he opined was admittedly a

demand debenture or demand loan and the wording was consistent with the same. He relied heavily upon para 8.147 of the text which he quoted as follows:

> "it is now widely known and understood that the lender on a demand loan must allow the borrower a reasonable period for the payment of the balance outstanding following any demand for repayment on that loan. The idea that a creditor on a demand loan was required to make not only a demand but give a reasonable time to repay such a loan originated at least as long ago as 1863.
>
> A borrower does not take on credit in order to stockpile the money so that it will be able to repay that money should the lender demand it back. The credit is invested and otherwise employed, quite often in illiquid form - a fact of which the lender is obviously aware, for usually the borrower must disclose the use to which the credit advanced will be applied as an integral part of applying for credit in the first place."

[34] Reliance was also placed upon ***Jim Laundry Pontiac Buick v CIBC*** **40 D. L. R. (4th) 343** and ***Roynat v Northern Meat Pac*****kers 29 D. L. R. (4th) 139:**

> "In the circumstances of this case it is my opinion that where no prior notice, let alone reasonable notice was given to **Northern** or **Restigouche**, the appointment by **Roynat** of a receiver and its subsequent seizure and sale of the assets of **Northern** and **Restigouche c**onstituted trespass and conversions for which **Roynat** is liable in damages".

[35] Counsel also relied on "***The Law of Corporate Receivers and Receivers- Managers"*** by **Professor Andrew Burgess (Professor Burgess)** now **Burgess JA,** in which he submitted that Professor Burgess stated that some older cases supported the proposition that there was no need for service of a demand before a receiver was appointed *where there was no contractual* stipulation for service of a demand but went on to say:

> "The more recent authorities, on the other hand, which address the specific question of the service of demand as an essential step in appointing a receiver consider the service of demand to be necessary to the valid and effective appointment of a receiver. This is considered to be so both in cases where the debenture itself contains a requirement for a demand as well as where there is no requirement for it in the debenture ..." (**emphasis supplied)**

Discussion

[36] There was very little difference of opinion between the parties as to the facts which occurred and the circumstances in which the receiver was appointed. Such differences as they arose related to the matter of the interpretation of clauses 1, 10 and 13 of the debenture as they related to the factual matrix of the case.

[37] The evidence of Mr. Phillips was that he was appointed receiver of the first defendant on the 10th April 1984 by the plaintiff under its debenture and that he entered the first

defendant's property on that date. It was also certain that no prior notice of the appointment was given to the first and second defendants and it was not suggested by the plaintiff that such notice was given.

[38] The contention between the parties in relation to the appointment of the receiver revolved around the resolution of the issue whether or not a prior demand ought to have been made in law by the plaintiff to the first and second defendants so as to trigger the appointment of the receiver, in the event that there was a default in compliance with that demand, within a reasonable time of that demand.

[39] In seeking to resolve that issue, it is instructive to look at clause (1) in the operative part of the debenture on which Sir Richard relied in its entirety and to construe it in relation to the submission that the debenture was a demand debenture as characterized by the witnesses (DeGannes and Horace Cobham).

[40] Clause 1 in its entirety reads thus:

> "The Company hereby covenants with the Bank to pay to the Bank on demand all moneys and liabilities now or hereafter due and owing to the Bank by the Company whether in respect of moneys advanced or paid to or for the use of the Company or charges incurred on its account or for any moneys whatsoever which may become due and owing by the Company to the Bank as principal or surety and either solely or jointly with any other company society corporation person or persons in partnership or otherwise upon current banking account or upon loans or bills of exchange or promissory notes drafts orders for payment or delivery of money bills of lading or other negotiable or mercantile instruments drawn accepted or endorsed by or on behalf of the Company and discounted or paid or held by the Bank either at the request of the Company or in the course of business or otherwise or in respect of bills of exchange accepted by the Bank on the instructions of the Company or in respect of moneys which the Company shall become liable to pay to the Bank either under guarantee given by the Company to the Bank or for money guaranteed by the Bank for and on behalf of or at the request of the Company or in any other manner whatsoever and whether any such moneys shall be paid to or incurred on behalf of the Company or any other company society corporation person or persons in partnership or otherwise at the request of the Company or for any other account whatsoever or for any actual or contingent liability or otherwise howsoever including and together with interest as hereinafter provided commission banking charges law and other costs charges and expenses."

[41] The question posed to Mr. De Gannes and Mr. Horace Cobham was whether each of them considered that the debenture was a demand debenture to which each replied in the affirmative. Neither witness was asked whether they considered that the debenture required a demand if there was a default by the first defendant in relation to its covenants under clause 10 or any other clauses of the debenture.

[42] In any event, any answers given by the witnesses would not be binding on the court since this is one of the issues which the court must decide upon. In the ***'Law of Receivers of Companies'*** **by Lightman & Moss,** a debenture is defined as

> "a writing of a company creating or acknowledging a debt and may be secured by a charge or charges over the assets of the company or maybe unsecured".

The author notes that it is only a secured debenture which will normally provide for the appointment of a receiver by the holder of the debenture since the right to appoint is in practice invariably an incident of the charge on the property.

[43] The authors further note that where the making of a demand is an express or implied condition precedent to an appointment, the right to make an appointment must have accrued at the date of acceptance of the appointment by the receiver if the appointment is to be valid and effective. The debenture may enable an appointment to be made at any time, on the happening of a specified event or on the occasion of a default by the company. The burden of proof is upon the debenture holder and receiver to prove that the power of appointment has become exercisable.

[44] All parties relied on clause 10 to support their respective submissions. Clause 10 of the debenture provides as follows:

> "10. The moneys hereby secured shall become payable immediately by the Company to the Bank on the happening of all or any of the events following that is to say:
>
> (a) if the Company make(s) default in the payment of the moneys hereby secured or any part thereof on any of the days and times and in the manner hereinafter provided for payment thereof;
>
> (b) If the Company make(s) default for fourteen days in the payment of any interest hereby secured and the Bank before such interest is received by the bank by notice in writing to the Company calls in such principal moneys:
>
> (c) on demand being made by the Bank for payment thereof;
>
> (d) if the Company cease or threaten to cease to carry on its business or become insolvent;
>
> (e) if a distress or execution or other process of law be levied upon or issued against any of the property of the Company;
>
> (f) if an order be made or an effective resolution be passed for the winding up of the Company;

> (g) if a receiver be appointed of any of the Company's property by any court or Debenture Holder or Trustee for Debenture Holder;
>
> (h) if the Company commit any breach of non-observance of any covenant or stipulation herein contained and on its part to be observed and performed.

[45] Clause 10 contains a variety of fact situations, all of which are not susceptible to the same interpretation as suggested by Counsel for the defendants.

[46] The default provisions contained in clause 10 are capable of being interpreted and indeed on interpretation require that notice be given to the first defendant in the circumstances outlined in sub-clauses (a), (b) and (c). Clauses 10 (a) and (c) do no more than reassert the underlying purport and intent of the debenture that demand for payment of the principal moneys secured by the debenture is required to trigger default, likewise demand for payment of interest where there is a default in payment for 14 days and the plaintiff by notice in writing to the first defendant calls in the principle moneys.

[47] In this regard the court is of the opinion that quotations on the law submitted by Counsel for the defendant are quite apt. Namely, that a reasonable time ought to be given after demand to the Company to make payment after demand in the circumstances outlined in sub-clauses (a) (b) and (c) of clause 10.

[48] The court is of the opinion that a proper interpretation of clause (1) is that the requirement of a demand by the plaintiff is in relation to the obligation to pay the moneys lent or any moneys expended by the plaintiff on behalf of the first defendant upon current account or in respect of money, bills of lading or mercantile instrument, bills of exchange or transactions in the nature of such mercantile transactions in respect of which the plaintiff Bank had expended moneys on behalf of the first defendant under the obligations contained in the debenture.

[49] However, it is important to look at the other sub clauses of clause 10 in relation to the opposing submissions. By virtue of sub-clauses (d), (g) and (h) the moneys became immediately payable if at any time -

> (d) the Company ceases or threaten(s) to cease to carry on business or become(s) insolvent.
>
> (g) if a receiver be appointed of any of the Company's property by any court or debenture holder or trustee for debenture holder;
>
> (h) if the Company commit(s) any breach or non-observance or stipulation herein contained and on its part to be observed and performed.

[50] These sub-clauses, on a literal interpretation, do not require the plaintiff to give notice to the first defendant. Indeed, sub-clauses (d), (e) and (f) were matters squarely within the control of the Company which had given the debenture to the debenture holder.

[51] Sub-clause (f) similarly does not require the plaintiff to give notice of the events to the first defendant as it is clear that the first defendant would have been aware that it was in breach of the relevant covenants or stipulations contained in the mortgage.

[52] All of the cases cited by Counsel related to the obligation to repay the principal sums advanced and which the debentures sought to secure. None of the cases cited raised the issue of the non-performance of obligations other than to pay the principal sums advanced and /or interest thereon.

[53] One can readily appreciate the observation of Professor Burgess in ***"The Law of Corporate Receivers and Receiver-Managers"*** when he opined:

> "... that there are indeed cogent reasons why service of a demand is necessary in receivership, as a remedy, ... is an extremely drastic remedy with devastating consequences for the debtor company. Given this and given the importance of the company to modern capitalist economies such as that in Barbados, it appears to be desirable that every opportunity should be afforded a debtor company avoid receivership. The requirement of service of demand as a necessary step in the appointment of receivers affords the debtor company some opportunity so to do."

[54] The author was dealing with the issue of demand for payment, having cited, *inter alia*, ***Cripps (R.A). & Son v Wickenden; Cripps (Pharmaceuticals) v Wickenden*** **[1973] 2 All ER 606** where the time given to the demand was extremely short. The Court held that the appointment of the receiver could not be impugned on the ground that insufficient time had been allowed after demands had been made for payment where it was clear that the companies had neither the money nor any convenient place to which they might go to get it.

> "Accordingly the companies could not object on the ground that they were not given time to find the money or that the interval between 11.a.m when the demand was made and midday or later when the receiver was appointed was too short"

[55] However, Professor Burgess made no observation with respect to the non-observance by companies of other obligations in debentures other than failure to pay. His opinion, therefore, cannot be taken as supportive of the argument that a demand must first be made in respect of all of the contingencies referred to in clause 10 of the debenture.

[56] Clause 10 (g) when properly interpreted suggests that the principle sums become due and owing when a receiver is appointed under the debenture rather than it being a pre-requisite of his appointment that a demand be first made. This further suggests that there are circumstances other than default in the payment of the principal monies which allow for the appointment of a receiver. It is therefore necessary to look at the other covenants in the debenture so as to ascertain what the circumstances are.

[57] Clause 8 of the debenture provides:

> The Company hereby covenants with the Bank:-
>
> (a) ...

(b) ...

(c) ...

(d) ... to insure and keep insured in an office or offices or other insurer to be approved by and in the name of the Bank against loss or damage by fire hurricane earthquake riot and civil commotion and (if required by the Bank) sea wave its property and effects of every description and against such contingencies and risks in such manner and or such amounts as the Bank shall require and produce to the Bank the receipts for the current premiums within seven days after their becoming due and payable failing which the Bank may at the expense of the Company effect or renew any such insurance as to the Bank shall seem fit."

Covenant to insure

[58] The plaintiff also submitted that a demand for payment of money was only one of the relevant events which would make the moneys secured by the debenture immediately payable. It was not the only event which triggered immediate payment.

[59] The event relied upon as triggering the immediate payment of the secured moneys was the failure of the first defendant to insure and keep insured its property and effects in accordance with clause 10 (b) of the debenture. In this regard the plaintiffs relied upon the letter dated 29th March 1984 from the Insurers NEM (West Indies) Limited to the plaintiff (Exhibit CIBC4) informing the plaintiff of the cancellation of policy of insurance with effect from 7th April 1984 and which was copied to the second defendant. This letter was written four days after the fire occurred.

[60] They submitted that the second defendant in his evidence admitted that the premises were uninsured prior to the appointment of the receiver. Accordingly the failure to insure or keep insured even for one day, counsel submitted, was a breach of clause 10.8 (d) of the debenture, which was an event which triggered clause 10 and which made the moneys due and payable immediately.

[61] The defendants submitted that a demand for payment is required in respect of the first defendant's breaches of its obligations under the clauses of the debenture.

[62] Exhibit CIBC (4), a letter from NEM (West Indies) Insurance Limited informed the plaintiff of the cancellation of the Policy of Insurance (W(B) 291,670 Gypsy International Limited) with effect from 29th March 1984 where it stated as follows:

> "We have decided to cancel the policy with effect from the 29th March, 1984 and have sent written notification of this to the Brokers, Arthur Alleyne & Co. Ltd., with copies to the Insured and the Managing Director, Mr. Royston Beepat.
>
> In accordance with the terms of the Mortgage Clause, we shall continue to protect your interest under the policy up and 10 days from the date of cancellation i.e. 7th April, 1984."

[63] At no time during the proceedings did the first and/or second defendant deny receipt of this correspondence. Indeed, the second defendant in his evidence clearly accepted that he heard of the cancellation of the insurance.

[64] By virtue of a letter dated 30th July 1984 from the first defendant to Barbados Development Bank for the attention of one Mrs. Griffith and written under the hand of the second defendant as managing Director of the first defendant, the first defendant wrote in part:

> "Due to the arrest of the Director and the cancellation of Insurance policies **(emphasis mine)** the CIBC was forced to place a Receiver on the company to protect the remaining assets and to establish a claim on the damages. The claim has now been established to be in the vicinity of approximately BDS$900,000 to $950,000. This figure is now being finalized by the insurance broker and the claims adjustor."

[65] This uncontradicted evidence does not square with the submission of counsel for the defendants that it was the arrest of the second defendant only that triggered the appointment of the receiver. It acknowledged the cancellation of the insurance as a factor.

Discussion

[66] By virtue of clause 4 of the debenture it is provided that:

> "The company hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured (including any expenses and charges arising out of or in connection with the acts authorized by the conditions hereof) and so that the charge hereby created shall be continuing security (over) all its undertaking goodwill and other assets and property whatsoever and wheresoever both present and future including its uncalled capital for the time being and the charge hereby created shall be a fixed first charge on its freehold and leasehold property and the fixed plant and machinery thereon and as to all other premises hereby charged shall be a floating security…"

[67] It is clear law that a company may create either in addition to a fixed charge, a floating charge upon the debtor's personal property. Until there is a default the property subject to the floating charge is under the company's control. When default occurs, the debenture holder can terminate the debtor company's license or ability to deal with the property. At this point the floating charge converts or 'cyrstallizes' into a fixed charge and the company can no longer exercise control over its property. (See ***Evans v Rival Granite Quarries Ltd*** **[1910] 2QB 979)**

[68] In '***Bennett on Receivership'*** **2nd Edition 1999** - pg. 57 the author notes:

> "It is common to provide in a security instrument that if the debtor defaults in a payment of principal or interest or if the debtor breaches some other provision, whether a positive or negative covenant, the security under the instrument becomes enforceable as against the debtor. (**Emphasis mine**)
>
> Upon default and subject to the rights of the debtor, the security holder is in a position to enforce the terms and conditions of the security

> instrument including the right to appoint a receiver. Events of default which entitle the security holder to enforce the security and otherwise cause a floating charge under a security instrument to crystallize are usually defined in the instrument. Such events, covered below, often include the breach of a covenant, becoming insolvent or bankrupt, a default under a separate instrument or a material change in the debtor's undertaking, financial statements or management.
>
> One of the remedies usually afforded to the security holder upon the debtor's default is the appointment of a receiver, or a receiver and manager whether by instrument or by court appointment. The receiver is usually given powers to take possession of the assets, property and undertaking of the debtor with a view to carrying on the debtor's business and ultimately selling the assets to retire the outstanding debt owed to the security holder.
>
> Once the debtor defaults, the security holder can enforce the terms of the contract. It is the default provisions in the contract that give rise to the right to appoint a receiver, and upon the appointment, the floating charge contained in the security instrument crystallizes. On crystallization, the floating charge converts from an equitable floating charge to a fixed or specific equitable charge. The debtor is no longer able to carry on the business in the ordinary course. It is often said that the floating charge "attaches", "fastens on" or "crystallizes" to the then existing property of the debtor."

[69] Under the rubric acts of crystallization automatic and partial crystallizations the authors noted:

> "The question of what acts lead to the crystallization of a floating charge has been the subject of much debate. It has been argued that the crystallization can be self-generated or that the floating charge in the debenture or security agreement can automatically crystallize upon the debtor's default. However, the preferred view is that crystallization cannot occur until the security holder takes some positive step or intervenes after default by the debtor. While it is possible to provide for the floating charge to crystallize automatically upon a debtor's breach, it is probably less desirable to do so because the slightest breach of a non-contentious covenant could cause the floating charge to become fixed and effectively precipitate a receivership and prohibit the debtor from continuing to carry on the business.
>
> In the leading case of ***Evans v Rival Granite Quarries Ltd.,*** **Buckley L.J**. said that crystallization may be brought about in a number of ways, including the appointment of a receiver, the company going into

> liquidation (bankruptcy) or the happening of an event which is defined as bringing an end to the licence to the company to carry on business."

[70] The author opined that, in spite of criticisms of the theory of automatic crystallization in Canada, there were certain events which terminated the debtor's license and crystallized the charge. The given examples were bankruptcy and winding-up proceedings. The author further noted that the security holder must take some positive step to crystallize the charge such as appointing a receiver.

[71] No exhaustive list of the breaches of covenants in a debenture which would cause such crystallization to occur may be found in the case law or literature. It is clear that every case must be determined by its own peculiar facts having regard to the covenants which are contained in the particular debenture.

Conclusion on Insurance

[72] In this case, the covenant to insure and keep insured had been breached. In circumstances where the assets which were the subject matter of the floating charge (namely jeans, fabric and machinery) had either been destroyed or damaged by fire, the enormity of the risk to the security of the debenture holder of the non-insurance of the property after cancellation of the said insurance policy cannot be overstated.

[73] The court is of the view and holds that this breach of covenant (clause 8 (d)) was an event which caused the crystallization of the charge and which entitled the plaintiff to appoint a receiver under the debenture.

[74] The court, therefore, finds no merit in the submission of the first and second defendants that the receiver was not validly appointed because there was no demand under clause 1.

The submission that the Company ceased or had threatened to cease to carry on business

[75] The defendants submitted that the plaintiff sought to justify the appointment of the receiver under clause 10 on the following two grounds:

> (1) The first defendant ceased to trade or carry on business, and
>
> (2) The first defendant exceeded the overdraft limit or was otherwise in default of payments under clause 10(a)

[76] Counsel submitted additionally that the pleadings in relation to the defence to counterclaim did not particularize any facts in support of the allegation and further that the plaintiff was obliged to plead the facts on which it relied in support of the defence and if it failed to do so no reliance could be made on that ground. See ***Philips v Philips*** **[1878] 2QB 127** at **153**.

[77] Sir Richard, in support of this contention that the second defendant had not ceased to carry on business nor had not threatened to do so, relied upon the second defendant's evidence that less than seven percent (7%) of the factory was damaged; that the fire was minor and that the Company was making efforts to restart the business which prior to the fire was operating at 33% capacity. He submitted that the first defendant had the intent and ability to restart the business after the fire. He relied also upon the testimony of Mr. De Gannes that the fire was in an isolated area and that not a significant amount of machines were damaged.

[78] Mr. Forde QC submitted that the evidence suggested that, during the period March 25 to April 9, prior to the appointment of the receiver, the first defendant ceased to carry on business. This he asserted, was confirmed by the 2nd defendant's testimony to the effect that between 25th March and 9th April there was no production of jeans. He relied also on section 274 of the ***Companies Act*** to support his proposition with respect to the events which triggered the immediate payment of sums due under its debenture.

[79] Mr. Forde posited his submission that the first defendant had ceased to carry on business on the alleged admission of the second defendant that between 25th March and 9th April, there was no production of jeans, and the evidence of Mr. De Gannes that after the fire, the police took control of the premises and he (Mr. Beepat) was not allowed in when he tried to visit. The submission was that business had ceased for more than three (3) weeks, which was a prolonged period of time allowing the plaintiff to come to the conclusion that the first defendant had ceased to carry on business thus triggering the appointment of the receiver.

[80] Counsel for the first defendant submitted that the fire damage was minor. He submitted further that to trade or carry on business did not mean that a company must have been constantly trading or doing business. Temporary "stoppings" did not fall within the meaning of 'ceased'. That term meant that the business actually no longer existed.

[81] To justify the receiver's appointment under clause 10 (d) the plaintiff had to establish, in his submission, ... "that the first defendant's business no longer existed at the time of the appointment or objectively that there was a visible threat that it would no longer exist." The evidence, he opined, fell short of supporting that contention.

Discussion

The Law

[82] **Section 274 of *Companies Act***) provides as follows:

> 1) Debenture holders are entitled to realize any security vested in them or in any other person for their benefit, if:
>
> (a) the company fails, within one month after it becomes due, to pay
>
> (i) any instalment of interest
>
> (ii) the whole or part of the amount, or
>
> (iii) any premium owing under the debenture or the trust deed covering the debenture
>
> (b) the company fails to fulfill any of the obligations imposed on it by the debentures or the trusts deed;
>
> (c) any circumstances occur that by the terms of the debenture or trust deed enable the holders of the debentures to realize their security interest; and

(d) the Company is liquidated.

2) Debenture holders whose debentures are secured by a general floating charge vested in debentures or the trustee of the company trust deed or any other person are additional entitled to realize their security if:

(a) …

(b) the Company ceases to pay its debts as they fall due;

(c) the Company ceases to carry on business.

[83] It had also been noted that clause 10 (d) of the debenture provides that the moneys secured became due and payable immediately if the Company ceased or threatened to cease to carry on business. In other words, clause 10 (d) incorporated the provisions of **section 274** within the contract between the first defendant and the plaintiff.

[84] In "***the Law relating to Receivers, Manager & Administrato***rs" 3**rd edition by Hubert Picarda** the author raised the question whether there was any distinction between "ceasing to carry on business or stopping business (or trading)" on the one hand and "ceasing to be a going concern" on the other. He noted that **Fletcher Moulton LJ** in ***Evans v Rival Granite Quarries Ltd*** **[1910] 2 KB 990 at 993** treated the phrases as being synonymous. The author went on to state

> "the concept of cesser of business perhaps allows for more objective assessment than 'ceasing to be a going concern'; a company could cease to be a going concern without actually ceasing to carry on business. But even if the phrases are not being used interchangeably in the authorities, it is clear that the material event to cause crystallization is a cessation of the business and not if that is something different, ceasing to be a going concern."

[85] The evidence in relation to the state of the factory premises is contradictory. Mr. Phillips gave evidence that, on his entry into the premises, he found them substantially damaged by fire. He tried firstly to secure the premises in the interests of the secured creditors. The major assets apart from the usual inventory were clothing and fabric. The fabric was damaged by smoke and fire as one would have expected in these circumstances. He explained that **Pannell Kerr Foster,** the accountants for both defendants, were unable to prepare a statement of affairs until 9 months after his appointment due to lack of documentation which may have been destroyed by the fire. It was delivered to him by letter dated 2 January 1986, almost two full years after his appointment. When asked if he observed whether any of the building rooms were damaged by fire, he said that he could not swear that under oath since this was some 20 years ago.

[86] He said that he collected $717,750.00 from the insurers which covered all of the insured items, stock, inventory and fiscal assets.

[87] The first defendant gave evidence that there were more than 50 (approximately 65) sewing machines prior to the fire which were, not all in use. His evidence of the number of machines varied. After the fire about 5 were burnt out totally and about 10 suffered water damage. About 40 machines were out of use before the fire. He later gave evidence that "... we were doing this production (i.e. 300 jeans per day) with about 35 machines". He said that between 25th March and 9th April they had no access to the factory, that the police had control of the factory between the date of the fire and the appointment of the receiver.

[88] He further said that he spoke to his staff and told them that he had to go and make arrangements and would try to restart operations the following weeks after clean up operations; that he had spoken to the insurance broker who assured him that he would send the adjuster to have a look at the premises. He visited the manager of CIBC, informed him of the fire and told him that by re-configurating the equipment "we could start back work almost immediately without any loss of capacity".

[89] There is a clear contradiction in what the second defendant told his staff and what he told the bank manger. Restarting in a few weeks clearly differs from restarting almost immediately. It is obvious from the second defendant's evidence that there was uncertainty as to when business could recommence. Furthermore, the court must look objectively at the facts to determine whether the first defendant ceased to carry on business.

[90] The second defendant also gave evidence that he was able to get back into the building after he communicated with the banker. The police were there and informed him that they needed to conduct investigations into the cause of the fire. He said that he had to hand over the keys and that he and his staff were excluded from the building. He regained possession on the 10th April, 1984; the date when the receiver was appointed.

[91] Under cross-examination by Sir Richard Cheltenham QC., Mr. Ross said that the company had stopped trading and had laid off staff. He further said that the Bank felt its security was in jeopardy because the Insurance was cancelled. Under further cross examination, it was suggested to Mr. Ross that the combined effect of the cancellation of the policy and the arrest of Mr. Beepat caused the appointment of the receiver/manager. He answered: "No - the company was not operating as a going concern, it lost its Trinidad market and had laid off staff".

[92] Having heard and seen these witnesses in examination in chief and under cross examination, and, having regard to the inconsistencies in the second defendant's testimony, and its diversion from the objective evidence, I am inclined to accept and do accept the evidence of the receiver in preference to that of the second defendant.

[93] The court finds as a fact that to recommence operations the first defendant would have required financing as Mr. Philips said and the company was in no financial position to fund its own operations. The court also finds that the exclusion of the second defendant and the first defendant's staff from the premises, in the aftermath of the fire caused the business to cease operations. Therefore, I find that, prior to the date of the receiver's appointment, the company had ceased to carry on business and had stopped operations within the provisions of the ***Companies Act.***

[94] It is clear therefore that the cesser of the first defendant to operate as a going concern was also one of the matters which the plaintiff had taken into account in relation to the appointment of the receiver.

[95] I am satisfied, therefore, that on the balance of probabilities, that the *cesser* of business also caused the crystallization of the debenture.

Submission that the plaintiff's security was in jeopardy

[96] Mr. Forde submitted that the plaintiff's security was fourfold, namely:

a) The Debenture;
b) The Central Bank Guarantees;
c) The Fire Insurance; and
d) The Personal Guarantees of the Directors.

These securities were reflected in the terms of the loan facility which was approved by the plaintiff to the first defendant

[97] The Credit Guarantee Insurance policy issued by the Central Bank of Barbados in the minimum amount of $800,000.00 with loss to the Bank expired on 29th February 1984.

[98] The cancellation of the insurance policy combined with the arrest of the second defendant constituted a sufficient threat to the security held by the plaintiff entitling the plaintiff to appoint a receiver. He relied on ***Re London Pressed Hinge Company Limited*** **[1905] 1 Ch 576.**

[99] On the other hand, the defendants submitted that there was no provision in the debenture entitling the plaintiff to appoint a receiver where it considered its security to be in jeopardy. Relying on ***Cryne v Barclays Bank PLC*** **[1987] BCLC 548** (**Cryne)** counsel for the defendants submitted and urged the court to accept that the real reason for the appointment was the plaintiff's opinion that its security was in jeopardy and that consequently the appointment was invalid.

Discussion

[100] All parties have accepted that the plaintiff considered its security to be in jeopardy. The plaintiff relied on the absence of the agreed guarantee by the Central Bank and the cancellation of the fire policy over the assets to justify their submission.

[101] The first and second defendants, though submitting that there is no power to appoint a receiver on the ground advanced by the plaintiff, have not properly dealt with the point of whether or not the guarantee and fire policy were not in place at the time the receiver was appointed.

[102] In ***Re London Pressed Hinge Company Limited*** the headnote reads:

> "Debenture holders who have a floating security upon the undertaking and all the property, present and future of a company, are entitled to the appointment of a receiver of the property subject to the debenture if their security is in jeopardy, although nothing is payable in respect of principal or interest, and there has been no default or breach of contract by the company."

In that case the events upon which the moneys became payable were (1) if default was made for 6 calendar months in payment of interest and (2) if an order was made or resolution passed for winding-up of the company.

[103] Neither of these events had occurred, however, a writ was levied against the company to secure a sum due by another creditor and there was no defence to it. Judgment was accordingly signed in favour of the creditor. **Buckley J** lamented the absence of statutory provisions allowing the appointment of a receiver in such circumstances.

[104] In ***Cryne***, **Kerr LJ** pointed out the fact that ***Re London Pressed Hinge Company Limited*** was solely concerned with applications to appoint a receiver by the court and the court's discretion in that regard. He said:

> "... These cases are no authority for the proposition that a debenture holder may appoint a receiver out of court, as the debenture holder's agent, if there is no contractual right to do so."

[105] He therefore held that, in the absence of a clause to that effect in the debenture, the debenture holder had no right, except by order of the court, to appoint a receiver out of court when it considered its security to be in jeopardy since it would not be a right arising under the terms of the contract between the parties.

[106] I consider that the law laid down in ***Cryne*** to be a correct statement of the law. In this case, there is no provision in the debenture or in the terms of agreement for the loan facility between the plaintiff and the first defendant allowing for the appointment of a receiver out of court where the plaintiff's security was in jeopardy.

[107] The submission of the plaintiff is, therefore, rejected and that of the defendant upheld.

[108] In this case, however, there is provision for appointing a receiver where the company breached its covenants in the debenture, namely, the covenant to insure and keep insured. This is a specific breach giving rise to a contractual right to appoint a receiver and is not to be mistaken for the general concept that the security was in jeopardy. It was in jeopardy because of the specific breach.

[109] However, having regard to my finding that the plaintiff had validly exercised his right to appoint the receiver on other grounds, the appointment of Mr. Phillips is not, *ipso facto*, invalid.

Defence and counterclaim

[110] The defendants pleaded that the plaintiff and the first defendant entered into a collateral agreement whereby credit was to be maintained and the debenture security was not to be enforced by the plaintiff against the first defendant while the Bank accounts were maintained as the plaintiff demanded from time to time by agreed repayments to the plaintiff on account of the first defendant's debts including unsecured debts.

[111] In breach of the collateral agreement which was always honoured by the first defendant in respect of the manner in which the loan accounts were to be maintained, the plaintiff appointed the receiver without warning and without the first defendant being in default of the said demands and requirements. In the premises the plaintiff was not entitled by reason of the collateral agreement to exercise the right to appoint a receiver under the debenture unless the first defendant was in default.

[112] Counsel for the defendant referred to the evidence of Mr. DeGannes that the first defendant's account was one of the best that the Marhill Street Branch had; that it was assessed by the Bank and there was a commitment to reduce the same. When the first defendant exceeded the overdraft limit it was with Mr. DeGannes and therefore the Bank's prior permission. He submitted that such a consensual arrangement could not be regarded as a breach of the debenture. The implication was that the allowance by the plaintiff of the first defendant to exceed the overdraft limit would not lead to the appointment of a receiver.

[113] The plaintiff's counsel did not specifically deal with this issue in his written submission. However, he argued that the appointment of the receiver was valid, there being no need

for a demand where other triggers were present to cause crystallization of the debenture which conferred the power of appointment.

Discussion

[114] It is in the nature of a demand debenture that the debenture holder will not call in the sums due until there is a default in payment or breach of some other consideration in the debenture entitling it to do so. The evidence of Mr. Ross is also important to this issue. Under cross-examination by Sir Richard Cheltenham QC, it was suggested to him that the first defendant's account operated satisfactorily i.e. most times within agreed limits, to which the witness agreed. He further suggested that on occasions when the first defendant operated outside agreed limits, it was by virtue of a consensual arrangement with the Bank. The witness gave evidence was that if cheques were presented in excess of the overdraft, the Bank paid them but he did not know if it was a consensual position. Counsel then suggested that when Gypsy operated outside agreed limits, it was temporary. The witness said he could not say.

[115] Mr. De Gannes, under cross-examination said that the first defendant was over the overdraft limit by some $40,000.00. The company sought his permission to go over the limit and he expected the excess to be liquidated by the 15th July 1984. He was unable to say if it was liquidated. The proper inference to be drawn from the evidence is that the plaintiff gave indulgences to the first defendant on occasions when it exceeded the overdraft limit. It does not bear out the suggestion that the bank had entered a collateral agreement with the defendant not to appoint a receiver where the first defendant was in default of its obligations under the debenture.

THE POSITION OF THE RECEIVER

If the appointment was valid, then did the receiver act in accordance with the law in relation to the duties of a receiver?

[116] Counsel for the plaintiff submitted that the receiver was validly appointed and that his authority and powers derived from the provision of the debenture and the provisions of the C***ompanies Act.*** He relied on clause 11 of the debenture which provided that the receiver, when appointed, was the agent of the first defendant. Reliance was also placed on clause 13 of the debenture which is herein set out in this decision

> "13. The Company hereby irrevocably appoints the Bank with power to act through the Bank's attorneys and any receiver appointed by the Bank jointly and also severally to be the attorney and attorneys of the Company and in the Company's name and on the Company's behalf and the Company's act and deed or otherwise to sign seal and deliver and otherwise perfect any deed assurance agreement instrument or act which may be required or may be deemed proper for any of the purposes aforesaid and it is hereby declared that the Bank and the Bank's attorney and any such receiver are hereby authorised to execute or to do any assurance instrument or thing in and with its his or their own name or names and signatures and under it his or their own seal or seals where sealing is required."

[117] Mr. Forde submitted that an invalidly appointed receiver is not the agent of the debenture holder who appointed him disagreeing with the opinion of the author **Sir Gavin Lightman** in his text "***The Law of receiver of Companies***" p234 who suggested otherwise. Counsel also relied on the ***Bank of Baroda v Panessar and others*** **[1986] 3 All ER 751 at 763**. He also submitted that the receiver was not the plaintiff's agent. It must be reiterated that the plaintiff has never conceded that Mr. Philips' appointment was invalid.

[118] Counsel for the defendants submitted that the debenture constituted the receiver agent of the first defendant. However, he further submitted that the appointment was invalid and in those circumstances the receiver is regarded as the agent of the plaintiff which appointed him. Where a receiver acts under an invalid appointment he is a trespasser in respect of any property with which he interferes. (***Forde & Carter Ltd v Midland Bank and another*** **[1979] 129 NLJ 543)**. He also submitted that the plaintiff and the receiver were to be regarded in law as joint wrong doers (**Hubert Picarda "*The Law relating to receivers, Manager and Administrators*" 3rd Edition page 147**" and **Lightman and Moss "*The Law of Receivers of Companies*"** at para 7-15.

[119] Counsel further submitted that the plaintiff was vicariously liable for the receivers conduct in seizing control and disposing of the company's assets. The receiver, he opined, "liquidated the company and closed its business".

Discussion

[120] The functions of receivers are set out in sections 276 *et seq*. of the ***Companies Act.*** Section 276 provides that "a receiver of any property of a company may, subject to the rights of secured creditors receiver the income from the property, pay the liability connected with the property, and realise the security interest of those on behalf of whom he is appointed; but except to the extent permitted by the Court he may not carry on the business of the company."

[121] Clauses 11 and 12 of the debenture provide as follows:

> 11. At any time after the moneys and liabilities intended to be hereby secured shall have become payable under the provisions of clause (10 hereof the Bank may with power to act through its attorney appoint in writing any person (whether an officer of the Bank or not) to be a receiver of all or any part of the property hereby charged and every receiver so appointed shall be the agent of the Company (which shall alone be personally liable for his acts defaults and remuneration) and a receiver so appointed shall have power to do the following namely:-
>
> (a) to take possession collect and get in all or any part of the property hereby charged and for that purpose to take any proceedings in the name of the Company or otherwise as may seem expedient;
>
> (b) to carry on manage or concur in carrying on and managing the business of the Company and to raise money from

the Bank or others on the security of any property hereby charged;

(c) to make any arrangement or compromises which the Bank or any receiver shall thing expedient;

(d) to make and effect all repairs improvements and insurance;

(e) to appoint managers officers and agents for the aforesaid purposes at such salaries as the receivers may determine; and

(f) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which the receiver lawfully may or can do as agent for the Company.

[122] Section 277 provides that "a receiver of a company may, if he is also appointed manager of the company, carry on any business of the company to protect the security interest of those on behalf of whom he is appointed. Clause 11 (b) of the debenture provides that at any time after the moneys and liabilities intended to be thereby secured shall have become payable under the provisions of clause (10) hereof the bank may with power to act through its attorney appoint in writing any person (whether an officer of the bank or not) to be a receiver of all or any part of the property hereby charged and every receiver so appointed shall be the agent of the company (which shall alone be personally liable for his acts defaults and remuneration) and a receiver so appointed shall have power to do those matters set out in paragraphs 11 (a) and 11 (b) of the debenture above mentioned. (See section 280 of the ***Companies Act*** which provides that a receiver or receiver manager of a company appointed under an instrument must act in accordance with that instrument and any directions of the court made under s282 of the Act)

[123] Section 281 provides that "a receiver or receiver manager of a company appointed under an instrument must a) act honestly and in good faith; and b) deal with any property of the company in his possession or control in a commercially reasonable manner. The duties of a receiver are detailed in section 283 of the Act which provides as follows:

"A receiver or receiver-manager of a company must

(a) immediately give notice of his appointment to the Registrar, and of his discharge;

(b) take into his custody and control the property of the company in accordance with the court order or instrument under which he is appointed;

(c) open and maintain a bank account in his name as receiver or receiver-manager of the company for the moneys of the company coming under his control;

(d) keep detailed accounts of all transactions carried out by him as receiver or receiver-manager;

(e) keep accounts of his administration, which must be available during usual business hours for inspection by the directors of the company;

(f) prepare financial statements of his administration at such intervals and in such form as are prescribed;

(g) upon completion of his duties, render a final account of his administration, in the form adopted for interim accounts under paragraph (f); and

(h) file with the Registrar a copy of any financial statement mentioned in paragraph (f) and any final account mentioned in paragraph (g) within 15 days of the preparation of the financial statement or rendering of the final account, as the circumstances require.

[124] Section 286 provides that the receiver must forthwith send notice of his appointment to the company and within 14 days after receipt of the notice by the company or such longer period as may be allowed by the receiver, there shall be made out by the company and submitted to the receiver a statement in accordance with section 287 as to the affairs of the company.

[125] Section 286 of the ***Companies Act*** provides as follows

"(1) Where a receiver of the whole, or substantially the whole, of the assets of a company, in this section and section 287 referred to as the "receiver", is appointed under subsection (3) of section 274, or under the powers contained in any trust deed, for the benefit of the holders of any debentures of the company secured by a general floating charge, then, subject to this section and section 287

(a) the receiver shall forthwith send notice to the company of his appointment;

(b) within 14 days after receipt of the notice by the company, or such longer period as may be allowed by the receiver, there shall be made out by the company and submitted to the receiver a statement in accordance with section 287 as to the affairs of the company;

…

[126] Section 287 of the ***Companies Act*** provides as follows:

1) The statement as to the affairs of a company required by section 286 to be submitted to the receiver or his successor must show, as at the date of the receiver's appointment

(a) the particulars of the company's assets, debts and liabilities,

(b) the names, addresses and occupations of the company's creditors,

(c) the security interests held by the company's creditors respectively,

(d) the dates when the security interests were respectively created, and

(e) such further or other information as is prescribed.

2) The statement of affairs of the company must be submitted by, and be verified by, the signed declaration of at least one person who is, at the date of the receiver's appointment, a director, and by the secretary of the company at that date, or by such persons, hereafter in this subsection mentioned, as the receiver or his successor, subject to the direction of the Registrar, may require to submit and verify the statement, namely: persons who

(a) are or have been officers of the company;

(b) have taken part in the formation of the company at any time within one year before the date of the receiver's appointment;

(c) are in the employment of the company, or have been in the employment of the company within that year, and, in the opinion of the receiver, are capable of giving the information required; or

(d) are, or have been within that year officers of, or in the employment of, an affiliated company.

3) Any person making or verifying the statement of affairs of a company, or any part of it, must be allowed and paid by the receiver or his successor out of the receiver's receipts, such costs and expenses incurred in and about the making or verifying of the

> statement as the receiver or his successor considers reasonable, subject to an appeal to the court."

This section sets out what must be contained in the statement of affairs and is now set out in this decision

[127] Clause 12 of the debenture provides

> 12. All moneys received by any such receiver shall after providing for all costs and expenses incurred in carrying on the business of the Company or the sale or disposal of the whole or any part of the property hereby charged by applied.
>
> FIRSTLY in payment of rents rates taxes and outgoing affecting any freehold or lease hold property of the Company and; or premia on fire and other insurance thereon and the cost of executing the necessary and proper repairs and replacements;
>
> SECONDLY in payment of all costs charges and expenses of and incidental to the appointment of the receiver and the exercise by him of all or any of the powers aforesaid including the reasonable remuneration of the receiver;
>
> THIRDLY in or towards payment to the Bank of all interest unpaid in respect of this Debenture and all charges due thereunder;
>
> FOURTHLY in or towards payment to the Bank of all principal moneys due in respect of this Debenture and
>
> FIFTHLY in payment to the Company of any surplus.

[128] The receiver gave evidence that he entered the first defendant's premises on 10 April 1984, the date of his appointment. He did not have a statement of affairs on entry and asked the Director's to produce that statement within 14 days which they did not. The statement was not prepared until months after the appointment and was submitted to him by the accountants by a letter dated 2 January 1986 (CIBC 21) and it was prepared by Pannell Kerr Foster the accountants of the company and the second defendant's personal accountant.

[129] The statement itself (CIBC 22) was a statement of affairs as at 29 February 1984. The accountant's letter detailed the difficulties encountered in the preparation of the statement.

[130] The statement was not signed and verified by a director and the secretary of the company as required by section 287 (2) of the ***Companies Act.*** He said that, having done his receivership, he rendered certain statements and a summary of receipts and disbursements made during his receivership (CIBC 11 and 12).

[131] CIBC was paid around $700,000.00 but were not satisfied in full. He had made efforts to collect receivables but they were unsuccessful for the most part. He collected $717,750.00 from the insurers which covered all of the insured items, stock, inventory and fixed assets. He sold some stock, fabric and residual assets for approximately $300,000.00. He stated that he had liaised with Mr. Beepat and there had been no objection to his receivership.

[132] He had contacted the law firm of Fitzwilliam & Co in Trinidad with a view to collecting some foreign receivables and that one of the persons who owed the first defendant company money for the purchase of stock post receivership from a company called Mansour set up a claim against the first defendant that the stock was more damaged than anticipated.

[133] He subsequently was made aware that there was a vehicle at Spring Garden, Saint Michael which was over 10 years old and was not in working condition and which was sold for $600.00 after an initial offer of $500.00. No other vehicles came into his possession.

[134] It should be noted that in the statement of affairs the sum of $85, 612.00 had been recorded for motor vehicles, $357,111.00 for plant and machinery, $89,358.00 for building improvements and $39,614.00 for office equipment. A further $56,942.00 is included for factory furniture and equipment. Mr. Philips noted that these items were bracketed and note 10 placed against them; that note reads as follows "these assets are shown at book value as at 30 June 1983 plus unaudited additions and disposals since that date".

[135] The receiver stated that this was the usual terminology used when by the accountants who were unable to supply him with the additions and disposals between 30 June 1983 and the date of his appointment. When he came on board, there were no vehicles in the property and none were pointed out to him. It was the responsibility of the Directors to produce a sworn statement of assets and liabilities within 10 days of his appointment. The statement submitted to the accountant was unsworn and was produced by the accountants and not the Directors.

[136] He noted that he attempted to collect the receivables indicated on the statement of affairs but the question of the company's receivables and bills discounted was a complex and perplexing issue. The Central Bank had written on a number of occasions expressing dissatisfaction with the collection of the receivables. After his efforts were frustrated, he retained Messrs Fitzwilliam, Stone, Furness - Smith & Morgan (Fitzwilliam) in Trinidad and detailed from information a file with copies of correspondence relevant to debtors totaling $557,422.78. A further $326,076.42 had been received by a Mr. Ali of DACS either in cash or goods from the company or its suppliers in Trinidad and had failed to account for it.

[137] The receiver's letter (CIBC 23) was dated 2 August 1985 and addressed to "Fitzwilliam, Stone, Furness - Smith and Morgan" in Trinidad and Tobago. The response to the receiver's letter (CIBC 24 dated 13 Sept 1986) from "Fitzwilliam" is herein set out in full below since it details the efforts made to collect the receivables and the state of the transactions between the foreign debtors and the first defendant and the role played by the second defendant in relation to the first defendant's foreign debts:

"**GYPSY INTERNATIONAL**

I saw Mr. Salamat Ali for half an hour today, 11th September, 1985, and went through the documentation with him.

Insofar as DAC is concerned, although our instructions were to apply for payment of $70,008.50 which we did, the correspondence quite clearly shows that the balance due is actually $12,260.81 as evidenced by the letter of 24th October, 1984 and this is Mr. Ali's position.

Apparently all the goods in these shipments were defective including the DAC's shipment and Mr Beepath from Gypsy came to Trinidad took back the goods and sold them crediting DAC's saccount with the proceeds of sale of about $58,000 leaving a balance of $12,000 as shown. Mr. Ali concedes this but no doubt if an action were brought on the bill of exchange he would set up against it the fact of goods being damaged and that the $58,000 represented a fair price for them in that damaged state.

We also discussed the other suggestion that he had received $300,000.00 worth of cash or goods. As he explains the transactions and this is consistent with the documentation, the goods were ordered from Gypsy by himself on indent i.e. with Gypsy shipping the goods to the customers direct and the customers paying Gypsy for the same direct with Ali looking to Gypsy for payment of his commission. The customers would take up their goods and clear them on their own import license; Ali would have nothing to do with this. He contends that when the fact of the goods being defective became known, Beepath, the then Gypsy Managing Director came to Trinidad and himself took over most of the goods and entrusted them to Ramcharitar to sell and credit the proceeds of sale against the various bills of exchange. Ramcharitar and Beepath are apparently very good friends and Beepath stayed at Ramcharitar's home on his visits to Trinidad. Ramcharitar sold the goods so entrusted to him to one Leong Poi of Point Fortin but Leong Poi has failed to pay for the same and Ramcharitar has bought an action against him presumably for the price of goods sold and delivered. If this is the case then the arrangement between Beepath and Ramcharitar will govern whether the latter can be looked at as having liability to Gypsy for immediate payment or whether the arrangement – as no doubt will be contended- was that Gypsy would be paid by Ramcharitar only as and when he was paid. There does not appear to be anything in the documentation to suggest that Ali received either the money or the goods amounting to $300,000 odd. When I asked him specifically about how he could give the assurance referred to at the top of page 2 of the October 24th, 1984 letter that settlement would be made on an open account basis, he merely said that this was his understanding of how it would be done even though, as I pointed out to him, he did not represent the customers. He was the agent for Gypsy. Quite clearly a statement from Beepath as to the passage of events is highly desirable if not critical.

> Without it, it would be difficult on the present state of our instructions to advise with any certainty that an action would lie against Ali for either goods or money had and received. It will be noted that Ali's account is consistent with the contents of the other letters we have been receiving.
>
> JM:VMcD
> 13 September 1986"

[138] It is clear that the receiver tried to recover as much of the debt as he could but that the role of the second defendant had so complicated matters that there was grave uncertainty as to the extent of the debt due.

[139] Professor Burgess in his text noted;

> "…the property charged may include claims, the recovery of which may be difficult. In addition, there may exist claims against the company. Section 274 (4) (b) (iii) confers on the receiver the ability to take decisions as to whether to pursue or defend these claims fully or to compromise, settle or to enter into arrangements in respect of these claims.
>
> The power to compromise contained in s.274 (4) (b) (iii) is the power to enter into an agreement which terminates a dispute between the company and a creditor as to the rights of either the company or the creditor, or which modifies the undoubted rights of a creditor which he has difficulty in enforcing.
>
> …
>
> Section 274 (4) (b) (iii) does not expressly establish whose interest is to be consulted by the receiver in exercising this power. It is submitted that in making compromises, settlements and arrangements pursuant to the subsection that the receiver must adhere to the best interest of the debenture holders who appointed him."

[140] At the date of his appointment the receiver had over thirty years experience in receivership. In cross examination, Mr. Phillips said that his responsibility was to act honestly, prudently, carefully and in good faith. Sir Richard suggested to Mr. Philips that he had seen himself as a receiver/manager, the questions and answers are instructive and are hereunder reproduced for their intent and purport

> "Sir Richard: you see yourself as a receiver/manager
>
> Mr. Philips: In times past, that is prior to the new Companies Act, the fine distinction between receiver and receiver/manager was not always clinically observed. This deed (CIBC 8) speaks of my appointment as receiver upon terms specified in the debenture and I have been assured that I enjoy under my appointment all the powers and authorities conferred upon me by this working tool.

Sir Richard:	Though not so styled, you understood yourself to be receiver/manager
Mr. Philips:	I saw my powers embracing and being those given to me by the document. I agree that normally a receiver recovers property
Suggestion:	A receiver/manager runs the business with a view to putting it back on its feet
Answer:	is this with reference to powers of a receiver or duties? In this particular case I saw it as my duty to recover the assets of the company. The question of managing the operation with a view to returning the operations as an ongoing commercial operation was not pursued for a number of reasons. This is why I asked if the question was put as to powers or duties, because while I had under the debenture powers to manage and carry on the business, those powers are not obligations. To trigger the decision to carry on the business one has to look for financing to rehabilitate the buildings, stock replacement, refurbishment staffing and working capital. In the circumstances in which this receivership occurred, and the difficulties getting in receivables which left the bank dissatisfied, the bank would hardly have countenanced a decision to give the receiver money."

[141] Counsel for the defendants submitted, and it was also pleaded, that the receiver applied the first defendant's monies from the insurance claim and used, or allowed it to be used by the plaintiff and/or the receiver to pay debts which were unsecured or non-preferential and which were repaid and/or serviced by the first defendant as agreed. The said monies ought to have been used first to pay the secured debt and to terminate the receivership, thus enabling the receivership to continue to the detriment, destruction and the disposition at undervalue of the first defendant's business and assets.

Discussion

[142] It has not been pleaded or demonstrated by submissions what were the preferential debts or unsecured debts which the receiver paid in breach of his obligations. The fairest thing that ought to have been done would have been to particularise the alleged wrongful acts by the receiver in the pleadings so that he would have known the case he was expected to meet. Likewise, it was never suggested to him what unsecured debts or non- preferential debt to be paid that he ought not to have paid.

[143] In CIBC 16 the second defendant referred to the first defendant's intent to pay "all preferential creditors i.e. NIS, PAYE, customs, severance pay and overdraft". There is no suggestion that sums were owed with respect to these statutory imposts which the receiver did not pay and none of which are contained in the Statement of Affairs submitted to the receivers.

[144] This alleged breach of the receiver's duty has been pleaded by the first and second defendants and it is their legal responsibility to prove it on a balance of probabilities.

[145] The receiver submitted his statement of receipts and disbursements for the period 10th April 1984 to 17th March 1985 in which he set out fully the funds collected for the period. For ease of reference, the statement is now reproduced:

"GYPSY INTERNATIONAL LIMITED
(IN RECEIVERSHIP)
RECEIVER'S STATEMENT OF RECEIPT AND DISBURSEMENT
FOR THE PERIOD APRIL 10, 1984 TO DECEMBER 17. 1985

RECEIPTS		
Proceeds of Insurance settlement		$ 725,000.00
Less Stamp duty thereon		7,250.00
		717,750.00
Proceeds from:		
Sale of Jeans		124,210.00
Sale of fabric and residual assets 75,000.00		
Sale of equipment 37,000.00		
Receipts from sundry creditors 61,136.13		
Total receipts to date		$1,015,096.13
Less Disbursements:		
Rent	$ 41,024.60	
Security services	37,677.61	
Travelling expenses	9,829.42	
Transportation and removal costs	4,920.00	
Insurance	9,350.00	
Mr. Beepat	4,300.00	
Misc. wages	1,040.00	
Receiver's fees, expenses & costs	82,155.77	
Insurance consultants fees	27,887.50	218,184.90
Net Proceeds on realization		$ 796,911.23

DISTSRIBUTION TO SECURED CREDITORS

	B. D. B.	**C.I.B.C**.	**Total**
Proportionate interest in Total receipts $1,015,096.13	$324,830.76	$690,265.37	
Less costs and expenses of realization (excluding receivers and consultants fees	34,605.32	73,536.31	108,141.63

	290,225.44	616,729.06	906,954.50
Receiver & Insurance Consultant fees	55,021.63	55,021.63	110,043.27
	235,203.81	561,707.42	796,911.23
Less amount retained	8,000.00	17,000.00	25,000.00
Balance available for Distribution	227,203.81	544,707.42	771,911.23
1st distribution made May 1985	204,456.25	465,406.25	669,862.50
2nd distribution made December 1985	$ 22,747.56	$ 79,301.17	$ 102,048.73

Presented this 17th day of December 1985."

[146] Section 285.1(1) of the ***Companies Act*** provides:

> "Where a receiver is appointed on behalf of the holders of any debentures of a company that are secured by a floating charge or where possession is taken, by or on behalf of any debenture holders of a company, of any property of the company that is subject to a floating charge, then if the company is not at the time in course of being liquidated, the debts that in every liquidation are under Part IV and the regulations relating to preferential payments to be paid in order of priority to all other debts must be paid in order of priority forthwith out of any assets coming into the hands of the receiver or person taking possession of that property, as the circumstances require, in priority to any claim for principal or interest in respect of the debentures of the company secured by the floating charge."

[147] Section 30 (1) Part X of the ***Companies Regulations* 1984** provides:

> "Subject to this regulation and to any specific enactment, in the liquidation of a company there shall be paid in priority to all other debts (whether or not judgment has been obtained in respect thereof)
>
> (a) all taxes of every description due from the company at the date of the receiving order; and
>
> (b) all contributions payable pursuant to the National Insurance and Social Security Act.

[148] It has never been alleged that the receiver failed to pay any such debt which was payable. CIBC 11 showed that the disbursements paid by the receiver were expenses reasonably incurred in respect of and reasonably incident to the proper exercise of the receiver's powers. Miscellaneous wages are also included as well as some $4,300.00 paid to Mr. Beepat. The net proceeds were distributed to the BDB and CIBC, the plaintiff. This is consistent with the receiver's obligations in clause 12 of the debenture.

[149] The BDB's debt was secured by virtue of an endorsement in favour of the BDB on the policy of assurance in respect of the first defendant's premises. In a letter dated 1984-04-04 ref. No. 8-0107 the Barbados Development Bank wrote to NEM (West Indies) Insurance Limited as follows "In accordance with the conditions on the above captioned policy and by virtue of the interest vested in the BDB under an endorsement attached to the said policy, the BDB hereby submits a claim to the full extent of its interest in the amount of $400,000.00". This letter was copied to the defendants' Attorneys-at-Law, Messrs Fitzwilliams, Stone & Alcazar. Thus, the first and second defendants had at least imputed knowledge of the priority of the BDB's debt through their attorneys-at-law.

[150] CIBC 16 (previously referred to) also shows that the defendants were aware and had actual knowledge of the BDB's debt and that it ranked in priority to the plaintiff's debt. The sum of $400,000.00 is contained under the caption 'Long Term Loan' in the liabilities section of the Statement of Affairs prepared by the defendant's accountants. In the notes to the said Statement of affairs the accountants stated that the BDB advanced a loan to the company of the same $400,000.00.

[151] Counsel for the defendants on 22nd May 2006, informed the court that he agreed that the BDB was a secured creditor and that the charge was duly registered (Exhibit 29). He then handed up exhibit 29 which is an extract of the particulars to be supplied to the Registrar of Companies pursuant to section 92 of the ***Companies Act*** which showed that first defendant on 29th December 1983, by debenture, charged its entire assets and undertakings to the BDB to secure the sum of $400,000.00.

[152] There can be no argument about the propriety of the payment of the debt to the plaintiff which is mandated as the receiver's obligation in clause 12 as well.

[153] The supplementary statement of receipts and disbursements for the period 18th December 1985 to 31st May 1988 (CIBC 13) shows a distribution to the plaintiff of $165,000.00 after reduction of expenses of legal fees, and payment to the defendants' accountant totaling $29,243.74 entirely consistent with the receiver's obligations under clause 12 and under the Laws of Barbados.

Disposal of issue

[154] There is no merit in the pleading that the receiver improperly applied the funds received by him to unsecured or non-preferential debts. There is likewise no merit in the pleading that he was invalidly appointed. I also find no merit in the pleading, that the plaintiff's and receiver's dealing with the assets of the first defendant lacked *bona fides.*

Notice

[155] The defendants pleaded in their counterclaim that the plaintiff "without demand or warning purportedly appointed a receiver and manager of the first defendant (see paragraph 4 of counterclaim). In paragraph 8 the defendant's pleaded that they were never notified or informed of the intended appointment of such a receiver. The defendants submitted in consonance with his submission on the requirement of a demand under clauses 1 and 10 of the debenture that reasonable notice of the appointment ought to have been given. The plaintiff submitted that no notice of the appointment was required under the debenture or by the ***Companies Act.***

Discussion

[156] Neither under the ***Companies Act*** nor under the terms of the debenture is there a requirement that the plaintiff give prior notice of its intention to appoint a receiver. Professor Burgess at page 131 of his text noted

> "A receiver is under a duty immediately to notify the Registrar of his appointment…
> A receiver of the whole, or substantially the whole of the company's assets must also immediately upon his appointment send notice to the company of the fact of his appointment. However, the practice in Barbados is for the receiver to advise the company of the date of the appointment and the source of the authority of the appointment."

[157] In the circumstances of this case, the notice given by the receiver to the company was appropriate given the breaches of the debenture under which he was appointed and the urgency of action which those breaches necessitated.

[158] That being the pleading with respect to the defendant's counterclaim, the counterclaim is dismissed.

The claim against the defendants

[159] The evidence of Mr. Ross was that there was a balance of $109,969.18 due to the plaintiff after receipt of the funds from the receiver on the completion of his receivership together with interest at the rate of 12.75%, the interest was $214,091.60 and 22nd June 1988 a total of $324,060.78.

[160] The defendants did not dispute the existence of the debt; they contended that they should not be called upon to pay it because of the invalidity of the receiver's appointment and his "misapplication" of the moneys coming into his hands. In fact paragraph 2 (a) of the amended defence and counterclaim expressly admitted the existence of the plaintiff's debt.

[161] The defendants pleaded that the first defendant's assets were at "all material times sufficient to pay the debt which was secured by a debenture ..." See also Exhibit CIBC (11). The analysis of the evidence which I have undertaken earlier in this decision leads me to the finding, on a balance of probabilities that, the first defendant's assets were insufficient to pay the debt secured by the debenture.

First defendant's liability

[162] The first defendant's liability arose under the terms of the debenture. I have already outlined in this decision the clauses in the debenture which gave the plaintiff the right to appoint the receiver. Having held that a demand is required to trigger the provisions of clause 10 (a) in the debenture, I must consider the application of this clause to the liability of the first defendant in this case.

[163] There is no evidence that the plaintiff made a demand upon the first defendant to pay the outstanding debt due to it under the debenture after the receiver had distributed funds in his hands on completion of the receivership. This does not obviate the necessity for a demand for payment of such balance prior to the institution of proceedings to recover the said balance of debt. In the absence of such a demand, the plaintiff cannot recover the balance of the debt as against the first defendant.

Second defendant's liability

[164] The second defendant's obligations to pay arose under and by virtue of the guarantee which he executed in favour of the plaintiff. By virtue of a registered letter (CIBC 13) dated the 22nd June 1988 and addressed to the second defendant, a demand was made by

the plaintiff acting through Mr. H. A. Cobham for payment forthwith of the first defendant's indebtedness to the bank which at the date of the letter amounted to $109,969.18 plus interest of $214,091.60.

[165] The second defendant had not paid that money. Having found that the receiver was validly appointed and that the allegations in the defendant's defence and counterclaim are unfounded, the plaintiff is entitled to recover the sums due from the second defendant under the guarantee. I will return to this in my disposal of this matter.

Damages

[166] In the event that I may be found to have erred in my decision with respect to the validity of the receiver's appointment under the debenture, the law requires me to consider the measure of damages, of any, which the defendants aught to receive.

[167] The first and second defendants counterclaimed the items of loss and damage hereinbefore referred to in their defence and counterclaim in addition to a general claim for damages.

[168] Counsel for the defendants submitted that, since the first defendant company operated for a short period of time, there is an element of uncertainty with respect to the items of damages which are based mainly on projections. In his closing arguments he submitted that the first defendant ought to recover the market value of (1) plant and equipment; (2) stock on hand; (3) receivables and (4) leasehold improvements and that Mr. Beepat's evidence of their values are uncontradicted. He referred to the statement "Gypsy International Limited Stocks Summary" as at 29th February 1984 where stock on hand - finished and unfinished were recorded at $1,186,833.75. He urged the court to find that the stock on hand at the time of the fire was $945,000.00 as Mr. Beepat testified.

[169] He urged us to accept that $357,111.00 was spent on plant and equipment, $39,614.00 on office equipment and $56,942.00 on factory furniture and other equipment.

[170] The start up value of these items being an aggregate $453,667.00 and urged the court to apply a depreciation of 15% making it $327,774.40, from which the amount realised from the sale was $37,000.00 giving a net value of $290,774.40. He also submitted that first defendant spent $89,358.00 on leasehold improvements and that assuming a similar depreciation rate of 15% annually on leasehold improvements on $89,358.00 the assumed value at the time of the fire would be $71,063.15. Given that the fire was minor and a reduction rate of 25% of value applied to take into account fire damage, he submitted that a reasonable approximation of the value of leasehold improvements at the time of fire was $53,297.32.

[171] He argued that the receiver was entitled to recover the full value of the insurance policy of $900,000.00 less $9,000.00 stamp duty or $881,000.00 net since there was no reason for the compromise of the insurance proceeds by the receiver of $700,000.00.

[172] He submitted that a sum of $500,000.00 for fabric, stock, packaging materials etc. was recoverable since $644,119.32 was the value given of these materials in the stock summary and it is reasonable to assume a stock value of at least $500,000.00 given the short space of time between the fire and the date of the statement.

[173] Counsel also submitted that there was evidence of a claim by the plaintiff to the Central Bank for payment of $510,454.84 under the Trade Discount Facility and the receiver's letter of 6th November 1985 (Exhibit CIBC 25) setting out receivables of $1.5 million which ought to be recovered. He said that the first defendant ought to have collected

those receivables, that there existed no ground on which any buyer was entitled to a set off.

[174] A reasonable inference Counsel suggested from the circumstances was that buyers used the occasion to raise fictitious claims to set off and otherwise avoid paying.

[175] Thus the summary of what the first defendant was entitled to receive was:

(1)	Finished stock	$ 945,000.00
(2)	Plant and equipment	327,774.40
(3)	Unfinished stock	500,000.00
(4)	Leasehold improvement	53,297.37
(5)	Insurance policy	881,000.00
(6)	Receivables	$1,500,000.00
		$4,207,071.77

[176] Giving credit to the plaintiff for $390,550.00 and $204,456.25 to Barbados Development Bank totaling the sum is $604,000.25. This would leave $4,207,071.77 minus $604,000.00.

[177] Mr. Forde submitted that the first defendant had not established its loss and damage. No inventory was taken by the defendants immediately prior to the fire or upon commencement of the receivership. He submitted that Mr. Beepat could not say what the stock, were in progress and finished goods were the day before the fire. Of more importance, is his submission that the defendants have taken no account of the effects of the fire itself on the inventory and the diminished values of the different elements which make up the claim. He submitted that the burden of proof lay on the defendants to convince the court as to the inventory pre and post fire as well as to convince the court that it was not possible for anyone to remove the assets prior to the appointment of the receiver.

[178] With reference to the leasehold assets, Counsel submitted that it was the receiver's evidence that he did not take them away and there is no evidence to support such an assertion. There is likewise no evidence in relation to any vehicles on the property. He also submitted that there was no evidence in relation to the foreign receivables and that the court must not speculate as to what they were. He also referred to Exhibit CIBC 9, a letter from Mrs. Dawn Myers in relation to a request for further and better particulars wherein it was admitted that the second defendant was unable to substantiate the several heads of loss claimed.

Discussion

[179] In ***Tuscany Imports (Investments) Pty Ltd v Dall'oste Belvedere; Lightfit & Co Pty Ltd v Tuscany Imports Pty Ltd*** **(Supreme Court of Victoria Nos. 1781 of 1978, 4534 of 1979; decided 8 September 1987 per Fullagar J, Victoria Unreported Judgments)** the learned judge stated at para. 52-54 as follows:

> "The authorities show, as one would expect, that a company is entitled to substantial damages for trespass to land and goods, and for other invasions of its rights by an unauthorized receiver, notwithstanding event that it was making a loss in trading, and notwithstanding that there is little or no acceptable evidence on which an accurate estimate of pecuniary loss from the trespasses can be made. In *Harold Meggitt Ltd v Discount & Finance Ltd (1938) 56 WN (NSW) 23,* Owen J said - "In my opinion the plaintiff is entitled to succeed in its claims for

> damages for trespass and conversion. So far as the claims for trespass to land and goods are concerned it is a most serious invasion of a person's rights if possession of his assets and the management and control of his business is taken out of his hands, even for a short period, without legal justification. If that invasion is made under a claim that the person trespassing is a receiver, the matter becomes even more serious, and the most far-reaching damage may be done to the person injured. I cannot accede to Mr. Windeyer's contention that the plaintiff here can, at best, only recover nominal damages because there is little or no evidence on which an accurate estimate of pecuniary loss can be made. Nor do I agree that, in the absence of evidence of specific monetary loss, a company cannot ever recover more than nominal damages for trespass. Even a limited liability company is, I think, entitled to claim that there is no place like home."

[180] The burden of proof is on the first defendant, on its counterclaim to satisfy the court, on a balance of probabilities, of the loss it sustained and to prove each item of loss. I have already found as a fact that the receiver acted honestly in the discharge of his duties. I have also found the evidence of the receiver in certain matters to be more reliable than that of the second defendant. The relevant values given by the second defendant are speculative at the most. The first defendant failed to produce the Statement of Affairs within the required period of time. The accountants he employed listed certain caveats with respect to the said statement of affairs since they were unable to verify them.

[181] Mr. Beepat gave evidence under cross-examination, when shown the statement of affairs provided by Pannell Kerr Foster, that he could not say what were the stock, work in progress and finished goods at the date of the fire which were valued at $1,187,026.00. He similarly could not say what the value of local receivables were at the date of the fire. When shown the Exhibit 22 (Local Receivables) he said he did not know who prepared the document. He did not take an inventory between the date of the fire and the receiver's appointment. He said on 10th April 1984 the police had control of the building

[182] This evidence falls far short of the standard required to convince the court that the figures claimed are realistic. One would have expected the managing director of the first defendant company to have had some knowledge of these items especially in the light of his suggestion that there was enough of a stock of finished goods to be sold to help to pay off the Bank.

[183] On the other hand, Mr. Phillips was quite positive as to what he found and he had made an inventory of what was in the factory. There is no evidence that he removed any items from the factory save in the course of and for the purposes of his receivership. He found only one disabled vehicle worth $600.00 yet the first defendant's statement of affairs contains vehicles valued at $89,612.00. The claim for leasehold improvements, value of stock, machinery etc. is based on pre-fire estimates and does not take into account the effect of the fire and water damage on these for which the receiver is not responsible. The leasehold improvements included the building of a second floor, a boiler room and the building of stock rooms. This information was provided by Ms. Dawn Myers by letter dated 27th February 1992 (Exhibit CIBC 19)

[184] The receiver gave evidence of the efforts he made to recover the foreign receivables and the difficulties he encountered in that regard. He employed Attorneys-at-Law in Trinidad to assist him in that regard. I have already referred to the letter from the Attorneys setting out their own difficulties in the recovery process and the role of the second defendant in relation to some of the receivables due to the first defendant.

[185] There is no evidence before me that any of the foreign debtors seized the opportunity to make or to claim fictitious set offs as referred to by counsel for the defendants and the court will not so speculate. Having pleaded it the defendants must satisfy the burden of proof which lies on them to establish sufficient facts on which the court could so conclude and they have failed to do so. I must deal with such evidence as there is.

[186] The court accepts the evidence of the receiver as to the items which he found on the premises and which he sold to pay off the several creditors. The equipment, machinery and other items would have been on the premises when they were restored to the first defendant company after the receivership ended.

[187] The only reliable evidence as to what the foreign receivables were is the evidence of the receiver which this court accepts.

[188] To award the first defendant the value of these items pre-fire would be to hold that the fire had no effect on those items or that the first defendant would not have had to bear the cost of re-instating them. In other words, part of this loss was occasioned by an act of God (the fire).

[189] With reference to the insurance policy, this was assigned to the Barbados Development Bank whose interest in the proceeds ranked *pari pasu* with the plaintiff's. It is wrong to suggest that the proceeds of that policy would have been payable to the first defendant when the fire policy formed part of the plaintiff's security as well as that of the BDB. The proceeds of the policy would have been payable to the BDB and the plaintiff and not to the first defendant.

[190] Similarly, the Central Bank Guarantee forming part of the fourfold security to the plaintiff would not have become payable to the first defendant. It was assigned to the plaintiff Bank which would have received it under its contractual arrangements with the first defendant.

[191] Accordingly under this head the court would have awarded as damages, those sums which the receiver sold the various items for and which the court finds were sold in good faith and at the best prices obtainable on the market.

[192] In the circumstances therefore the damages under this head would have been:

Proceeds from sale of jeans		$124,210.00
Sale of fabric & Residual Assets	$ 75,000.00	
Sale of Equipment	$ 37,000.00	
Receipts from Sundry creditors	$ 61,136.13	
		$297,346.13
Less		
Rent		$ 41,024.60
Security		$ 37,677.61
Insurance	$ 9,350.00	

Insurance Consultant Fees	$ 27,887.50
	$115,939.71
	$181,404.42
Less sums paid to Mr. Beepat	4,300.00
Total	$177,104.42

[193] Counsel for the defendants submitted that the difference between his client's claim on the insurance and the final payout figure ought to be credited to his client since there was no basis for the receiver accepting a lesser sum. Mr. Beepat wrote in CIBC 16 that the claim "has now been established to be in the vicinity of approximately BDS $900,000.00 to $950,000.00. This figure is now being finalized by the Insurance Broker and the Claims Adjuster. This was the basis upon which he founded his claim for the difference. In the receiver's statement of receipts and disbursements, a figure of $717,750.00 is entered being the proceeds of the insurance settlement of $725,000.00 less stamp duty thereon of $7,250.00.

[194] The receiver gave evidence that he retained CGM Consultant's to help unravel and make the best case for the claim. It is inherent in Mr. Beepat's letter that there was some uncertainty as to the extent of the claim. The facts bear out that the receiver, in appointing the consultants, acted consistently with his duty in ensuring that any claims were properly settled or compromised according to law. In this respect reference must also be made to the observation of Professor Burgess herein before referred to as it relates to section 274 (4) (b) (iii). There is no evidence to suggest that the insurance adjusters acted improperly.

Loss of profits

[195] Counsel for the defendants submitted that the courts should award the first defendants $10,669,662.00 as damages for loss of profits from 1985-1993. He relied upon the projected income and expenditure account for the first defendant for the years ended 30th June 1984-2006 prepared by Bisheswar Seebarran and Company Chartered accountants from Guyana. He urged the court to find that the first defendant in its first year realized revenue of $240,000.00 and in the second year $2.2 million. Interestingly, he noted that "given the capitalization of the company it was notwithstanding its solid meteoric progress in sales and in penetration of the markets in Trinidad and Jamaica, still not in profit." He posed the question whether it was more likely than not that the company would have continued for some reasonable period even though to a lesser level than indicated in year two.

[196] He relied upon the following factors to support his proposition that it was more likely than not:

i. The company was launched after the most careful preparation – factories in the far East were visited and careful observation made of their techniques of operation and production. The Jean facility in N Carolina was also visited and their techniques were studied.

ii. The equipment was the most modern and sophisticated of all the garment factories in operation in Caribbean. Even a machine to put in place the embroidered pockets of the jeans was in place.

iii. The design and layout of the factory made for efficient production.

iv. Considerable training was invested in the staff

v. The market in the Caribbean was a protected market for garments

vi. The garments were made to fit snuggly different races: Chinese, Indians and negroes. It was not a case of one jean fit all.

vii. The material used in the jeans was the best in the business.

viii. The materials used – buttons, threads, denim embroidery were also of the best quality.

The projected figures quoted by counsel as loss of profits were as follows:

i.	1983	($ 473,528.00)
ii.	1984	($ 321,648.00)
iii.	1985	$ 17,874.00
iv.	1986	$ 557,048.00
v.	1987	$ 1,334,103.00
vi.	1988	$ 1,928,478.00
vii.	1989	$ 2,914,724.00
viii.	1990	$ 3,894,166.00
ix.	1991	$ 4,861,830.00
x.	1992	$ 5,829,494.00
xi.	1993	$ 6,797,159.00
xii.	1994	$ 7,764,823.00
xiii.	1995	$ 8,732,487.00
xiv.	1996	$ 9,700,151.00
xv.	1997	$10,667,815.00
xvi.	1998	$11,635,479.00
xvii.	1999	$12,601,143.00
xviii.	2000	$13,570,807.00
xix.	2001	$14,538,472.00
xx.	2002	$15,506,136.00
xxi.	2003	$16,514,119.00

It should be noted that these figures related to retained earnings on the projected income and expenditure sheets and differed from the profit after taxation on the said sheet which is attached as an appendix to this decision.

[197] Counsel submitted that in the light of the uncertainty inherent in projections, the court could presume that moving from one quarter million dollars to $2.2 million in one year was likely to continue for five to seven years. The assumptions made were based on

information supplied by the second defendant whom counsel asked the court to accept as a witness of truth. He said that the Caribbean market was protected so as to ensure that there was no overrun from china and India, and that a Mr. Dennis Morgan had been employed by the first defendant to penetrate the United States market. There was no anticipated decline in the markets and it was presumed that the other expenses would not increase.

[198] Counsel submitted further that the court could discount the figures for loss of profits claimed by 25-33 1/3 percent to take into account the uncertainty inherent in projections.

[199] Mr. Forde, on the other hand, submitted that the accountant's evidence was unreliable. He had cross examined him in 2006 about his 2003 projections yet he had not check what had actually occurred in the market during those years which had passed since the projections were made. He suggested that the company had operated for one year and had suffered phenomenal losses. The accountant had no actual figures to base his projections on since there were no audited accounts. He submitted that the accountant could not justify his assumption that the production of jeans would have increased to 105 jeans per day. No empirical evidence was given in relation to the Trinidad market. There was no evidence in relation to comparable companies and their performances in the projected years. He submitted that the first defendant had failed in its legal obligation to prove its loss.

Discussion

[200] The first defendant claimed loss of profits for the period 1985-1993. The receivership ended in 1988. The claim for loss of profits is for some five years after the receivership ended. It is posited upon the submission that the receiver was not lawfully appointed and he had liquidated the first defendant's company and destroyed its business. I have already found that the receiver was validly appointed and that he acted bona fide in the discharge of his duties. In this case the second defendant gave evidence of the efforts he had made to clean up the factory with a view of restarting operations. He gave evidence that he would have been able to obtain financing with his father's help and with the help of related companies. He also gave evidence that he would have been able to put the required insurance in place.

[201] Counsel for the defendants relied upon the second defendant's testimony that he had commenced cleaning up the factory premises with a view to commencing operations

[202] The second defendant also gave evidence that he would have been able to get insurance through his related companies in Guyana, Beepat and Sons, Beesons Industries and Jeans Junction and in which he was a 50% shareholder.

[203] He also said that his company would have been in a position to pay the insurance if notice had been given. There were several ways, they were 20,000 pairs of jeans in stock which could have been sold, he could have called his friends in St. Lucia who at the time had over £20,000 in its bank in England. Alternatively, they could have requested funds from their other companies to cover the overdraft.

[204] It is clear that to restart the business an injection of capital was required. The second defendant in his evidence gave methodologies by which he said could have raised funds. Nowhere in his evidence did he say that he embarked upon any of these proposed courses.

[205] He gave evidence further of the methodologies by which he could have restarted manufacturing prior to the appointment of the receiver thereby mitigating his losses. That duty to mitigate continued after the completion of the receivership.

[206] I am of the opinion that the period from 1985-1993 is an unreasonable period, in the circumstances of this case, for a claim of loss of profits. I am of the further opinion and I hold that a period of one year post receivership would have been more than adequate for the first defendant to put its house in order and restart its manufacturing business. I would therefore have disallowed any claim for loss of profits after 1989.

[207] With reference to the figures claimed it is clear that the first defendant had potential as a manufacturing enterprise. It possessed modern equipment some of which was leased as the receiver found and it had vision. This is reflected in the projections of the accountant and in counsel submissions. That is not enough however to justify the profits claimed. One of the most important elements in relation to projected profits relates to markets for the manufactured goods. There is no reference in the projections to the markets which this company had penetrated. Likewise there is no solid evidence by way of correspondence, contractual, or propose contractual arrangements to penetrate the United States market through Mr. Dennis Morgan who was employed by the first defendant. He did not give evidence in this case. Mr. Ross gave evidence that the first defendant had lost its Trinidad market.

[208] The second defendant did not speak to this neither was it taken into account in the making of the projections. I find it unlikely that in such circumstances the fortunes of the company would have made a dramatic turn around so as to move from a loss position to the projected profit without there being solid evidence of availability of markets for its products. It is also a source of concern that the loss of one of the first defendant's primary markets was not factored into the accountant's proposals. No account was taken of loans which would have been required to recapitalize the business. This omission presents an unrealistic picture of the projected financial status of the first defendant for the period covered in the projections. The first defendant made losses of $473,528.00 and $321,648.00 in the years 1983 and 1984 respectively. The fire occurred on the 25th March 1984 so that it is not unreasonable to infer that the company would be involved in the process of rehabilitating its plant and recapitalizing itself.

[209] Assuming the projected profit of $557,048.00 for 1986, the court can find no logical basis for the projections of $1,334,103.00 and $1,928,478.00 in 1987 and 1988 respectively. The assumptions contained in the projections are that the company estimated that 335 jeans were manufactured per day at a price of $30 per pair of jeans. The company had the capacity to manufacture 1000 jeans per day. It was assumed that production would increase by approximately 105 jeans per day each year reaching 875 jeans in 1988. These projections were based on the capacity of the company to produce jeans. That, however, is not the basis for deciding profitability. No indicators of available markets other than the second defendant's word to the accountants underlie these assumptions. I have already set out the reasons why I have found the evidence of the second defendant to be unreliable.

Conclusion on Loss of Profits

[210] In the premises I am not satisfied that the first defendant has proven its loss of profits on the balance of probabilities. I am more inclined to the view and I hold on the balance of

probabilities that it was more likely that the first defendant would have made losses rather than profits during the years covered by the projections.

[211] Therefore, having found no impropriety in the receiver's actions, there is no basis in the evidence for the allegation that the receiver liquated the first defendant's business and/or caused its destruction. Referring to the decision in ***Tuscany*** I consider that the sum I would have awarded based on the sale of those assets referred to by the receiver would have been a substantial award in the circumstances of the case so as to satisfy the claim for damages for trespass and conversion had the court found in favour of the defendants.

DISPOSAL

[212] In the circumstances, judgment is entered for the plaintiff against the second defendant for the sum of $109,969.18 and interest of $214,091.60 due under the mortgage by the first defendant and guaranteed by the second defendant under the guarantee herein before referred to.

[213] The plaintiff's claim against the first defendant is dismissed.

[214] The first and second defendants' counterclaim against the plaintiff is dismissed.

[215] The decision with respect to costs and interest is reserved for argument by counsel.

William J. Chandler
Judge of the High Court

APPENDIX

PROJECTED INCOME
AND
EXPENDITURE

Gypsy International Ltd
Projected Income & Expenditure 1983- 1988

Particulars	**BD $**	**BD$**	**BD#**	**BD$**	**BD$**	**Bd$**
Year	**June 1983**	**Year Ended 30.06.1984**	**Year Ended 30.06.1985**	**Year Ended 30.06.1986**	**Year Ended 30.06.1987**	**Year Ended 30.06.1988**
Revenues						
Sales from Manufactured Goods	2,441,675	4,164,335	5,270,400	6,433,400	7,520,200	8,946,750
Other Income	25,958	0	0	0	0	0
	2,467,633	4,164,335	5,270,400	6,433,400	7,520,200	8,946,750
Less: Expenses						
Cost of Finished Products	1,476,114	2,593,551	3,274,232	3,988,075	4,602,426	5,499,300
Administrative Expenses	585,027	603,156	636,308	673,498	706,315	760,921
Selling Expenses	423,174	723,627	919,006	1,121,187	1,311,791	1,561,030
Interest Expenses	83,746	92,121	101,333	111,466	122,613	134,874
	2,568,061	4,012,455	4,930,879	5,894,226	6,743,145	7,956,125
Net Income Before Taxation	(100,428)	151,880	339,521	539,174	777,055	990,625
Taxation						396,250
Net Income After Taxation	(100,428)	151,880	339,521	539,174	777,055	594,375
Appropriated Account						
Profit After Taxation	(100,428)	151,880	339,521	539,174	777,055	594,375
Retained earnings (loss) at beginning of year	(373,100)	(473,528)	(312,648)	17,874	557,048	1,334,103
Retained earnings (loss) at the end of year	(473,528)	(321,648)	17,874	557,048	1,334,103	1,928,478

Gypsy International Ltd
Projected Income & Expenditure 1989 – 1993

Particulars	**BD $**	**BD$**	**BD#**	**BD$**	**BD$**
Year	**Year Ended 30.06.1989**	**Year Ended 30.06.1990**	**Year Ended 30.06.1991**	**Year Ended 30.06.1992**	**Year Ended 30.06.1993**
Revenues					
Sales from Manufactured Goods	10,405,800	10,405,800	10,446,800	10,446,800	10,446,800
	10,405,800	10,405,800	10,446,800	10,446,800	10,446,800
Less: Expenses					
Cost of Finished Products	6,123,375	6,135,906	6,196,536	6,196,536	6,196,536
Administrative Expenses	679,526	663,498	663,498	663,498	663,498
Selling Expenses	1,810,795	1,810,795	1,810,795	1,810,795	1,810,795
Interest Expenses	148,361	163,197	163,197	163,197	163,197
	8,762,057	8,773,396	8,834,026	8,834,026	8,834,026
Net Income Before Taxation	1,643,743	1,632,404	1,612,774	1,612,774	1,612,774
Taxation	657,497	652,961	645,109	645,109	645,109
Net Income After Tax	986,246	979,442	967,664	967,664	967,664
Appropriated Account					
Profit After Taxation	986,246	979,442	967,664	967,664	967,664
Retained earnings (loss) at beginning of year	1,928,478	2,914,724	3,894,166	4,861,830	5,829,494
Retained earnings (loss) at the end of year	2,914,724	3,894,166	,861,830	5,829,494	6,797,159

Gypsy International Ltd
Projected Income & Expenditure 1994 – 1998

Particulars	**BD $**	**BD$**	**BD#**	**BD$**	**BD$**
Year	**Year Ended 30.06.1994**	**Year Ended 30.06.1995**	**Year Ended 30.06.1996**	**Year Ended 30.06.1997**	**Year Ended 30.06.1998**
Revenues					
Sales from Manufactured Goods	10,446,800	10,446,800	10,446,800	10,446,800	10,446,800
	10,446,800	10,446,800	10,446,800	10,446,800	10,446,800
Less: Expenses					
Cost of Finished Products	6,196,536	6,196,536	6,196,536	6,196,536	6,196,536
Administrative Expenses	663,498	663,498	663,498	663,498	663,498
Selling Expenses	1,810,795	1,810,795	1,810,795	1,810,795	1,810,795
Interest Expenses	163,197	163,197	163,197	163,197	163,197
	8,834,026	8,834,026	8,834,026	8,834,026	8,834,026
Net Income Before Taxation	1,612,774	1,612,774	1,612,774	1,612,774	1,612,774
Taxation	645,109	645,109	645,109	645,109	645,109
	967,664	967,664	967,664	967,664	967,664
Appropriated Account					
Profit After Taxation	967,664	967,664	967,664	967,664	967,664
Retained earnings (loss) at beginning of year	6,797,159	7,764,823	8,732,487	9,700,151	10,667,815
Retained earnings (loss) at the end of year	7,764,823	8,732,487	9,700,151	10,667,815	11,635,479

Gypsy International Ltd
Projected Income & Expenditure 1999 - 2003

Particulars	**BD $**	**BD$**	**BD#**	**BD$**	**BD$**
Year	**Year Ended 30.06.1999**	**Year Ended 30.06.2000**	**Year Ended 30.06.2001**	**Year Ended 30.06.2002**	**Year Ended 30.06.2003**
Revenues					
Sales from Manufactured Goods	10,446,800	10,446,800	10,446,800	10,446,800	10,446,800
	10,446,800	10,446,800	10,446,800	10,446,800	10,446,800
Less: Expenses					
Cost of Finished Products	6,196,536	6,196,536	6,196,536	6,196,536	6,196,536
Administrative Expenses	663,498	663,498	663,498	663,498	663,498
Selling Expenses	1,810,795	1,810,795	1,810,795	1,810,795	1,810,795
Interest Expenses	163,197	163,197	163,197	163,197	163,197
	8,834,026	8,834,026	8,834,026	8,834,026	8,834,026
Net Income Before Taxation	1,612,774	1,612,774	1,612,774	1,612,774	1,612,774
Taxation	645,109	645,109	645,109	645,109	645,109
	967,664	967,664	967,664	967,664	967,664
Appropriated Account					
Profit After Taxation	967,664	967,664	967,664	967,664	967,664
Retained earnings (loss) at beginning of year	11,635,479	12,603,143	13,570,807	14,538,472	15,506,136
Retained earnings (loss) at the end of year	12,603,143	13,570,807	14,538,472	15,506,136	16,514,119