BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 27 of 2012

BETWEEN:

GYPSY INTERNATIONAL LTD. **FIRST APPELLANT**

ROYSTON BEEPAT **SECOND APPELLANT**

AND

CANADIAN IMPERIAL BANK OF COMMERCE **RESPONDENT**

BEFORE: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.

2014: January 13, 14;
November 14

Sir Fenton Ramsahoye, S.C., in association with Mr. Alrick Scott for the First and Second Appellants

Mr. Roger Forde, Q.C., in association with Mrs. Sherica J. Mohammed-Cumberbatch for the Respondent.

DECISION

INTRODUCTION

[1] **BURGESS JA:** The immediate concern of this appeal is the enforcement by the respondent, Canadian Imperial Bank of Commerce, (CIBC), of a demand debenture by the appointment of a receiver out of court (Mr. Grenville Phillips), over the assets of the first appellant, Gypsy International Ltd, (Gypsy). That appointment

had dramatic consequences for Gypsy's property and business and for Mr. Royston Beepat (Beepat) who executed a guarantee in favour of CIBC on 24 November 1982.

[2] On 10 April 1984, the date of the appointment, the assets of that company were seized by the receiver and were taken out of the company's control. The company's business of manufacturing jeans was halted and the employees of the company dismissed. The receiver remained in possession and control of the company until 30 May 1988 when the receivership ceased. During this time also, in an effort to obtain payment in priority to other creditors, the receiver liquidated Gypsy's assets. However, according to CIBC, the amounts realised were insufficient to discharge Gypsy's obligations to CIBC.

[3] Subsequent to the cessation of the receivership, Gypsy was never able to recommence business. This turn of events is hardly surprising for as the learned authors of **Picarda, The Law Relating to Receivers, Managers and Administrators (3rd edition)** at **p 4** observe, "the receiver is often seen not as a company doctor but as the undertaker". And so he was in this case.

[4] It is quite apparent from the foregoing, then, that the appointment of a receiver by a financier by way of enforcing a demand debenture can have extremely drastic consequences for the financier, the corporate debtor and third parties such as other creditors and employees. For this reason, the matters at issue in this appeal, namely, the requirements for the valid appointment of a receiver under a demand debenture in Barbados, the liability of an appointor for an invalid appointment, and the effect of an invalid appointment on the liability of a guarantor are no doubt of particular importance to financial lending institutions and businesses alike.

FACTUAL BACKGROUND

[5] Gypsy was incorporated in Barbados on 14 June 1981. Beepat and his brother, Dennis Beepat, were its directors. Beepat was also Gypsy's managing director. Gypsy's business was the manufacture and sale of high quality jeans. Beepat testified that he and his brother each invested $550,000.00 into Gypsy as start-up capital.

[6] Gypsy obtained loan facilities from CIBC, a bank incorporated in Canada with its office and main place of business at Trafalgar and Marhill Streets in the City of Bridgetown, and from the Barbados Development Bank. The facility with CIBC was a line of credit in the form of an overdraft facility, to the limit of $300,000; secured by a demand debenture charging the fixed and floating assets of Gypsy, and Trade Bills Discount to the extent of $800,000.00. The Trade Bills Discounted facility was guaranteed by the Central Bank of Barbados to the extent of $1,000,000.00. The Barbados Development Bank extended credit to Gypsy in the sum of $400,000.00. Its security was an assigned insurance policy with NEM (West Indies) Insurance Limited (NEM Insurance). This security ranked *pari passu* with CIBC's demand debenture.

[7] Gypsy leased two units, totalling 1400 square feet of floor space from the Industrial Development Corporation at Six Roads Industrial Park, St. Philip. In addition, a mezzanine floor was added, creating greater floor area. The premises were prepared for a high quality manufacturing process. The evidence of Mr. Gregory DeGannes, Deputy Manager of CIBC and Beepat confirms that the plant was modern and well-equipped. The receiver himself admitted in his testimony that: "It was a significant manufacturing business" and that "They were advanced in relation to general manufacturing business".

[8] Gypsy began production and sale of jeans in 1982. In the first year, its sales from jeans were in excess of $.25m. In the second year, its sales increased to $2.7m. It was showing spectacular progress and, according to Beepat, there were plans to expand sales in existing markets and to penetrate new ones.

[9] On 25 March 1984, a fire occurred at Gypsy's premises. According to Beepat, he learnt of the fire from a news reporter who had called him to get his comment. In his words, he was "shocked" and immediately drove to the scene. Firemen were on the job at the premises. After the firemen were finished with their work, Beepat secured the premises. He observed that the fire was a minor one.

[10] The next day Beepat met with Gypsy's staff. He assured them that the factory would restart the next week after a cleanup of the factory. Beepat next visited Mr. Sam Alleyne, Gypsy's insurance broker. Mr. Alleyne assured Beepat that he would

send someone to assess the loss. Beepat also visited CIBC to assure it that Gypsy could and would restart operations almost immediately without any loss of capacity. On that same day the police took possession and control of the premises.

[11] On 29 March 1984, four days after the fire, Beepat was arrested by the police at the airport after he had checked in for a flight to St. Lucia. His evidence is that he intended to travel to St. Lucia to visit and consult with his father who was himself a manufacturer and businessman and who was living there at the time. Charges were laid against Beepat but never pursued. After 37 or 38 appearances before the court, the charges were dismissed without any evidence being led.

[12] On 10 April 1984, the police released the building to Gypsy. On that day, around 10:00 a.m., Mr. DeGannes and Mr. Grenville Phillips, appeared. Beepat was served with a notice, dated the said 10 April 1984, that Mr. Phillips was appointed receiver of Gypsy. Beepat remonstrated that Gypsy did not need a receiver and that the company could control its finances and repay the bank. Mr. DeGannes assured Beepat that the appointment was an interim measure intended to get the company restarted.

[13] In fact, the receivership did not cease until 30 May 1988 and the company was never restarted. During this time, despite having power under clause 11 (b) of the debenture "to carry on manage or concur in carrying on and managing the business of the Company", the receiver never sought to manage or continue the business which was showing such promise. The receiver sought merely to realise the security interest of CIBC in pursuance of the powers conferred on him under clause 11 (a) of the debenture. He took possession and sold Gypsy's stock, equipment and other assets, paid certain outgoings, collected some receivables and distributed the net income. At the end of this time, and despite the substantial assets of Gypsy, the receiver failed to pay off Gypsy's debts to CIBC.

[14] Following the cessation of the receivership, CIBC alleged that Gypsy was indebted to it in the sum of $109,968.18 - being monies advanced under the debenture and interest thereon. By notice dated 22 June 1988, CIBC demanded from Beepat payment of the sums allegedly due by Gypsy to CIBC. The demand was made

pursuant to a personal guarantee which Beepat gave to CIBC. It is worth underlining here that no demand was made on Gypsy up to this point or at any time thereafter.

[15] On 16 August 1988, CIBC commenced an action against the appellants. In its statement of claim, CIBC claimed the sum of $109,969.18 and interest of $214,091.60 and continuing for breach of certain financial agreements including the demand debenture signed by Gypsy and the guarantee signed by Beepat respectively.

[16] By an amended defence and counterclaim filed on 22 November 2002, the appellants denied liability and contended that CIBC, in breach of the debenture, wrongfully appointed a receiver of Gypsy and that as a result of the receiver's trespass, Gypsy suffered substantial loss and damage which exceeded any amount due by it to CIBC.

[17] By an amended reply and defence to the appellant's counterclaim filed on 4 June 2003, and a further amended reply and defence to that counterclaim filed on 24 October 2003, the respondent joined issue with the appellants and contended that the receiver was validly appointed. According to the respondent, the appointment was made under clause 10 of the debenture between Gypsy and CIBC. The respondent also denied that the first appellant suffered the loss and damage as alleged.

CHANDLER J'S JUDGMENT

[18] The matter was heard before **Chandler J** at various dates between 5 December 2003 and 12 July 2010. Six witnesses gave evidence. Three of those witnesses, Mr. DeGannes, Beepat and Mr. Chandraballi Bisheswar were called by the appellants. The other three, Mr. James Ross, Mr. Phillips and Mr. Horace Cobham gave evidence on behalf of CIBC. Some thirty-one documents were admitted into evidence. The notes of the evidence and the arguments ran into 222 pages.

[19] On 29 May 2012, **Chandler J** delivered his carefully researched and closely reasoned judgment in which he ordered (a) at para [212], that judgment is entered for the respondent against the second appellant in the sum of $109,969.18 and interest in the sum of $214,091.60; at para [213], that the respondent's claim against the first appellant is dismissed; and at para [214], that the first and second appellants'

counterclaim against the respondent is dismissed. The judge's findings and reasons for so ordering are at the heart of this appeal and demand a full review.

[20] At para [27] of his judgment, **Chandler J,** in our view, correctly identified the central issue in the case as "whether or not the appointment of Mr. Grenville Phillips as Receiver of the First Defendant (Gypsy) was valid". In the succeeding paragraph, the judge again, in our view, correctly opined that all the other issues in the case were dependent upon the resolution of this issue. Between para [29] and para [108] of his judgment, the judge then entered into an extensive consideration of the question of whether or not the receiver's appointment was valid. He concluded at para [109] that the appointment was not "*ipso facto*, invalid".

[21] The judge made five important findings in coming to his conclusion that the appointment was not invalid. The first, stated at para [37], is that "no prior notice of the appointment was given" to Gypsy. The second, found at para [46], is that "[t]he default provisions contained in clause 10 of the debenture are capable of being interpreted and indeed on interpretation require that notice be given in the circumstances outlined in sub-clauses (a), (b) and (c)". The third, stated at para [50], is that sub-clauses (d), (e) and (f), which are matters within the control of Gypsy, do not require notice to be given to Gypsy. The fourth, found at para [73], that Gypsy breached the covenant in clause 8 (d) of the debenture and that as such CIBC was entitled to appoint a receiver. The fifth, explained at para [93], is 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".

[22] Having found that the receiver was validly appointed, the judge then considered between para [116] and para [153] the question whether the receiver acted in accordance with the law in relation to the duties of a receiver in the application of funds collected by him. At para [154], the judge concluded that the receiver had not "improperly applied the funds received by him to unsecured or non-preferential debts" as alleged by Gypsy, nor that the receiver's dealing with the assets of Gypsy lacked *bona fides*.

[23] **Chandler J** next turned to CIBC's claim against Gypsy and Beepat for the post receivership sum of $109,969.18 and interest of $214,091.60 due under the

debenture which he considered between para [159] and [165]. On this, he found at para [163] that CIBC had not made a demand upon Gypsy "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". Thus, he determined at para [163] that "[i]n the absence of such a demand, the plaintiff (CIBC) cannot recover the balance of the debt as against the first defendant (Gypsy)". On the other hand, because CIBC had made such a demand on the second defendant, Beepat, the judge held at para [165] that "the plaintiff is entitled to recover the sums due from the second defendant under the guarantee".

[24] Finally, between para [166] and para [211], on the assumption that he had erred with respect to the validity of the receiver's appointment, the judge considered the question of "the measure of damages, of (sic) any, which the defendant aught to receive". Here, the judge made several important findings. These include (i) at para [180], that the evidence of the receiver was "more reliable than that of the second defendant (Beepat)"; (ii) at para [181] and [182], that the evidence of the state of affairs of Gypsy prior to the appointment of the receiver fell "far short of the standard required to convince the court that the figures claimed are realistic"; (iii) at para [186], that the items which were found on the premises after the appointment of the receiver were those as described by the receiver; (iv) at para [189], that the proceeds of the insurance policy were payable to the Barbados Development Bank; and, at para [202] to [210], that evidence of the loss of profits claimed by Gypsy was not established on a balance of probabilities.

[25] In light of these findings, the judge held at para [191] and [192] that he would have awarded damages counter-claimed as "loss and damage", in effect loss arising from the inadequate realisation on the assets by the receiver, as follows:

> "[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"**

[26] In respect of the counter-claim for loss of profits because of the destruction of Gypsy's business by the wrongful seizure, the judge held that he would have made no award as "on the balance of probabilities …it was more likely that the first defendant would have made losses rather than profits during the years covered by the projections".

ISSUES ON THE APPEAL AND THE CROSS-APPEAL

[27] By notice of appeal filed on 5 June 2012, the appellants appealed **Chandler J's** decision. On 16 July 2012 the respondent filed a notice of cross-appeal in which it urged this Court to dismiss the appeal and to allow the judge's order as it related to the entry of judgment for CIBC against Beepat to stand. The grounds of appeal stated in that notice, the grounds in the cross-appeal, the written and oral submissions of Sir Fenton Ramsahoye S.C, and Mr. Scott, counsel for the appellants, and the written and oral submissions of Mr. Forde Q.C, counsel for the respondent, before this Court make

it plain that final determination of this appeal rest on whether or not **Chandler J** was right in holding that the receiver was validly appointed. The other major issues in this appeal, namely, whether Beepat is liable as guarantor and whether Gypsy is entitled to damages and what is the appropriate measure and the reasonable quantum of damages can only be resolved after that question is answered.

[28] At paragraph 2 of their notice of appeal, the appellants invite this Court to interfere with the judgment of **Chandler J** on the basis of a number of particularised errors of "holdings of law", and a number of particularised errors of findings of fact as well as errors of findings of mixed law and fact claimed to be made by the judge. Consequently and quite understandably much argument was presented by counsel on both sides on the power of this Court to interfere in the judge's decision in the case at bar. A preliminary question therefore arises as to this Court's power of interference with the decision of the court below.

THIS COURT'S POWER TO INTERFERE IN THE CASE AT BAR

[29] **Section 52 (1)** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** confers on this Court "jurisdiction to hear and determine…appeals from any judgment or order of the High Court…" This provision is generally accepted as conferring on this Court power to interfere with the judgment of the court below, even in respect of findings of fact and to give any judgment and make any orders which this Court considers ought to have been made by the court below. This is very well settled law. The only question here is as to the principles of law that should guide this Court in exercising its statutory power of interference.

[30] Mr. Forde Q.C, argues that the fundamental rule which guides this Court is that the appellate function is not to retry cases decided by the trial judge; nor is it to substitute its views for the views of the trial judge according to what it thinks the evidence establishes. This Court, Mr. Forde continues, operates on the presumption that the decision of the lower court was right and that it is for the appellants to displace that presumption. If this Court is in any doubt, it will not disturb the decision of the lower court. This rule describes what is called in procedural justice theory the principle of appellate courts' deference to trial courts.

[31] Mr. Scott accepts Mr. Forde's adumbration of the role of this Court in appeals from a trial court as well settled. The basis of that adumbration was explained in the Supreme Court of Canada's decision of **Housen v Nikolaisen [2002] 2 SCR 235 (Housen)** at **para 4** in relation to Canadian law as follows:

> "It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge."

Accepting the principle of appellate court deference, Mr. Scott contends, however, that the real question for this Court in the case at bar is whether the matters particularised at paragraph 2 of the notice of appeal satisfy the applicable standard to warrant this Court's interference with the decision of **Chandler J**.

[32] Before addressing that question, it may be profitable to be reminded of some basics of an appeal from a trial court to an appeal court. We digress to note here that this Court addressed this question in its recent decision of **E. Pihl & Sons A/S (Denmark) v Brøndum A/S (Denmark), Civil Appeal No. 24/2012 (date of decision 23 October 2013)**. But that case was not cited by counsel. This is unfortunate.

> In our view, it is fundamental to the due administration of justice in Barbados that the authority of decisions of this Court be scrupulously respected by counsel as binding unless and until overturned by the **Caribbean Court of Justice (CCJ)** as our common law tradition requires. In the absence of this, the administration of justice becomes incoherent, the development of a local jurisprudence is stifled and the law becomes uncertain.

[33] In **E. Pihl** this Court opined that, for purposes of determining the appellate court's function on an appeal from a trial court, the issues that confront a trial court fall into three broad categories. These are questions of law, questions of fact, and questions of mixed law and fact. In a nutshell, questions of law are questions about

what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[34] On an appeal on a question of law, there can be no doubt that an appellate court is free to review a trial judge's findings and to replace the opinion of the trial judge with its own to correct errors of law. On such an appeal, the appellate court is unmistakably exercising its primary function which is, as was said in **Housen** at **para 9,** "to delineate and refine legal rules and ensure their universal application". The standard which determines appellate interference on questions of law is one of correctness; and an appellate court is thus free to replace the opinion of the trial judge with its own where there is an error of law.

[35] Where the appeal is on questions of fact, the settled law in our jurisdiction is that a distinction is to be drawn between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts. The process of finding primary facts involves assessing the credibility of witnesses. Inferences are concerned with the evaluation of those primary facts.

[36] In **Eudese Ramsay v St. James Hotels Services Ltd (Magisterial Appeal No. 4 of 1999) (Eudese Ramsay)**, **Simmons CJ** in delivering the judgment of this Court stated the law to be that this Court will only interfere with findings of fact where there was no evidence at all or only a scintilla of evidence to support the finding. See also, **Layson v Marshall (Civil Appeal No. 45 of 1990) (Layson v Marshall); Edwards v Buxton (1982) 30 WIR 82; Powell v Streatham Manor Nursing Home [1983] AC 243 at p. 251 per Viscount Sankey LC; Bookers Stores Limited v Mustapha Ally (1972) 19 WIR 230; Peters v Peters (1969) 14 WIR 457.** **Simmons CJ** explained at **para 11** of **Eudese Ramsay** that:

> "The reason for the reluctance of an appellate court to interfere with findings of fact by a court below is that "the judge was in a better position to assess the credibility of the witnesses and the value of their evidence" per Berridge JA in **Edwards v. Buxton** (supra at p.87)."

[37] Three other reasons are sometimes given for an appellate court deferring to a trial judge's findings of facts. The first of these is that setting limits on the scope of judicial review on fact finding in turn limits the number, length and cost of appeals. The second is that the principle of deference promotes the autonomy and integrity of the trial proceedings. The third is that it reduces needless duplication of judicial effort with no corresponding improvement in the quality of justice.

[38] With respect to inferences from primary facts, **section 61 (e)** of **Cap. 117A** expressly provides that, in hearing and determining appeals, this Court may draw inferences of any fact that might have been drawn by the trial judge. However, that Act does not anywhere indicate the applicable standard on which this Court can interfere with factual inferences of the trial judge.

[39] There is some suggestion in the judgment of **Husbands J**, as he then was, in the now abolished Divisional Court in **Layson v Marshall** that a lower standard for appellate interference is applicable to the inferences of fact drawn by a trial judge than to his factual findings. **Husbands J** said there:

> "[The] Divisional Court will not lightly differ from the finding of the Magistrate on a question of fact and will not disturb a judgment of fact unless satisfied that it was unsound**. In Benmax v. Austin Motor Co. [1955] 1 All E.R. 326**, it was decided that an appellate court, on appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction must be drawn between the perception of facts and the evaluation of facts. Where the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge."

[40] A similar suggestion is to be found in the judgment of Byron CJ, as he then was, in the Grenadian Court of Appeal case of **Grenada Electricity Services Ltd v. Isaac Peters, Grenada Civil Appeal No. 10 of 2002**. Byron CJ opined at **para 7**:

> "The statute thus confers power on the Court of Appeal to find facts and to draw inferences. The authorities relied on discussed the principles on which an appellate court would reverse the findings of fact of a trial judge. It is clear that the power is exercised in different ways according to the circumstances. The famous starting point, which the respondent emphasised, is that an appellate court will usually be reluctant to differ from the finding of a trial judge where his finding turned solely on the credibility of one or more witnesses. This however, includes an important limitation and requires the court to draw a distinction between a finding of specific fact and finding of fact which in reality is an inference from facts specially found. To use different words the court must distinguish between the perception and evaluation of facts. It is in the finding of specific fact, or the perception of facts that the court is called on to decide on the basis of the credibility of witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving the testimony. On the other hand the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inferences or to evaluate as the trial judge. This is particularly so in cases of negligence, because the judge has to make specific findings of fact to determine what actually happened, and then he has to draw inferences to determine whether the facts found support a conclusion of negligence."

[41] Neither **Husbands J** nor Byron CJ identified the standard on which a Court of Appeal interferes with inferences drawn by a trial judge. They both merely state that, in such a case, the appellate court is generally in as good a position to draw inference or to evaluate as the trial judge.

[42] In our respectful view, these statements cannot mean that an appellate court will interfere in respect of inferences drawn by a trial judge where no error on the part of the trial judge is shown. In our further respectful view, these statements merely underline the principle that where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that where the issue on appeal involves the trial judge's inferences or factual conclusions from accepted facts it can be overturned absent error by him/her. As to this, see also Lindley MR in **Coghlan v Cumberland [1896] 1 Ch 704** at **706**.

[43] This Court is not free to interfere with an inference or factual conclusion drawn by a trial judge with which it disagrees where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. This Court's decisions in **Ward v Walsh, Civil Appeal No. 20 of 2005 (date of decision 28 November 2012)** and **E. Pihl** suggest that for this Court to interfere, not only must there be error by the trial judge in coming to a factual conclusion based on accepted facts, but that error must also be clear and convincing. Such a standard is not only consistent with principles of appellate court deference but is also consistent with the basic purpose of appellate jurisdiction which is to correct lower court error, not to retry cases.

[44] Finally, questions of mixed fact and law involve applying a legal standard to a set of facts. It is to be contrasted with factual findings or inferences which, as just seen, require making a conclusion of fact based on a set of facts. But, both mixed fact and law and factual findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. It follows therefore that on an appeal on a question of mixed law and fact, this Court is free to draw legal or factual inferences. It may therefore interfere with the findings of the trial judge on the standard of clear and convincing error applicable to factual inferences. It may also

interfere if it is clear that the trial judge made some extricable error in principle with respect to the characterisation of the standard or its application. In such a case, the error would amount to an error of law, and therefore, subject to interference, in order to correct the error of law.

[45] In the case before us, **Chandler J** saw and heard the witnesses. Throughout his judgment where credibility was in issue, and in particular at paras [92], [181]-[183] and [186] of that judgment, **Chandler J** preferred the evidence of the receiver and the other witnesses of the respondents to that of the appellants. Nothing has been presented to this Court that persuades it that it should interfere with **Chandler J's** findings of fact where his findings were based on the credibility of the witnesses. Consequently, consistent with the principles expounded in the foregoing paragraphs of this judgment, this Court has accepted the factual findings in this case.

[46] However, the real dispute in this case turns on the evaluation of the factual or legal basis of **Chandler J's** conclusion that the receiver was validly appointed, and whether there is a factual or legal basis for the award of damages against CIBC for trespass. In other words, what is in dispute in this case is not the credibility of witnesses, but rather the proper inferences to be drawn from the facts found by **Chandler J** and the legal standard applied by him to the facts found. This Court may therefore interfere with the factual inferences of the judge on the basis of clear and convincing error applicable to factual inferences. This Court may also interfere if it is clear that **Chandler J** made some extricable error in principle with respect to the characterisation of the legal standard or its application. In such a case, the error would amount to an error of law, and therefore subject to interference to correct the error of law.

WAS THE APPOINTMENT OF THE RECEIVER VALID?

[47] Against the foregoing backdrop, we turn to the first major issue in this appeal, namely, whether the receiver was validly appointed. Determination of this issue hinges on three considerations. These are (i) whether there was a legal requirement of service of a demand on Gypsy by CIBC before the appointment of Mr. Phillips as receiver; (ii) whether, if there was such a legal requirement, it could in law be contractually excluded by the terms of the debenture; and (iii) whether, if it

could in law be contractually excluded, it was so excluded by the terms of the debenture. We consider these issues *seriatim* hereafter.

Requirement for a demand

[48] In this case, there are at least two things which are not in dispute. The first is that the form of the debenture is one of a demand debenture. Both Mr. DeGannes and Mr. Cobham, bankers of considerable experience and whose evidence **Chandler J** (paras [39] and [41] of judgment) accepted, agreed with Gypsy that the debenture was a demand debenture. The second matter on which there is no dispute is that CIBC did not serve a demand for payment on Gypsy before appointing a receiver. This is noted by **Chandler J** at paras [36] and [37] of his judgment. The dispute is whether a demand for payment was legally required to be made by CIBC before the appointment of the receiver over the assets of Gypsy.

[49] The question as to whether service of a demand for payment is a prerequisite step in the appointment of a receiver under the existing company law regime in 1983 was fairly well settled. There existed some oblique support in the older English cases for the view that there was no need for service of demand: see, for example, **Norton v Ellam (1837) 2 M&W 461** at **464 (Norton v Ellam)** per Parke B, **Walton v Mascall (1844) 13 M&W 452** at **458** per Parke B, and **Re Tewkesbury Co., Tysoc v Tewskesbury Gas Co [1911] 2 Ch 279**.

[50] However, the more modern common law authorities that addressed the specific question of the requirement for service of a demand as an essential step in the appointment of a receiver considered service of a demand to be essential to the valid appointment of a receiver. Thus, in the leading Supreme Court of Canada decision of **R E Lister Ltd v. Dunlop Canada Ltd [1982] 1 SCR. 726 (Lister v. Dunlop);** the leading High Court of Australia decision in **Bunbury Foods Proprietary Limited v. National Bank of Australia Ltd (1984) 51 ALR 609 (Bunbury Foods);** and the leading New Zealand decision in **ANZ Banking Group (NZ) Ltd v. Gibson [1981] 2 NZLR 513 (ANZ Banking Group)**, the need for service of a demand was stated to be as essential to the valid appointment of a receiver.

[51] The leading English authority on the requirement of a demand for a valid appointment of a receiver is to the same effect. Thus in **Windsor Refrigerator Co Ltd**

v Branch Nominees Ltd [1961] 2 All ER 277 (Windsor Refrigerator) at **280**, Lord Evershed MR said:

> "…it will be plainly necessary to establish as a fact that before anything which could be called an appointment…there had been a demand."

The remainder of the Court of Appeal, Harman LJ and Donovan LJ, took a similar view of the law. All the English authorities subsequent to **Windsor Refrigerator** accept the law there stated on the need for service of a demand without qualification. See e.g., **Cripps (Pharmaceuticals) Ltd v. Wickenden [1973] 2 All ER 606** at **616**.

[52] In our view, there are compelling reasons why service of a demand is necessary. In **Burgess: The Law of Corporate Receivers and Receivers-Managers (Kingston: 2002)** at **p 71**, the following reason is given for the rule:

> "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 in modern capitalist economies such as that in Barbados, it appears desirable that every opportunity should be afforded a debtor company to avoid receivership. The requirement of service of demand as a necessary step in the appointment of receivers affords the debtor company some opportunity to do so."

[53] Another powerful reason is that advanced by Lambert JA in the British Columbia Court of Appeal decision in **Waldron v Royal Bank (1991) 53 BCLR (2d) 294 (Waldron v Royal Bank)** at **paras [11]** to **[13]**. His reason is premised on the observation that the fundamental nature of the appointment of a receiver is that it involves the seizure of corporate assets to realize the creditor's security interest. Inherent in such seizure is the mischief of the possibility that a person may suffer serious harm from an unanticipated seizure that was not necessary. He contends that "from its earliest origins" the requirement of service of a

demand before a seizure was designed to remedy this mischief. So, in **Massey v. Sladen (1868) L.R. 4 Ex. 13** at **pp 17-18**, Chief Baron Kelly, in explaining the necessity for a demand stated that:

> "…were it otherwise, the absurd and inequitable consequence might follow, that the plaintiff might have at its bankers moneys far exceeding the amount demanded, and yet might on his return from a five minutes' absence from his place of business find that his opportunity of complying with the demand was lost, and that his goods were already in the hands of the defendants."

In Lambert JA's view, the requirement for a demand is therefore a response to the call for fairness in the realisation of security. He concludes at **para [13]** that:

> "The call for fairness in the enforcement of security instruments responds to the same fundamental demands as those which have resulted in the constitutional protection against unreasonable seizure …"

[54] Finally, it would be remiss of us not to note that **section 10.B (1)** of the **Bankruptcy and Insolvency Act, 2001, Cap. 303 (Cap. 303)** has introduced into our law relating to the appointment of receivers a requirement that a secured creditor must send to the debtor-company in the prescribed form and manner, a notice of his intention to enforce his security. By **section 10.B (2)**, the secured creditor sending the notice cannot enforce the security in respect of which the notice is sent until the expiry of ten days after the sending of the notice. In our view, these provisions are reflective of a wider principle in our law which mandates service of a demand before the appointment of a receiver.

[55] It is apparent from the foregoing that the overwhelming weight of modern Commonwealth authority supports the conclusion that service of a demand is a prerequisite to the valid appointment of a receiver under a demand debenture. Admittedly, there is disagreement between the English authorities and other Commonwealth authorities on the time within which a receiver may be appointed after

service of a demand. But that is not in issue here. In this case there was no service of a demand and the question of the time within which a receiver may be appointed after service of a demand does not arise.

[56] The settled law is therefore that service of a demand is a prerequisite to the valid appointment of a receiver under a demand debenture. **Chandler J's** judgment, which is supported by the submissions of Mr. Forde, is to the effect that this requirement can be contractually excluded and that it was so excluded in this case by Clause 10 of the debenture. We therefore turn to considering the correctness of this view of the law.

Can requirement for demand be contractually excluded?

[57] First, we note that the question whether the requirement for a demand can be contractually excluded has not been directly raised and squarely confronted in the English case law. Be that as it may, there is little doubt that the preponderance of English case authority appears to assume that the requirement for service of a demand depends exclusively on the interpretation of the security instrument at issue and not on any principle of law governing seizures under a security instrument no matter what that instrument says. The assumption in these cases is therefore that the requirement for a demand can be contractually excluded. In our judgment, however, the question as to whether the requirement for a demand can be contractually excluded is far too important to be determined solely on the assumption in the English case law.

[58] Accordingly, we note that this question has been confronted head-on in Canadian case law. In the *locus classicus* Supreme Court of Canada decision in **Lister v Dunlop**, Estey J declaimed at **p 746** what is now widely referred to as the *Lister* principle as follows:

> "The rule has long been that enunciated in Massey v. Sladen (1868), L.R. 4 Ex. 13, at 1938 L.J Ex 34: the debtor must be given "some notice on which he might reasonably expect to be able to act". The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but

> nonetheless real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment."

[59] The *Lister* principle has been relied on in Canada to support a growing body of Canadian authority that the requirement for service of demand principle governs seizures under security instruments and overrides any terms of a security instrument that conflict with the principle. One such authority is the unanimous judgment of the Ontario Court of Appeal in **Kavcar lnvestments Ltd. v. Aetna Financial Services Ltd. (1989) 70 O.R (2d) 225**, **(Kavcar)** (which was cited with approval by the Supreme Court of Canada in **Royal Bank of Canada v GOT Associates Electric Ltd [1999] 3 SCR 408** at **para [20]**) where McKinlay JA, in delivering the judgment of a division composed of Blair JA, Robins JA and herself, said at **280-81:**

> "I consider that the decision of the Supreme Court of Canada in Lister v. Dunlop, and the cases that have been decided since, preclude a creditor from realizing on security which secures an indebtedness payable on demand, *regardless of the wording of the security document,* unless a period of time which is reasonable in the circumstances has been given to the debtor to satisfy the demand. (Emphasis added).

And at **p 240**:

> "…I do not accept Aetna's argument that some types of default permit enforcement of the security without any demand for payment being made. In my view, the law has developed to the point where, regardless of the wording of a debenture security, it cannot be enforced without first, the making of a demand, and second, the giving of a reasonable time within which to pay the indebtedness. This was the opinion of Fawcus J. in *Royal Bank of*

Canada v. Cal Glass Ltd., supra, at p. *68*, and I agree."

[60] In the British Columbia Court of Appeal decision in **Waldron v Royal Bank** at **para [19]**, Lambert JA said of McKinlay JA's statement in **Kavcar** that it "represented an important and considered conclusion of law". Lambert JA's explanation of the *Lister* principle at **paras [20]** to **[25]** deserves to be cited *in extenso*. He said there:

> "[20] I should also add that in my opinion the cases applying the *Lister* principle illustrate, from the words in the security instruments, that the principle cannot be one of interpretation. Time and again the words used are words such as "immediately," "forthwith," or "instantly." In the leading case *of Massey v. Sladen* (1868), L.R. 4 Exch. 13, the words in the instrument were: "instantly on demand, and without any delay on any pretence whatsoever." It cannot be consistent with words like that to decide that the *Lister* principle is only a guide to interpretation.
>
> [21] If the *Lister* principle is, as I think it is, an independent rule of law about seizures, then the principle must rest on one or both of two grounds. They are, from the common law side, the ground that a term of a security instrument that is contrary to the *Lister* principle is void as being contrary to public policy, and is severable; and, from the equity side, the ground that a term of a security instrument that is contrary to the *Lister* principle is unconscionable, and is severable. So those are the two grounds, public policy and unconscionability.
>
> [22] I think that either of those two grounds would be adequate for the task. Indeed, I think that they overlap and that they can properly be thought of as together providing the

foundation for the rule that a contractual term cannot abrogate the *Lister* principle. As to the overlapping nature of the grounds of public policy and unconscionability, I refer to the judgment of Lord Diplock in *A. Schroeder Music Publishing Co. v. Macaulay* [1974] 1 W.L.R. 1308, [1974] 3 All E.R. 616 (H.L.), where he says, at p. 623:

> "It is, in my view, salutory to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning-power, the public policy which the court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable."

[23] Much the same point was made by both Chief Justice Dickson and Madam Justice Wilson in *Hunter Engr. Co. v. Syncrude Can. Ltd.*, [1989] 1 S.C.R. 426 at 462 and 510-18, 35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385, 57 D.L.R. (4th) 321, 92 N.R. 1, namely, that the rules about "fundamental breach" are a poor foundation for a principle about not enforcing exclusion clauses, and that it is preferable to apply the direct legal principle of unconscionability to avoid the application of exclusion clauses rather than going through the roundabout route of "fundamental breach".

> [24] I refer also to the chapter on "Unconscionability," c. 14 in Wad-dams' The Law of Contracts, 2nd ed. (1984), in which the argument for direct use of the rules of unconscionability, as opposed to trying to reach the same result by paying lip service to rules of interpretation, is made with compelling persuasiveness.
>
> [25] Finally, on the question of the legal nature of the *Lister* principle, I mention the decision of Madam Justice L'Heureux-Dubé, for the Supreme Court of Canada, in *Houle v. Can. Nat. Bank*, 22nd November 1990, Doc. 20634 [now reported 74 D.L.R. (4th) 577, 114 N.R. 161 (sub nom. *Houle c. Banque Nat. Du Can)]*. In that case the bank had rights under the terms of its security instrument to recall its loan on demand and to realize on its security without delay and without notice. The Supreme Court of Canada decided that under the civil law of Quebec a seizure without reasonable notice was an abuse of contractual rights and that the civil law of Quebec provided a rule in very much the same terms as provided in the common law under the *Lister* principle. It is clear from the reasons of the Supreme Court of Canada in *Houle v. Can. Nat. Bank* that the principle in the civil law of Quebec is not a principle of interpretation of a security instrument but a principle which overrides any contrary provision in the security instrument. I think that the common law principle is similar in its legal nature."

[61] We find irresistible persuasion in the Canadian case authority that the requirement for service of demand principle governs seizures under security instruments and overrides any terms of a security instrument that

conflict with the principle for a number of reasons. First, we recall that the legislative backdrop, the Canadian Business Corporation Act, against which that principle of law is stated is *in pari materia* with that in Barbados, the **Companies Act, Cap. 308**. Second, that principle of law is entirely congruent with the provisions on the requirement for a demand in **Cap. 303** and the rescue culture embraced generally by that Act. Third, that principle of law conduces to respect for the efforts of small business enterprises in Barbados without occasioning unreasonable prejudice to the security interests of secured creditors. The fourth and final reason is that the CIBC is a Canadian bank whose debenture was a standard form contract which was no doubt drafted or vetted by their lawyers in Canada. As such, CIBC would, or should, have been well aware of the **Lister v Dunlop** decision and the principle laid down in that decision.

[62] In sum, we hold that the law in Barbados on whether or not the requirement for service of a demand in demand debentures can be excluded by contractual agreement is the same as that stated in **Kavcar** and **Waldron v Royal Bank**. That requirement cannot be contractually excluded as a matter of law. Accordingly, regardless of the wording of the debenture in this case, CIBC was bound to serve a demand on Gypsy. The appointment of Mr. Phillips as receiver without such service rendered his appointment invalid and we so hold.

[63] Notwithstanding our conclusion that the service of a demand requirement cannot be excluded by the terms of a security instrument, we now consider the question whether, if it could, the terms of the debenture in this case did so.

Was requirement for demand excluded by the debenture?

[64] In approaching this question it is important to note that it is agreed on all sides that the only provision in the debenture that could have such an exclusionary effect is clause 10 of the debenture. Answer to the question therefore depends on the interpretation of clause 10. Before embarking on such an interpretation, however, it may be useful quickly to retrace the principles which should govern the construction of this clause.

[65] In **E. Pihl,** this Court discussed extensively and applied Lord Hoffmann's well-known restatement in the English House of Lords case of **Investors**

Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at **912-13 (Investors Compensation Scheme)** of the fundamental principles that should guide inquiry into the meaning of contractual language**.** Those principles are succinctly captured by Lord Steyn in the later English House of Lords decision of **Sirius International Insurance Co (Publ) v General Insurance Ltd [2005] 1 All ER 101** at **200**, where he said:

> "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."

[66] The rationale of the **Investors Compensation Scheme** guiding principles may be found in a dictum of Lord Wilberforce in the English House of Lords in **Reardon Smith Line Ltd. v. Hansen- Tangen [1976] 3 All ER 570** at **547** where he said:

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

[67] The **Investors Compensation Scheme** guiding principles are universally accepted as a declaration of the common law. They were so accepted and applied by the **CCJ** in the Barbadian case of **Sea Haven Inc v Dyrud (2011) 79 WIR** at **146 para [30]** and was again cited with approval by that Court in **Campbell v A-G of Barbados (2009) 76 WIR 63** at **66 para [43]**, an appeal from this Court.

[68] In light of these **CCJ** decisions, this Court is bound to accept and apply the **Investors Compensation Scheme** principles in construing clause 10 in the case at bar, on the basis of *stare decisis*. In construing clause 10, then, our aim is not to probe the real intentions of CIBC and Gypsy, rather it is to ascertain what a reasonable person circumstanced as CIBC and Gypsy were, would have understood them to have meant by the use of the specific language of clause 10. To do this we must examine that clause within the context of the text of the debenture, (its textual context), and against the relevant background facts of that security document, (its factual background).

[69] We agree with Mr. Scott that, when clause 10 is placed in its textual context, it has to be read in light of clauses 1 and 11 of the debenture. For this reason, we reproduce clauses 1, 10 and 11 verbatim. These clauses provide as follows:

> Clause 1:
> "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…."
> Clause 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 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 default for fourteen days in the payment of any interest hereby secured and the Plaintiff before such interest is received by the Bank by notice in

writing to the Company call 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 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.

Clause 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 ……"

[70] Clause 1 is the supreme or governing clause in the debenture as it defines the fundamental nature of the loan facility granted by CIBC to Gypsy. By imposing an obligation on Gypsy "to repay to the Bank on demand all monies and liabilities", that clause constitutes the "banking facilities and other financial accommodation by way of loan overdraft or current account", referred to in the witness clause of the debenture, a demand loan or demand facility. The "demand" by the Bank is what renders the moneys loaned to Gypsy "payable".

[71] A demand loan facility is generally regarded in banking, commerce and corporate finance as one in which moneys are repayable on demand made at any time at the discretion of the lender for any reason: see e.g., David Adams, *Corporate Finance: Banking and Capital Markets, page 22*. In other words, when the lender demands the money, the money becomes payable and the borrower must pay it. So unlike a regular loan that is paid in installments and has a defined maturity date, demand loans work on the specific demand of the lender. It is as it were a self-help remedy. The right to demand or call in the loan without recourse of an action in court by the lender is intrinsic to the existence of a demand facility.

[72] The demand required in clause 1 is in respect of repayment of the moneys secured by the debenture. It does not conflict with the law relating to demand notes and money lent as it has been understood for over 150 years. The law here has been that the cause of action for money lent simply or upon a demand note arises immediately the money is lent or the note is given. No demand is necessary before action and the time of the cause of action arising for the purpose of the old **Limitation Act** is the date of the note or the date of the loan.

[73] This law is plain from **Norton v. Ellam,** an English unquestioned authority of ancient vintage. In that case, the question at issue was whether for the purpose of the *Limitation Act* time ran from the date of the note when it was a demand note or from the time of demand. Counsel for the plaintiff argued that "when a note is

payable on demand, a demand is necessary before the statute can begin to run". Parke B, with whom Alderson B agreed, said at **464**:

> "I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*. It is quite different from the case of a note payable at sight, because there, by the terms of the contract, it must be shewn before the action is brought."

[74] The demand clause created in clause 1 has nothing to do with the right of CIBC to institute a cause of action in the courts in respect of its demand loan to Gypsy. Clause 1 relates to CIBC requesting repayment without recourse to a cause of action in the courts. The British Columbia Court of Appeal decisions in **Barclay Const. Corp. v. Bank of Montreal [1990] 65 DLR (4th) 213** and **Waldron v Royal Bank** support the view that, even though no demand may be required before initiating a cause of action on a demand debenture, a demand is required before the right to repayment of the sums secured by a demand debenture accrues.

[75] Clause 10 takes meaning in the context of the fundamental character of the demand loan or demand facility created in clause 1. Clause 10, on its plain words, does not purport to redefine the facility established in clause 1 as something other than a demand loan. Clause 10 does nothing more than what it says, namely, lists events

on the happening of which the moneys secured by the debenture may become immediately payable by Gypsy to the bank. These are what are sometimes called "events of default".

[76] The function of events of default in demand loan documents, like the debenture in this case, is described in David Adams *Corporate Finance: Banking and Capital Markets* at *p 103* as follows:

> "Events of default are events, specified in the loan agreement, which provide the bank with a contractual right to terminate the loan, cancel any commitment and to demand repayment for all outstanding principal and interest (known as 'acceleration')."

[77] Admittedly, clause 10 read by itself merely provides that moneys "secured shall become payable immediately" on the happening of a default event specified in that clause. But, that clause does not define what is meant by moneys becoming "payable". The meaning of "payable" in clause 10 only becomes apparent in the context of clause 1 which imposes an obligation on Gypsy to pay to CIBC "on demand" moneys due and owing to CIBC. Clause 10, read in the context of clause 1, is therefore to be seen as a security measure aimed at allowing CIBC to call in, or demand repayment of, the loan as a preemptive measure on the happening of any or all of the events enumerated in that clause. In sum, clause 10 is the contractual device in the debenture which conferred on CIBC the right to demand of Gypsy repayment of the moneys secured by the debenture and thereby to avoid having to institute a cause of action in the courts for such repayment.

[78] On the express language of clause 11, clause 10 must also be construed in light of clause 11. The relevant part of clause 11 bears repetition:

> "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…"

[79] Clause 11, by conferring the right on CIBC to appoint a receiver on the happening of an event of default specified in clause 10, places in the hands of CIBC a self-help remedy for the enforcement of moneys which become payable under clause 10. As seen above, moneys and liabilities become "payable" under the provisions of clause 10 only on demand and pursuant to clause 1. Consequently, an appointment of a receiver pursuant to clause 11 on the basis of moneys becoming payable under clause 10 could only be validly done after a demand in accordance with clause 1.

[80] The upshot of the foregoing is that, assuming that the service of a demand requirement can be excluded by the terms of a security instrument, it was not so excluded in this case. In our view, a reasonable person circumstanced as CIBC and Gypsy were, would not have understood them to have intended clause 10 to have such an exclusionary effect. Rather, given the general acceptance in banking, commerce and corporate finance that the purpose and function of an "events of default" clause, as clause 10 is, such a reasonable person would have ascribed that meaning to that clause.

[81] The interpretation of clause 10 as not excluding the requirement for a demand in the appointment of a receiver under a demand debenture finds unyielding support in Commonwealth case law. The Canadian courts have consistently so interpreted similar clauses in demand loans documents requiring (1) that a demand must be made and (2) that reasonable time be given to repay: see e.g., **Lister v Dunlop**; **Kavcar; Waldron v Royal Bank**. The case law in New Zealand and Australia is to the same effect: see e.g., **ANZ Banking Group**; **Bunbury Foods**.

[82] The English case law differs from that in Canada, New Zealand and Australia that the demand must give a reasonable time for repayment, but agrees with the case law in those jurisdictions on the requirement for a demand. As was seen at para [57] above, Lord Evershed MR, in the English Court of Appeal case of **Windsor Refrigerator** at **280** stated this to be the law and this view of the law has been accepted by subsequent English cases. See e.g., **Cripps** at **616**.

[83] At paras [44] to [56] of his judgment, the judge sought to draw a distinction between the events of default specified in the sub-clauses under clause 10 in relation to the requirement for a demand. According to him, repayment for default under sub-clauses (a), (b) and (c) of clause 10 required service of a demand, whereas default under the other sub-clauses does not. In our opinion, given the purpose and function of events of default in demand loan documents, such as the debenture in this case, it is difficult to contemplate that the reasonable person circumstanced as CIBC and Gypsy were, would have understood clause 10 to have that meaning. For sure, such a reasonable person circumstanced as CIBC would be unpleasantly surprised to think that the occurrence of any of these events did not entitle CIBC to demand repayment immediately by Gypsy.

[84] CIBC sought to justify their appointment of the receiver on the basis that two events of default had occurred. The first such event is that Gypsy exceeded the overdraft limit or was otherwise in default of payment contrary to clause 10 (a). It is not necessary to comment further on this since **Chandler J** held that because clause 10 (a) created an event of default which required a demand before an appointment and there was no demand, CIBC could not rely on that sub-clause to support a claim that the appointment in the circumstances was valid.

[85] The second event of default relied on by CIBC for the appointment is that Gypsy ceased to trade or carry on business contrary to clause 10 (d). **Chandler J** held that CIBC could make a valid appointment under this sub-clause as this clause does not require a demand before appointment. In our view and for the reasons given in this judgment, we do not agree with that finding. As for all the other sub-clauses in clause 10, service of a demand was a necessary pre-requisite to the appointment of a receiver for breach of clause 10 (d).

[86] We would add also, that we agree with the submissions of the appellants that the judge's conclusion that Gypsy ceased or had threatened to cease carrying on business was erroneous as a matter of fact and law. We do not propose to recount all the evidence adduced by the parties on this issue. However, we feel obliged to say that it is impossible to make a factual conclusion, as the judge did, that Gypsy ceased or had threatened to cease carrying on business between 25 March 1984,

when the fire occurred at Gypsy's premises, and 10 April 1984 the time of the appointment in circumstances where the police took possession and control of Gypsy on 26 March 1984 and returned possession to Gypsy on the date on which the receiver was appointed.

[87] During the period between 25 March 1984 and 10 April 1984, there was no doubt an interval of business inactivity at Gypsy; as it were for a *scintilla temporis*. But, that cannot amount in fact or law to ceasing or threatening to cease carrying on business: **South Behar Rly Co. v. Inland Revenue Comrs [1925] AC 46**. Surely, it would be nothing short of remarkable to characterise a business as ceasing or threatening to cease carrying on business if that business was inactive for the same period of time for which Gypsy was, following a hurricane.

[88] Finally, even though this default event was not pleaded by CIBC, **Chandler J** also found that the appointment of the receiver without a demand could be justified because Gypsy was in breach of clause 8 (d) of the debenture, in that it failed to insure and keep insured its property and effects. Gypsy had a policy of insurance with NEM Insurance. However, on 29 March 1984, NEM Insurance wrote to Gypsy cancelling the policy in effect from the 7 April 1984, 3 days before the appointment of the receiver. So that at the time of the appointment Gypsy was in breach of clause 8(d). The judge held that this breach entitled CIBC to make an appointment without a demand.

[89] Clause 8 (d) is not an event of default in itself. It is an event of default because clause 10 (h) provides that a breach or non- observance of any covenant in the debenture is an event of default. Enforcement of a breach of clause 8 (d) by the appointment of a receiver is therefore subject to the same preconditions applicable to clause 10. This means that even if Gypsy was in breach of clause 8 (d), there was an obligation on CIBC for service of a demand on Gypsy before appointment of a receiver. For this reason, it is our judgment that the judge fell into error in holding to the contrary.

Is Gypsy Estopped from Pleading the Invalidity of the Appointment?

[90] Mr. Forde Q.C contended before this Court that, even if the appointment of Mr. Phillips as receiver were invalid, Gypsy is estopped from raising that invalidity as Gypsy dealt with and treated the receiver as validly appointed. In support of this contention, Mr. Forde relied on a dictum of Walton J in the English case of **Bank of Baroda v Panessar [1986] 3 All ER 751** at **762**. Walton J said there that in circumstances where companies had dealt with a receiver appointed over them on the footing that he was validly appointed:

> "…there can be no real doubt but that the companies are themselves estopped from denying that, the receiver was validly appointed. The principle of estoppel applicable can be taken from *Habib Bank Ltd v Habib Bank AG Zurich [1981] 2 All ER 650* at *666, [1981] 1 WLR 1265* at *`1285*, where Oliver LJ applied the test which he had previously himself formulated in *Taylor Fashions Ltd v Victoria Trustees Ltd [1981] 1 All ER 897* at *915, [1982] QB 133* at *151-152* in these terms:
>
> > '…whether…it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encourage another to assume to his detriment…'."

[91] It is clear that Walton J's dictum rested on the assumption that the basis of estoppel was whether it would be unconscionable for a person to deny what he has allowed or encouraged. The English House of Lords decision in **Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55 (Yeoman's Row)** completely undermines that assumption. At para [16], Lord Scott said of the place of unconscionable behaviour in estoppel of the proprietary kind:

> "To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion."

[92] In **Capron v Government of Turks & Caicos Islands *[2010] UKPC 2***, Lord Kerr framed the principle in **Yeoman's Row** on unconscionable behaviour as follows at **para [39]**:

> "In advancing the claim under this head, the appellant made much of the alleged unconscionable behaviour of the government in 'resiling from its promises' to him. As is clear from the decision in **Yeoman's Row**, however, unconscionable behaviour cannot stand alone as the basis for a finding of proprietary estoppel. Where there is no ground for a belief that the claimant was entitled to acquire a certain interest in land, the fact that the behaviour of the person against whom proprietary estoppel is sought to be established was unconscionable cannot fill the gap that exists in the essential proofs required for the doctrine to come into play."

[93] In **Ward v Walsh**, this Court held that unconscionable conduct by itself was no basis for invoking the estoppel doctrine. The dictum of Walton J must therefore be viewed with suspicion and not as authority on which this Court can rely.

[94] In any event, the dictum of Walton J sits uncomfortably with this Court's decision in **Winifred Enterprises Ltd v Barbados Development Bank, Civil Appeal No. 6 of 1990 (date of decision 19 March 1990) (Winifred Enterprises Ltd.)**. In that case, a receiver was appointed under a mortgage debenture. The managing director of the company over which the receiver was appointed initiated proceedings claiming that the appointment was invalid and seeking an order to have the appointment set aside. The defendant, BDB, sought and was granted an order for a stay of proceedings until the managing director provided an indemnity for costs in favour of the defendant. King J (Ag) in the High Court granted the order and the plaintiff appealed that ruling. This Court held, dismissing the appeal, that in order to bring the claim, the director had to provide an indemnity against imperilling the assets available to pay off the debenture holder.

[95] We are in firm agreement with the warning of Lord Walker in **Yeoman's Row** at **para 46** that:

> "… estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way."

In our view, any rational application of estoppel on the basis that the directors dealt with the receiver and did not challenge the validity of his appointment in our law would require careful reconciliation with **Winifred Enterprises Ltd**.

Overall Conclusion on Validity of Appointment

[96] Our overall conclusion on whether the receiver was validly appointed in this case is that he was not. Service of a demand made before the appointment of a receiver is a legal requirement in our law and that requirement cannot be excluded by contractual agreement. But in any event, clause 10 of the debenture in this case did not have the effect of excluding this requirement. Finally, estoppel on the basis that the directors dealt with the receiver and did not challenge the validity of his appointment is not a defence to Gypsy asserting the invalidity of the receiver's appointment.

[97] In those premises, the only question left for us to consider is CIBC's liability to Gypsy for damages for trespass by the receiver. We do so hereafter.

DAMAGES

[98] It is settled law that when a creditor, like CIBC in this case, fails to serve notice of a demand on a debtor, like Gypsy, before appointing a receiver and seizing the debtor's assets, the creditor is liable for damages in tort for trespass and conversion. The normal measure of damages for trespass is the market value of the goods

misappropriated. The market value is assessed as at the time of the misappropriation. Market value is generally regarded as the price which a property might be expected to bring if offered for sale in a fair market, that is, a market that is not prone to fluctuations. It is the price as would be fixed by negotiation and mutual agreement between a willing buyer and a vendor who is willing but not compelled to sell.

[99] Broadly speaking, Gypsy claims damages on two bases. Gypsy's first claim is for the market value of its assets which were inadequately realised by the receiver. The second is for loss of future profits because of the destruction of its business by the wrongful seizure.

[100] Assessing damages for these claims is difficult. This is so because there is no evidence as to the market value of the assets for which Gypsy claims loss at the time of the fire. Similarly, Gypsy was still in its infancy when its business was destroyed by the invalid receivership and this complicates computation of Gypsy's claim for loss of profits.

[101] The essential legal difficulty here, as Mr. Forde Q.C argues, is as to the certainty of damages. On this, Mr. Forde Q.C insists that the settled law is that a claimant is required to prove damages with "reasonable certainty" and that Gypsy has not provided such proof. Mr. Scott's retort is that reasonable certainty does not mean absolute certainty and that the degree of certainty depends upon the case itself, and that in the circumstances of this case the proof provided by Gypsy meets the standard of reasonable certainty.

[102] As authority for the proposition that the law does not require absolute certainty but that the certainty required depends on the circumstances of each case, Mr. Scott points to the oft cited dicta of Bowen LJ in the English Court of Appeal case of **Ratcliffe v. Evans [1892] 2 Q. B. 524** at **532-533** that:

> "In all actions…on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As

> much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

[103] The accepted approach where specific records are absent and precise evidence unavailable is that the court must do the best it can to estimate loss and damages. Thus, Devlin J. in **Biggin v. Permanite [1951] 1 K. B. 422 at 438 (Biggin v. Permanite)** commenting on the certainty of damages, stated:

> "It is only that where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can."

[104] We conclude on the authorities, then, that the difficulty in this case in assessing loss due to incompleteness of records is not to be regarded by us as a bar to assessing damages, but as nothing more than a challenge to do the best we can in the circumstances of this case. In approaching this challenge, there are two principles to which we must pay particular attention. The first is that the difficulty or uncertainty in assessing certain aspects of loss does not prevent Gypsy from recovering substantial damages resulting from the invalidly appointed receiver. In this regard, the statement of the law in **Tuscany Imports (Investments) Pty Ltd. v. Claudio Dall'Oste and Gwendolen Ellen Dall'Oste; Belvedere & Lightfit & Co. Pty Ltd. v. Tuscany Imports Ply Ltd. and Gluseppe Coronica, Nos. 1781 of 1978 & 4534 of 1979 (Tuscany)** bears repeating:

> "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 even 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 Meggit Ltd v. Discount & Finance Ltd (1938) 56 W N (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 more 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 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."

[105] The second principle to which we must have constant regard is that in assessing damages the strongest presumptions should be made against the wrongdoer. In **Wilson v. Northampton and Banbury Junction Railway Co [1874], LR 9 Ch App 279**, Lord Selborne at **285-286** explained the principle thus:

"We know it to be an established maxim that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the bona fide performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according

to the circumstances of each case."

[106] With these principles in mind, we now embark on the assessment of the damages for which CIBC is liable to Gypsy for trespass. We do so under the two heads claimed by Gypsy. These are (i) the loss from the inadequate realisation on Gypsy's assets by the receiver, and (ii) the loss of future profits by Gypsy as a result of the seizure and destruction of Gypsy's business.

. **(1) Inadequate Realisation on Assets**

[107] Under this head, Gypsy claims to be entitled to recover (1) the market value for the stock on hand; (2) plant and equipment; (3) leasehold improvements; and (4) receivables. Mr. Forde Q.C contends that Gypsy has not discharged the burden on him to prove with reasonable certainty each of these items of loss and that consequently Gypsy is entitled to, at most, nominal damages.

[108] We do not agree that that contention is supportable. As has just been seen, **Tuscany** is authority that difficulty or uncertainty in assessing certain aspects of loss does not prevent recovery of substantial damages. At the same time, **Biggin v. Permanite** requires of us merely that we do the best we can in approaching the proof provided by Gypsy. This we propose to do by accepting **Chandler J's** findings of primary facts and drawing our own inferences of fact where there is clear and convincing error by the judge in coming to factual conclusions based on those findings of primary facts.

[109] Beepat gave evidence as to the value of finished and unfinished stock; sums spent on leasehold improvements; plant; equipment and office furniture and other start-up costs. There was no evidence to contradict the figures given by Beepat and significantly, as **Chandler J** noted at para [168], they were not challenged in cross-examination. The best we can do in those circumstances is to accept the evidence of Beepat.

[110] In respect of stock in hand, there were records of stock in hand at dates just prior to the fire to be found in the document titled "Gypsy International Limited Stocks Summary as at 29/2/84". Gypsy had to report to CIBC monthly on a range of

matters, including finished goods which it did in this document, the last such report before the fire. In this document, stock on hand - finished and unfinished - was recorded at $1,186,833.73. Stock in hand for the previous month as at 31/1/84 was recorded at $1,177,604.81. There is no reason to doubt the reliability of the information contained in this document. We therefore find persuasion in Sir Fenton's submission that the statements in this document may be treated by this Court in doing the best it can as a guide as to Gypsy's stock in hand prior to the fire.

[111] Beepat testified that the value of the finished stock on hand at the time of the fire was in the region of $945,000.00; that Gypsy had 27,000 pairs of finished jeans at the time of the fire, all bagged and sealed and that there were firm orders for 20,000 pairs of jeans; and that the price for these orders represented the market value of the finished stock, since that price reflects what willing purchasers were prepared to pay for the same. The receiver's "Statement of Receipts and Disbursements" (Receiver's Statement) shows that the stock was sold for $124,210.00. However, there is nothing in that Statement that confirms or contradicts Beepat's evidence and the receiver's testimony does not establish that the finished stock was damaged by smoke, and is at best vague as to the quantity of finished stock that existed. In doing the best we can, we accept the evidence of both Beepat and the receiver.

[112] Beepat also testified that Gypsy spent $357,111.00 on plant and equipment, $39,614.00 on office equipment and $56,942.00 on factory furniture and other equipment. The Receiver's Statement has an entry for 'sale of equipment' which term apparently embraces all the equipment. The Receiver's Statement shows that the equipment was sold for $37,000.00. The start-up value of the office, factory and other equipment was ($39,614.00 + $56,942.00 + $357,111.00) or $453,667.00. Gypsy concedes that the equipment would have depreciated between 1981 and 1983. They contend that, assuming a depreciation rate of 15% per annum, the approximate value at the time of the fire would have been in the region of $327,774.40. In disposing of equipment for $37,000, there was an inadequate realisation (or loss) of ($327,774.40 - $37,000.00) or $290,774.40. Again, we accept here the evidence of both Beepat and the receiver.

[113] Mr. Beepat further testified that Gypsy spent $89,358.00 on leasehold improvements. Assuming a similar depreciation rate of 15% annually on the leasehold improvements of $89,358.00, Beepat's evidence was that the assumed value at the time of the fire would be $71,063.65. He conceded that there was some damage to leasehold improvements by the fire. However, the fire was minor and a reduction of 25% in the value is made to take account of the damage done by the fire. Therefore, a reasonable approximation of the value of the leasehold improvements at the time of the fire is $53,297.37. This approach does not seem unreasonable to us and so we accept it.

[114] There was a policy of insurance over the building in the sum of $1.5m. The claim was in the region of $900,000 to $950,000.00. The evidence of the receiver is that the insurance claim was compromised at $725,000.00. We accept Gypsy's claim to be entitled to recover the full proceeds of the policy, less stamp duty of $9,000.00 payable on the same which amounts to $881,000.00.

[115] The "Gypsy International Limited Stock Summary" described above, shows that Gypsy had fabric, stock, stationery, packaging materials, threads, spare parts, needles and work in progress in the sum of $644,119.32. There is no evidence as to the value of those items at the date of the fire. The time span between the date of the statement and the date of the fire is narrow and in the absence of evidence of any dramatic change in the company's position, and there is none, it is reasonable to assume that the value of the same was in the region of $500,000.00. The receiver's statement shows that the fabric and residual items were sold for $75,000.00. The sale therefore resulted in an inadequate realisation of $425,000.00.

[116] The evidence is that on 10 March 1987, CIBC wrote to the Central Bank, Gypsy and the receiver submitting a claim to the Central Bank for payment of the sum of $510,454.84 under the Trade Bills Discount facility. There is no reason to doubt the records of the Central Bank. Had it not been for the invalidly appointed receiver, Gypsy would have, in all probability, collected those receivables. Beepat testified that there existed no ground upon which any buyer was entitled to a set-off. This was not contradicted by the receiver. In those circumstances, we accept that Gypsy

is entitled to recover the sum indicated in the Central Bank records as the receivables of Gypsy.

[117] In summary, doing the best we can, our conclusion is that in view of the uncertainty surrounding the accuracy of the evidence relating to the value of various items Gypsy is entitled to recover the following discounted by 25%:

i.	Finished stock	$ 945,000.00
ii.	Plant and equipment	$ 327,774.40
iii.	Unfinished stock, etc	$ 500,000.00
iv.	Leasehold improvements	$ 53,297.37
v.	Insurance policy	$ 881,000.00
vi.	Receivables	$1,500,000.00
	Total	**$4,207,071.77**
	Less 25%	$1,051,767.75
		$3,155,303.02

[118] Of course, credit must be given for the payment of $390,550.00 made to CIBC and the sum of $204,456.25 made to Barbados Development Bank in respect of the loan. These credits total $604,000.25. In fine, CIBC is liable to Gypsy in the sum of $3,155,303.02 - $604,000.25 = $2,551,302.77.

(2) Loss of Profits

[119] Gypsy claims that it is entitled to recover projected loss of earnings for the period 1985 to 1993 in the sum of $7,118,805.00. It is with this claim that the issue of certainty of damages is raised most acutely.

[120] The evidence tendered by Gypsy in support of this head is that of Mr. Bisheswar, a chartered accountant from Guyana. He noted that the company had only been in business for two years and that in the first year, it realized revenue of $240,000.00 and in the second year $2.2 million. However, the company had still not yet turned a profit. He stated that, in those circumstances, the question had to be asked whether Gypsy was more likely than not to have continued its growth for some reasonable period, even at a lesser level than in year two.

[121] He expressed his professional opinion that relying on certain factors it was more likely than not that Gypsy would make a profit. He projected Gypsy's gross profits as follows:

i.	1985	$ 339,521.00
ii.	1986	$ 539,174.00
iii.	1987	$ 777,055.00
iv.	1988	$ 594,375.00
v.	1989-1993	$ 4,868,658.00
	Total	**$ 7,118,805.00**

[122] Mr. Bisheswar conceded that his projections were based on a number of assumptions, information provided by Beepat and that his extrapolation involved some uncertainty. However, he deposed that his methodology was a recognised and accepted accounting method for arriving at future loss in a situation such as Gypsy's. He explained that he felt more comfortable with his projections up to 1993 since the more extended the period of the projections the greater the degree of uncertainty which comes into play. We pause here to note that Gypsy is, as a matter of law, in the circumstances of this case, entitled to damages up to the period where this Court makes its determination.

[123] It is apparent from the evidence of Mr. Bisheswar that Gypsy's claim for loss of profits raises some uncertainty and relies heavily on guesswork. Be that as it may, it is difficult to see how **Chandler J** arrived at the conclusion at para [210] that "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". Perhaps, the judge arrived at this conclusion because of his finding at para [200] that "the receiver was validly appointed" and at para [211] that he found "no impropriety in the receiver's action".

[124] But, we have come to the conclusion that the receiver was not validly appointed and was in unlawful possession of Gypsy's business for four years and that CIBC is liable in damages for the receiver's trespass. In assessing damages for this trespass, we are therefore bound to recall the principle in **Wilson v.**

Northampton and Banbury Junction Railway Co that the strongest presumptions should be made against CIBC the wrongdoer. We are also bound to recall the principle in **Tuscany** that where an invalidly appointed receiver invades the rights of a debtor company, notwithstanding 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, the trespasser may be still liable to pay substantial damages.

[125] That said, this Court is satisfied that, given Gypsy's trajectory, it would have made a profit if its business was not liquidated by the receiver invalidly appointed by CIBC. The Court must therefore make an award for loss of profits doing the best it can in the circumstances of this case and mindful of the principles just recited. Accordingly, this Court would discount by 50% the $7,118,805.00 claimed by Gypsy and award $3,559,402.50 for loss of profits.

WAS BEEPAT LIABLE UNDER THE GUARANTEE

[126] The final question in this appeal is Beepat's liability under the guarantee. Having held that the receiver was invalidly appointed, this question can be easily disposed of. Our finding that the receiver was invalidly appointed means that CIBC is guilty of a repudiatory breach of the debenture. On acceptance of that breach, Gypsy was discharged from liability under the debenture. It is settled law that a guarantor cannot be held liable any more than his principal. Thus, Beepat, the guarantor of Gypsy's liability under the debenture was similarly discharged. In any event, it is well accepted law that any defence which Gypsy has against CIBC, Beepat also has against CIBC. For all of these reasons, Beepat is under no liability under the contract of guarantee.

DISPOSAL

[127] In the circumstances, the appeal is allowed and the cross-appeal is consequently dismissed. The first appellant is awarded the following amounts:

(i) Inadequate realisation of assets - $2,551,302.77

(ii) Loss of profits - $3,559,402.50

The awards shall bear interest at the rate of 6% with effect from 29 May 2012.

The appellants shall have their costs in this Court and in the court below, to be assessed, if not agreed.

Chief Justice

Justice of Appeal

Justice of Appeal