

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1526 of 2016

BETWEEN:

GRENVILLE WINSLOW PHILLIPS APPLICANT/ CLAIMANT
(Receiver/Manager)

AND

RCTD HOLDINGS LIMITED FIRST RESPONDENT/DEFENDANT

SILVER POINT VILLA HOTEL INC. SECOND RESPONDENT/DEFENDANT

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 7 March 2017

Appearances: Mr. Dustin Delany in association with Mr. Shazard Mohammed for the Applicant/Claimant. 00.

Mr. Amilcar Branche for the First and Second Respondents/Defendants

DECISION

INTRODUCTION

[1] This is an interlocutory application (“**the application**”) by which the applicant, Grenville Winslow Phillips, (“**the applicant**”) seeks the following orders:

- “1. A declaration that the Applicant/Claimant is the duly appointed Receiver/Manager pursuant to the Deed of Appointment of Receiver and Manager dated the 14th day of November, 2016 over the property, assets and undertaking of the 1st and 2nd Respondents/Defendants (the “**Property**”);
2. An injunction pursuant to 17.1(1)(e) and Rule 17.4 (1) (d) of the Civil Procedure Rules 2008 (*sic*) (as amended) (*sic*) (“**CPR**”) restraining the 1st and 2nd Respondents/Defendants, their Directors, Shareholders, Agents or Servants from

dealing with or removing any of the Property or in any way disposing of or dealing with or diminishing the value of the Property which are (*sic*) in the Island of Barbados, inclusive of all bank accounts, stocks, bonds and securities from the jurisdiction (*sic*);

3. An order that the Applicant/Claimant be granted custody of the Property pursuant to 17.1(1) (b) (i) CPR (*sic*);
4. An order for entry into and full possession and control of the Property by the Applicant/Claimant, his duly appointed and authorized Agents or Servants or otherwise howsoever (*sic*) the Applicant/Claimant may appoint pursuant to 17.1 (1)(c) of the CPR;
5. An order that the 1st and 2nd Respondents/Defendants return any fixtures, books, records and other items appurtenant to the Property unlawfully removed prior to the granting of this Order of possession or subsequent to and accordance (*sic*) with an inventory generated by the Applicant/Claimant, that the said items identified therein be returned and/or restored to the control of the Receiver of the Property forthwith (*sic*);
6. An order prohibiting the Directors, Shareholders, Agents or Servants of the 1st and 2nd Respondents/Defendants from hindering or obstructing the Applicant/Claimant, his duly appointed and authorized Agents or Servants or otherwise howsoever (*sic*) the Applicant/Claimant may appoint from executing and/or exercising his duties as the duly appointed Receiver/Manager;
7. The costs of the application is (*sic*) to be borne by the Respondents/Defendants; and
8. Such further Orders and Directions as the court considers just and as the circumstances of the case warrant.”

[2] I have determined that the application ought to be refused in its entirety. I set out my reasons below.

BACKGROUND

[3] I will draw from the statements of case and affidavits to outline the background to the application. These comprise, on the applicant’s part, the application, the applicant’s affidavit filed on 18 November 2016 (“**the applicant’s first affidavit**”), his affidavit filed on 19 December 2016 (“**the applicant’s second affidavit**”), the claim form and statement

of claim filed on 23 December 2016, and an affidavit sworn by Ms. Yoshodra Rampersaud, of Delany Law on 27 January 2017 (“**the Rampersaud affidavit**”).

- [4] The respondents filed three affidavits all of which were sworn by Mr. Roger Briggs Collins (“**Mr. Collins**”) and Mr. Damian Samuel Luke (“**Mr. Luke**”), directors of the respondents. These were filed on 7, 12 and 15 December 2016, respectively and I shall refer to them as “**the respondents’ first affidavit**”, “**the respondents’ second affidavit**” and “**the respondents’ third affidavit**”, respectively.
- [5] The applicant claims that by a written instrument made on 14 November 2016 (“**the deed of appointment**”), WM Capital Partners 57 LLC (“**WM Capital**”), a United States based corporation, appointed him Receiver/Manager over the assets (“**the assets**”) of the Second Respondent/Defendant (“**Silver Point**”). That appointment was purportedly made under powers contained in a Debenture dated 18 November 2005 (“**the 2005 Debenture**”) and made between the First Respondent/Defendant (“**RCTD**”), Silver Point, and BNB Finance & Trust Corporation (“**BFTC**”).
- [6] By the 2005 Debenture, Silver Point charged the assets in favour of BFTC to secure monies advanced by BFTC to RCTD under a loan facility. Mr. Collins and Mr. Luke executed a guarantee with respect to the loan facility (“**the guarantee**”). By 10 June 2008, the 2005 Debenture was stamped to secure an aggregate amount of \$16,600,000.00, currency of Barbados.
- [7] RCTD and Silver Point defaulted on their loan repayment obligations under the 2005 Debenture. By a letter dated 19 November 2015, the Attorneys-at-law for the lender had written to them demanding full payment. That letter stated their indebtedness to be \$13,333,187.94, currency of Barbados. By then BFTC had changed its name to Republic

Finance & Trust (Barbados) Corporation and the applicant asserts that another entity, Republic Bank (Barbados) Limited, had obtained an interest in the debt. I shall refer to these companies collectively as “**Republic**”.

[8] So how does WM Capital enter the arena? It is the applicant’s case that on 28 September 2016, Republic sold its interest, right and title to the loan and the guarantee to that entity; and that on 19 October 2016, Republic executed a deed assigning the 2005 Debenture to WM Capital (“**the transfer deed**”). By notices of the same date, Republic notified Silver Point Inc., RCTD Holdings and their Directors of the assignment.

[9] Thereafter, the pace of events quickened as WM Capital wasted no time in moving to enforce the security. On 27 and 29 October 2016, they served demand letters and notices of intention to enforce a security on RCTD Holdings and Silver Point.

[10] On 14 November 2016, the applicant filed a notice of “Registration of Enforcement of Security” with the Corporate and Intellectual Property Office and the Supervisor of Insolvency and served notice on RCTD and Silver Point to the effect that he had been appointed Receiver and Manager of Silver Point by WM Capital. On 15 and 16 November 2016, he sought to take possession of the assets but was prevented from doing so by RCTD and Silver Point. The latter companies dispute the validity of his appointment.

THE PROCEDURAL HISTORY

[11] The applicant turned to the legal process for assistance. On 18 November 2016, he filed on a certificate of urgency, a document headed “Fixed Date Claim Form” together with the applicant’s first affidavit.

[12] Despite its heading, the “Fixed Date Claim Form” closely resembled an application made pursuant to *Part 11* of the *Supreme Court Civil Procedure Rules, 2008* (“*CPR*”). *CPR 11*

provides for the making of applications for orders before, during or after proceedings. Yet, it had attached to it the “prescribed notes for defendants” which claimants are required by *CPR 8.12 (1) (c)* to serve on defendants.

[13] RCTD and Silver Point must have been served since they filed a counterclaim and the respondents’ first affidavit on 7 December 2016.

[14] The matter came on for hearing before me on 8 December 2016 but was adjourned to 14 December 2016. The respondents’ documents had not yet reached me and, in any event, time would not have permitted me to hear a contested application when it was called. However, before the adjournment was taken, in response to the Court, Mr. Shazard Mohammed indicated that what was intended to be before me was an application for interlocutory relief. He had appeared in association with Ms. Rampersaud for the applicant and Mr. Amilcar Branche for RCTD and Silver Point.

[15] On the adjourned date, Mr. Dustin Delany appeared for the applicant with Mr. Mohammed, and, as before, Mr. Branche appeared for the respondents. After hearing submissions on the procedural conundrum created by the applicant, I granted a consent order to facilitate the hearing of the applicant’s document headed “Fixed Date Claim Form” as if it were an interlocutory application. The hearing of the application was then scheduled for 21 and 22 December 2016.

[16] Thus, with the co-operation of Mr. Branche and a common acknowledgement that justice ought not to be delayed as form triumphs over substance, the application was transplanted from the sandy procedural ground on which it struggled to take root, and set on a firmer footing. Nonetheless, the hearing of the application was further delayed by other procedural issues.

[17] The consent order included a term that the existing affidavits were to stand in support of or opposition to the application, as the case may be, with each party being permitted to file further affidavits. The counterclaim was struck out to allow for a fresh start and the applicant was ordered to file his claim form by 18 November 2016. He did not comply with the latter order. Rather, on 16 December 2016, he filed a document headed “notice of amended application”.

[18] Mr. Branche took objection to the non-compliance with the order and the filing of the amended application. After some exchanges, Mr. Delany withdrew the document which had given rise to the objection and I extended the time for the filing of the claim form to 23 December 2016. Mr. Branche was unavailable over the yuletide season and the parties agreed to the hearing of the application on 10 January 2017.

THE UNDERTAKING IN DAMAGES

[19] Next, I will consider certain submissions made by Counsel in relation to what is commonly referred to as the undertaking in damages.

[20] *CPR 17.4 (2)* provides that an applicant who seeks interim orders of the type set out in the application must “[u]nless the court otherwise directs, ... undertake to abide by any order as to damages caused by the granting, continuance or extension of the order”. This is the undertaking in damages.

[21] The applicant made no reference to an undertaking in his filed documents. However, during the course of the hearing, Mr. Delany made an application that the undertaking be dispensed with. He submitted that an undertaking would be meaningless since, according to him, the applicant was an agent of RCTD and Silver Point and would, in effect, be giving

an undertaking to himself. He indicated, though, that if an undertaking is required, the applicant would give it.

[22] Mr. Delany referred me to a passage found at paragraph 42 of the decision of the Caribbean Court of Justice (“CCJ”) in *Canadian Imperial Bank of Commerce v Gypsy International Ltd. et. al. [2015] CCJ 16 (AJ)* for guidance as to the nature of the receiver-company relationship. In that passage the CCJ described the relationship as one of a “peculiar agency”. It explained the appropriateness of this characterisation. The principal, the mortgagor, does not select or participate in the appointment of the receiver and is not entitled to direct or dismiss him. The court went on to note that, nonetheless, the receiver owes “an equitable duty of due diligence to the mortgagor”.

[23] In my view, that acknowledgement is enough to shoot down Mr. Delany’s veiled suggestion that somehow the legal personalities of a receiver and a related company merge on the appointment of the receiver. Their relationship may be one of a “peculiar agency” but it is not so peculiar as to have the legal effect Mr. Delany advocated.

[24] Furthermore, Mr. Delany’s submissions betrayed some misunderstanding of the nature and effect of an undertaking. An undertaking is given to the court, not to a party. In the context of an order for interim injunctive relief, it is generally required to enable a successful defendant who suffers loss as a consequence of the injunction to obtain compensation without recourse to a cause of action against the claimant.

[25] Mr. Branche submitted that the undertaking is required. He emphasised that the applicant had not provided any evidence as to his ability to provide an undertaking, and submitted further that he ought not to be permitted to give the undertaking at this late stage or provide

any evidence that may be required. If he is right on both points, this issue might be dispositive of the application.

[26] It is clear from the language of *CPR 17.4(2)* that an undertaking is required, unless that requirement is dispensed with by the Court. There can be no judicial charter fixing the circumstances in which a court may properly direct that it need not be provided. However, the approach of the courts before the expression in statutory form of what has long been a general requirement, must be instructive. I see no reason, though, why the practice that obtained prior to the enactment of the provision ought not to provide a useful guide.

[27] Generally, courts would dispense with the requirement only in exceptional circumstances and where the interest of justice was best served by such a decision. I will not catalogue the situations in which courts have tended to exempt applicants from the requirement. It is enough to note that in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment [2003] 63 WIR 42*, at paragraph 39, the Privy Council emphasised that courts have an eternal duty “to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice”. That is the overarching principle by which this Court must be guided in deciding whether to direct that the undertaking is not required.

[28] Mr. Delany advanced no convincing ground in support of the contention that the undertaking should be dispensed with in this case. Having considered the role and powers of a receiver manager, I did not consider that it would be in the interest of justice to grant the orders sought and leave the respondents at risk of going without compensation if it turned out that the applicant’s appointment was invalid.

[29] During the course of the hearing, Mr. Delaney indicated a willingness to provide an undertaking, if required to do so. Mr. Branche did not firmly suggest that were this Court inclined to grant the orders sought, it was beyond its power to take the required undertaking before doing so, or that questions of the applicant's means or the need for fortification could not be considered at that stage. Though such a truncated approach might not be the most desired, it would seem to meet the ends of justice and, in the absence of seeing any authority against it, it is one I might have been prepared to adopt in this case. However, in light of my determination that the application must fail for other reasons, this issue is moot.

THE FORM OF ORDERS SOUGHT

[30] During the hearing of the application, I commented on the fact that the orders were not worded in such a manner as to make it clear that they were to have interim effect only. To my consternation, the applicant did not seek to amend his application. Nonetheless, the matter was argued as if he was seeking interim relief.

[31] Towards the end of the hearing, however, Mr. Branche commented adversely on this situation. He submitted that the Court could not grant orders of indefinite duration at this stage of the proceedings. That is beyond doubt. Counsel cited *Battaleys (Barbados) Limited v Kaupthung Singer & Friedlander Limited et. al. Civ. App. No 18 of 2014 (Date of decision, 20 March, 2015)* and urged that the application ought to be dismissed on this ground alone. That notwithstanding, the applicant did not seek to have the application amended.

[32] In *Battaleys*, the appellant (“**Battaleys**”) sought injunctive relief before the court of appeal pending the hearing of its appeal against a decision of the trial judge's refusal of an application for interim relief. The substantive claim had not yet been heard. The orders

sought were not expressed in such a way as to reveal they were intended to be temporary. The Court held that it had no jurisdiction to grant the relief sought since “this would be tantamount to this Court making a final determination of a matter still before the High Court. It opined at paragraph 15, that the injunction sought by Battaleys amounted to a permanent injunction since the order sought was not limited by duration.

[33] Battaleys sought the leave of the CCJ to appeal against the decision of the Court of Appeal. The court refused the application on the basis that the appeal had no prospect of success (*Battaleys (Barbados) Limited v Kaupthung Singer & Friedlander Limited et. al.*[2015] *CCJ 3 (AJ)*). It reasoned that the Court of Appeal had rightly held that the order sought was framed as a permanent injunction which it had no power to issue. This, despite a submission by Counsel for Battaleys, Mr. Alair Shepherd, QC, that the matter had been argued before the Court of Appeal on the basis that his client was seeking an interim injunction.

[34] It appears that the **CCJ** based its decision on the state of the “formal record” which it seems reflected nothing other than that the application was for a permanent injunction. If that is so, the binding force of its decision may be taken to be limited to that special circumstance.

At paragraph 10, the Court stated:

Mr. Shepherd QC complained to this Court that he had actually argued the matter before the Court of Appeal on the basis he was seeking an interim injunction, not a permanent one, though admitting he had not sought an amendment of his notice of appeal to reflect this. Mr. Garth Patterson QC in his written submissions states that he “very definitively pointed out that the applicant was seeking a permanent injunction”, though Mr. Shepherd QC in his written reply states that “it is not my recollection that this point was taken in the Court of Appeal.” In any event, it appears that, in carefully reading the formal notice of appeal a few days later when writing the reasoned judgment of the Court, Burgess, JA focused upon the wording of the sought-after injunction. He thus stated, “Framed like this, and not limited by duration, the injunction sought by Battaleys amounts to a permanent injunction.” The formal

state of the record cannot be contradicted and so fully justified Burgess, J.A.’s rejection of the application.

[35] The CCJ returned to the point at paragraph 16, where it stated:

[16] As is clear from [9] and [10] above, in the light of the formal record the only course open to the Court of Appeal was to refuse the application before it for an injunction that was not temporary but permanent. It follows that the appeal has no possibility of success. While the Court of Appeal has wide powers under s 61 of the Supreme Court of Judicature Act, Cap 117A, including all the jurisdictional powers of the High Court (including, under s 44, issuing injunctions where it appears to the court to be just or convenient to do so), it could not exercise those powers to grant the permanent injunction sought in the Prime Proceedings since that “would be tantamount to making a final determination of a matter still pending before the High Court.” It follows that since the application before the Court of Appeal was not for the grant of an interim injunction, no issues arise as to when it is just or convenient to grant such an injunction, taking account of cases like *American Cynamid Co v Ethicon Ltd*, *Toojays Ltd v Westhaven Ltd*, *Erinford Properties Ltd v Cheshire County Council* and *Novartis AG v Hospira UK Ltd*.

[36] It appears then that there might have been nothing on the formal record which reflected the way in which the matter had been argued before the Court of Appeal but that point is unclear. However, at paragraph, 17, the CCJ appeared to have spoken in wider terms when it stated:

Mr Shepherd QC contends that it is wrong to penalise Battaleys for the mistaken wording of the injunction sought on its behalf, but the wording of injunctions is often crucial to the success or failure of applications for an injunction and so should be the focus for counsel and courts. **It is no function of a court to take sides to plead an applicant’s case for it and to rehabilitate it if the applicant does not seek an amendment, especially where experienced counsel are before it in a commercial matter of much significance [emphasis mine].**

[37] Some obvious questions arise. Is this statement binding? If so, is it intended to establish a general edict against the grant of orders for interim relief on an application on which the orders are expressed as permanent ones? Can the court take account of the way in which

the case was argued and make such orders as it deems fit in the circumstances? If a court takes the latter course can it be said to be “taking sides?”

[38] I need not tarry on these troublesome questions. Despite the basis on which the arguments made before me were presented, at the dying stages of the hearing, Mr. Branche took objection to the application on the basis of the wording of the orders sought. At that stage, it was open to the applicant to seek to have the application amended. However, he elected to do nothing. This sent the message that it does not matter, and it does. I should not now take sides to plead the applicant’s case and rehabilitate it.

[39] There is one rider. It relates to the claim at paragraph 1 for a declaration. This Court has power, on an interlocutory application, to make a final declaration. However, the power should be exercised sparingly and the grant of such relief without a trial is very unusual. As I demonstrate later, there are issues to be resolved before a court can conclude that the applicant has made out his case that he is the lawfully appointed receiver. A final declaration at this stage could not have been granted.

[40] That being so, I am inclined to the view that the application fails on account of the manner in which the orders sought were worded and the fact that no final declaration could be made for the reason just mentioned. In any event, though, as I demonstrate below, I am satisfied that the application ought not to be allowed, even if considered on the basis that it is one for interim relief.

AN INTERIM DECLARATION? – PARAGRAPH 1

[41] The first order which the applicant seeks is a declaration that he is the duly appointed receiver/manager over the assets. The parties dispute whether the Court has power to grant

an interim declaration. Having considered the submissions and the law, I hold that no such power exists in this jurisdiction.

[42] Mr Delany submitted that the power to grant an interim declaration derives from *CPR 17.1 (3)*. One must examine this provision in its context in order to fully understand it. After all, like a word, a sub-rule is known by the company it keeps. *CPR 17.1 (1)* provides that “[t]he court may grant interim remedies including” any of the types listed at *CPR 17.1 (1) (a) to (l)*. An interim declaration is not among the types of interim orders listed in *CPR 17.1(1)(a) to (l)*. It is clear, though, that this list is not exhaustive. The presence of the word “includes” tells us so. *CPR 17.1(2)* is not relevant. It defines the term “relevant property” as it is used in *CPR 17.1(1) (b) and (g)*. Then follows *CPR 17.1 (3)*. It stipulates that “[t]he fact that a particular type of interim remedy is not listed in sub-rule (1) does not affect any power that the court may have to grant that remedy”.

[43] Counsel urged that *CPR 17.1(3)* is a “catch-all” provision which enables the Court to grant interim declaratory relief. The fallacy in that statement derives from his assumption that interim declarations fall within the *CPR 17.1(3)* net without first determining the scope of the “catch”. The crucial question is “catch-all of what?” The answer must be: “all of those interim remedies which this Court has power to grant but which are not among those listed in *CPR 17.1(1)(a) to (g)*”

[44] The language of *CPR 17.1(3)* is clear and unambiguous. It preserves the power of the court to grant an interim remedy notwithstanding the omission of that remedy from the statutory list. The words “any power that the court may have” requires an applicant who seeks an unlisted order to demonstrate that the court is otherwise empowered to make it. It can only

apply to orders which are otherwise permissible by law. It gives the court no licence to grant orders hitherto unknown to our law.

[45] The issue as to the scope of *CPR 17.1(3)*-type provisions has been considered elsewhere and answered no differently. In *Jewelerama Limited v Rock Investments Limited Civ App No. 91 of 2007, date of decision 19 October 2007*, the Jamaica Court of Appeal spurned an attempt to rely on **Rule 17.1(3)** of the *Civil Procedure Rules, 2002* to support the grant of an order which was not listed in *Rule 17.1(1)* of those rules, and for the making of which no power existed otherwise. *Part 17* of the **Jamaica Rules** is similar to *CPR Part 17* with **Rule 17.1(3)** of the former being identical to *CPR 17.1 (3)*.

[46] A similar provision is found in *Rule 25* of the English *Civil Procedure Rules 1998*. In Jamaica, as in England, provision is made for interim injunctions in the statutory lists, but that is immaterial to the present issue. *Rule 25.1(3)*, the English equivalent to *CPR 17.1 (3)*, was considered in *Woodfine Leeds Smith (a firm) v Russell et al [2007] EWHC 603 (QB)*. I lean on that decision only to borrow and adopt a statement from Seymore J. He stated, at paragraph 103:

...that provision leaves entirely open whether the court has a power to make a particular interim order of a type not specifically identified. It does not confer on the court a general liberty to make whatever interim orders it likes.

[47] So, does this Court have power to make an interim declaration? Mr. Delany submitted that authority for a positive response is to be found in *International General Electric Company of New York Ltd. et al v Commissioner of Customs Excise [1962] Ch. 784*, a decision of the Court of Appeal of the United Kingdom. However, that case supports the opposite. It held that an order which is declaratory of the rights of parties must in its nature be a final order. On page 789, Upjohn LJ with whom Diplock LJ agreed, stated it to be “perfectly

plain that the court in proceedings between subjects could not grant some form of interlocutory relief in the sense of some interim declaration”. Later, on page 780, Upjohn LJ considered it “quite impossible to invent some form of declaration which does not determine the rights of the parties but is only meant to preserve the status quo”.

[48] That continued to be the position in English law until the introduction of **Rule 25.1(1)(b)** which lists the interim declaration as an available remedy. The pre-statutory position is set out clearly in a passage to which Mr. Branche referred me from the **White Book Service 2004**, at paragraph **25.1.17**. It states:

It might be expected that the jurisdiction to grant a declaration as a final remedy would carry with it jurisdiction to grant a declaration as an interim remedy, preserving the status quo (e.g. as to rights over property) in a matter which is to be decided after further hearing in the final judgment of the court. However, in **Riverside Mental Health NHS Trust v Fox [1994] F. L. R. 614 CA**, the Court of Appeal said it was clear from the authorities that interim declaratory relief was “a creature unknown to English law”.

[49] Over four decades ago, Bolla CJ in **Singh et al v Butler, Suit No 1685 of 1973 (High Court of Guyana, date of decision, 3 July 1973)** properly summed up the position with his statement that “an interim declaration cannot be made on interlocutory proceedings as there is no such order.” I have found nothing to disabuse my mind that this is the position in this jurisdiction. The concept of an interim declaration is unknown to our law.

THE INTERIM INJUNCTION

[50] I thought it best to consider paragraph 6 of the application next. That is the order to restrain the applicant being hindered in, or obstructed from, carrying out the functions of receiver/manager. It seems to me that the outcome of this aspect of the application might determine what happens to paragraphs 2, 3 and 4.

[51] The applicant’s submissions were premised on the assumption that the general two-staged approach articulated in *Toojays Limited v. Westhaven Limited Civ App No. 14 of 2008, date of decision, 16 September 2011* are applicable. Mr. Branche did not suggest otherwise. Mr. Mohammed acknowledged section 44 of the *Supreme Court of Judicature Act, Cap 117* to be the basis of this Court’s jurisdiction. This provision empowers the Court to “grant injunctive relief where it is just and convenient to do so”.

[52] The significant points I have derived from *Toojays* are (1) a court must make an inquiry into the balance of justice, striving to maintain the balance as justly as possible between the parties, if the substantial issues between them can only be resolved at trial: (*paragraph 50*); (2) the approach to be taken involves a consideration of two questions, those being (i) “whether there is a serious question to be tried” and (ii) if there is, “whether the balance lies in favour of granting or refusing interlocutory relief” (*paragraph 79*); and (3) a significant factor in assessing the balance of justice is “whether if the plaintiff succeeds he would be adequately compensated by damages for loss sustained between application and trial” for, if he can be, an interlocutory injunction should only be granted in exceptional circumstances (*paragraph 79*).

Is there a serious question to be tried?

[53] I come therefore to the first question: is there a serious question to be tried? The parties do not dispute that there is. At paragraphs 29 to 30 of his written submissions, Mr. Mohammed frames the question as if it is one relating to the right of the respondents to interfere with a validly appointed receiver in the execution of his duties. However, that is not correct. The question relates to the validity of the appointment itself.

[54] The first order which the applicant seeks on his claim form is a declaration that his appointment is valid. This is questioned by the respondents. The deed of appointment is attached to the claim form and exhibited with the applicant's first affidavit. It purports to have been executed by WM Capital under the 2005 Debenture and describes that entity as "the successor corporate entity of the lender".

[55] At paragraph 13 of the claim form, the applicant claims that on 28 September 2016 "all interests, right and title to the loan, the Guarantee and the Insurance held by Republic were sold to WM Capital. He asserts further, at paragraph 14, that on 19 October 2016, Republic and WM Capital entered into the transfer deed in order to complete the sale of Republic's interest in the loan, guarantee and insurance to WM Capital.

[56] Paragraphs 11 and 12 contain the following assertions in relation to the issuance of exchange control permission from the Exchange Control Authority of the Central Bank of Barbados ("**the Authority**") under the Exchange Control Act, Cap 71 ("**the Exchange Control Act**"):

- "11. On or about June 2016, Republic and WM Capital ... entered into negotiations, for Republic to sell the debt of the 1st and 2nd Defendants to WM Capital.
12. Commencing the 31st day of August, 2016, WM Capital, pursuant to the Exchange Control Act CAP 71 of the Laws of Barbados, sought the permission from the Central Bank of Barbados, Exchange Control Authority The permission comprised of *inter alia* to use certain properties as itemised in the said missive of the 31st day of August, 2016 as collateral for a loan facility. A request was made by the Exchange Control Authority further documentation (*sic*), (*sic*) the 2005 Debenture which allowed for the appointment of a Receiver, was sent amongst the documents sent. In response to these documents, the Exchange Control Authority, by letter dated the 7th day of October 2016, granted approval for the transaction and the documents submitted therein."

[57] The respondents dispute the validity of the appointment on two grounds. They contend that no Exchange Control Permission was obtained, or at least none that related to any assignment of the debt or the transfer deed. The second ground is posited on an alleged agreement whereby, according to the evidence contained at paragraph 2(c) of the respondent's third affidavit, "it was agreed that [RCTD and Silver Point] would give up possession of the [assets] to the applicant upon [WM Capital] releasing [Mr. Collins and Mr. Luke] from their personal guarantees ...". They contend that the purported appointment of the applicant by WM Capital in breach of the agreement is somehow invalid. The applicant denies the existence of any agreement.

[58] That is the context within which the issue as to whether there is a serious question to be tried must be determined. The threshold the applicant must reach to secure an affirmative response is a relatively low one. The Court must be satisfied that there is a serious question to be tried in that the claim is not frivolous or vexatious. This was confirmed in *Toojays* at paragraphs 36 and 52.

The applicant's evidence: a special feature

[59] A determination of whether this test has been satisfied involves a review of the evidence. Before commencing that exercise, I must make a general comment about the applicant's evidence. In many instances, it is expressed to be based on information which he claimed to have received, and his belief. Though not objecting to the admissibility of any of this evidence, Mr. Branche was highly critical of it in his submissions, and rightly so.

[60] Section 48 of the *Evidence Act, Cap 121* ("*the Evidence Act*") bars the admissibility of evidence of a previous statement to prove the existence of facts asserted in that statement. This well-known rule of evidence is commonly called the hearsay rule. An exception is

provided for in interlocutory proceedings in section 63 of *the Evidence Act* which allows evidence of information and belief to be admitted once the deponent states the source of the information or belief. This exception is also stated in *CPR 30.3(2)(b)*.

[61] Nonetheless, the applicant's evidence is before me. Mr. Branche's submissions went to the value and weight of his evidence and that reflects the approach which I must now adopt. Where inadmissible evidence is admitted without objection in civil proceedings, a court may use that evidence to the extent of its rational persuasive power. The court must determine what weight and value to attach to the evidence. *Pratt v Renz 111 [2014] CCJ 7 (AJ)*; *Guyana Bank for Trade & Industry v Alleyne [2011] CCJ 5 (AJ)* and *Sheermohamed et. al. v. S.A. Nabi and Sons Ltd [2011] CCJ 7 (AJ)* support this approach.

Exchange Control Permission: the factual issue

[62] I will now examine the evidence relating to the exchange control issue. In the respondents' first affidavit, the deponents asserted that WM Capital had not obtained exchange control permission for the transfer of the 2005 Debenture. Based on advice from Mr. Branche, they assumed that permission was required under section 12(1) or section 34 of the *Exchange Control Act*. I shall come back to those provisions.

[63] In the respondents' second affidavit, Messrs. Collins and Luke exhibited a letter said by them to have been sent by Mr. Delany to Mr. Branche in response to queries raised by the latter about the nature of any exchange control permission granted. Dated 7 October 2016, the letter is on a letterhead marked "Central Bank of Barbados", addressed to Mr. Delany and purportedly signed by Ms. Joycelyn Holdipp for the Authority. The body of the letter reads:

"Dear Sir

Re: RCTD Holdings Ltd., and Silver Point Villa Hotel – US\$6, 666, 594

We refer to your previous correspondence ending with your letter dated October 3, 2016, subsequent conversation and email between (Holdipp/Howell) by which permission is sought on behalf of your client WM Capital Partners 57 LLC which has made an offer of financing in the amount of US\$6,666,594 to RCTD Holdings Ltd and Silver Point Villa Hotel. The funds will assist with capital expenditure and working capital for Lots C, A, D2, D1, G1, G2 and F located in the vicinity of Silver Sands, Christ Church.

We note that the borrowers will apply 100% of the net cash from the sale of units owned by the Borrower upon receipt to repay the principal amount of the loan.

We acknowledge receipt of your letter and supporting documentation outlining the terms and conditions of the above loan facility.

We advise that permission is granted for the above loan transaction.

Please be guided accordingly.”

[64] That is one of two letters referred to by the applicant at paragraph 12 of his statement of claim. It suggests that permission was sought, and granted, for a loan from WM Capital to Silver Point. In the respondents’ second affidavit, Messrs. Collins and Luke deny having knowledge of any such loan facility, or receiving any money from WM Capital.

[65] The letter makes reference to “previous correspondence”, and “subsequent conversation and email between (Holdipp/Howell)” and a “letter and supporting documentation outlining the terms and conditions of the above loan facility” which might be relevant to the nature of any permission sought. However, the applicant adduced no evidence of the contents of any conversation or e-mail between Ms. Holdipp and anyone identified as Howell. The only evidence he adduced in this matter is that contained in his affidavits and, as Mr. Branche submitted, he has no first-hand knowledge of the events that transpired between WM Capital and the Authority.

[66] In the applicant's second affidavit, he produced two additional letters and some e-mails which appear to relate to this issue. The first letter is dated 31 August 2016. It is referred to in paragraph 12 of the statement of claim. It was purportedly signed by Mr. Delany and addressed to the Director, Exchanged Control Authority. The applicant's evidence is that this is the initial letter by which WM Capital sought the permission. It is on a letter head marked "Delany Law". The body of that letter reads:

"Dear Sir,

Re: RCTD Holdings Ltd. and Silver Point Villa Hotel – US\$6,666,594/Various Plots located in Silver Sands, Christ Church, Barbados

We act as counsel for WM Capital Partners LL.C.

WM Capital Partners LLC has made an offer of finance to RCTD Holdings and Silver Point Villa Hotel (the Borrower(s), both local Barbados companies for the amount of US\$6,666,594.00 to assist with capital expenditures, and working capital purposes in relation to the condominium units, and hotel located on the following plots (the "Property"):

- i. Lots C and A ...
- ii. Lot "D2" ...
- iii. Lot "D1" ...
- iv. Lot "G1" ...
- v. Lot "G2" ...
- vi. Lot "F" ...

The beneficial owner of the property is Silver Point Hotel Inc. and by Condominium Declaration dated January 29, 2009, the property was condominiumized.

Per the facility agreement, the Borrowers will apply 100% of the net cash proceeds from the sale of units owned by the Borrower upon receipt to repay the principal amount of the loan.

We therefore seek your approval to use the said Property as collateral for this facility, being structured over a three (3) year term. Security will be first Legal Mortgage over the Property stamped to secure USD\$6,666,594.00 plus assigned comprehensive risk peril insurance.

If you should have any questions in relation to the foregoing, please do not hesitate to contact us. Otherwise, we look forward to hearing from you.

Kind regards,”

[67] Thus, what is said to be the initial application letter reflects an application for a loan in an amount and for the purpose stated in the permission letter of 7 October 2016. The application letter states the period over which the loan facility is structured and identifies the proposed security. Juxtaposing these two letters, a reader might readily conclude that the application and permission relate to a loan and security arrangement between WM Capital, as lender and RCTD and Silver Point, as borrowers. However, the other letter and the e-mails produced by the applicant render what might have appeared certain, less so.

[68] The letter to which I now refer is dated 3 October 2016, was purportedly signed by Ms. Rampersaud and addressed to The Director, Exchange Control Department for the attention of Ms. Holdipp. Thus, it came after the application letter of 31 August 2016 but before the permission letter of 7 October 2016. It is in these terms:

“Dear Sir,

Re: RCTD Holdings Ltd. and Silver Point Villa Hotel – US\$6,666,594/Various Plots located in Silver Sands, Christ Church, Barbados

Further to our previous communication, please find enclosed copies of the requested documents:

1. Silver Point Villas Hotel Inc. incorporated documents;
2. RCTD Holdings Limited incorporation documents;
3. Loan Sale and Assignment Agreement; and
4. 2005 Debenture as upstamped – RCTD Holdings Limited, Silver Point Villa Hotel Inc. & BNB Finance & Trust Corporation.

Kind regards,”

[69] The applicant adduced no evidence of the previous communication referred to in that letter. The letter suggests, though, that the authority was made aware of the 2005 Debenture before the issuance of the permission letter. It also makes vague reference to a “Loan Sale and Assignment Agreement” which the e-mails to which I come next suggest was an agreement made between Republic and WM Capital.

[70] The e-mails were purportedly exchanged between Mr. Mohammed and Ms. Holdipp. They came after the permission letter. Apparently, Mr. Mohammed’s was sent on 13 December 2016 and Ms. Holdipp’s response on 14 December 2016. The e-mail attributed to Mr. Mohammed is captioned “Re: RCTD Holdings Ltd., and Silver Point Villa Hotel”. It commences by referring to a “just concluded conversation” of which there is no evidence before me. It continues:

“I wish to seek clarification and confirmation based on your letter to us dated October 7, 2016, of the last line which reads as follows:

“We advise that permission is granted for the above loan transaction.”,
(*sic*)

The said permission granted by the Central Bank of Barbados, for the ‘loan transaction’ consisted of ‘an umbrella’ approval of the all the (*sic*) supporting documents outlining the terms and conditions in connection with the said loan facility. The documents which were exchanged via letter and email correspondences, includes (*sic*) the following: -

1. **Debenture Agreement 2005** (upstamped);
2. **Loan Sale and Assignment Agreement** between Republic Bank (Barbados) Limited and Republic and Republic Finance and Trust (Barbados) Corporation and WM Capital partners 57, LLC;
3. **Silver Point Villas Hotel Inc. incorporated documents;** and
4. **RCTD Holdings Limited incorporated documents.**

Kindly confirm if the above approval for the loan transaction consists of approval of all the supporting documents submitted herein.”

[71] The response attributed to Ms. Holdipp, reads:

“We wish to confirm that the approval given for the loan regarding RCTD Holdings Ltd. and Silver Point Hotel consists of approval of all the supporting documentation included.”

[72] Thus, it appears that sometime before the letter of permission was issued, the 2005 Debenture and an agreement between Republic and WM Capital was seen by Ms. Holdipp. It is unclear to the Court what is meant by “approval of all supporting documentation”. In addition, the agreement referred to was not produced and there is no evidence as to its contents or otherwise linking it to any transfer of Republic’s rights and interests in the debt to WM Capital.

[73] The final piece of related evidence is contained in the Rampersaud affidavit. Counsel deposed that WM Capital registered “the investment funds for the Transfer and Assignment of Debenture”. She produced a copy of a form headed “Form FI”, dated 28 October 2016 and purportedly approved by Ms. Holdipp on 23 November 2016, and a letter also dated 23 November 2016 seemingly from Ms. Holdipp to Ms. Rampersaud.

[74] The FI form shows the applicant’s name as WM Capital and that entity’s place of residence as the United States of America. It expresses the amount to be registered as \$1,758,044.50, currency of the United States with a Barbados dollar equivalent of \$3, 552,974.67. The “[p]articulans of investment” are stated as a “loan facility provided to RCTD Holdings and Silver Point Hotel Inc. to assist with capital expenditure and working capital associated with lot (*sic*) C, A, D2, D, G1, G2 and F in the vicinity of Silver Sands Christ Church.” Ms. Holdipp’s letter refers to the purpose of the funds in like terms.

[75] The above review demonstrates that on the evidence adduced, there is some uncertainty as to the true nature of any permission granted by the Authority. At paragraph 7 of his second affidavit, the applicant seeks to explain what he acknowledges to be an “apparent

peculiarity” in the permission letter. That evidence is useless. Whether or not exchange control permission was granted for a particular transaction involves a question of fact to be established by credible evidence from those who can explain what transpired and the documents produced. It cannot be determined by the rationalisation of the applicant.

[76] Therefore, I am satisfied that there is an issue of fact as to whether exchange control permission was granted by the Authority for any agreement relating to the transfer of Republic’s rights to WM Capital and, or, the transfer deed. However, the materiality of that issue must depend on whether exchange control permission was required and, if so, whether a failure to obtain it renders the transfer deed void. These are questions of law to which I now turn.

Exchange Control Permission: the legal issues

[77] The parties to this action assumed that exchange control permission was required for the transaction involving Republic and WM Capital, but there has been no consensus as to which of the statutory provisions apply. Mr. Branche submitted that the relevant provisions are sections 12(1)(c) and sections 34. References were also made during the course of the submissions to section 33.

[78] Section 12 deals with the transfer of “securities”, a term defined in section 2(1) to include debentures. Section 12(1) provides:

Except with the permission of the Authority, a security registered in Barbados shall not be transferred ... unless ... the following requirements are fulfilled, that is to say

(a) neither the transferor nor the person, if any, for whom he is a nominee is resident outside of Barbados; and

(b) the transferor delivers to the transferee at or before the time of the transfer the prescribed declarations as to his residence and that of the person, if any, for whom he is a nominee; and

(c) neither the transferee nor the person, if any, for whom he is to be a nominee is resident outside Barbados; and

(d) except when the security is registered in Barbados otherwise than in a subsidiary register, the Authority is satisfied that the requirements of paragraph (c) are fulfilled: ...

[79] In his written submissions, at paragraph 29, Mr. Mohammed submitted that section 12 “has no bearing on the substance of permission”. I am not sure what that means. Mr. Delany did not address the applicability of this provision in his oral submissions. I note, though, that in *Kings Beach Hotel Limited et al v Marks Civ Suit No. 20 of 2006, date of decision 21 July 2006*, Blackman J rejected the notion that section 12 is applicable to debenture-mortgages. He stated, at paragraph 39:

I am unable to agree with the proposition that the foregoing definition of securities could extend to an instrument such as the Debenture-Mortgage under consideration. It appears to me that the term securities, as defined, relate to transactions which are dealt with on a security exchange, or may be otherwise classified as “personalty rather than a mortgage instrument which speaks to real estate ...

[80] Neither side addressed me with respect to this passage nor does it appear that it was subject to appellate review. I will move on to section 34(3)(c) which Mr. Branche submitted to be applicable. This provision was not the subject of analysis in the submissions advanced and it is not immediately obvious why it might be relevant. I make no determination on the scope of the provision but it does appear to cover loans from persons resident in Barbados to corporations that are resident in Barbados but controlled by persons outside of Barbados.

It reads:

Except with the permission of the Authority, no person resident in the Island shall lend any money or securities to any body corporate resident in Barbados which is by any means controlled (whether directly or indirectly) by persons outside of Barbados:

.....

- [81] The other provision mentioned by Counsel was section 33(1)(a). It reads:
- (a) no person resident in Barbados shall transfer or do any act forming part of a series of acts calculated to result in the transfer by way of sale, lease, exchange, gift or mortgage of any land, buildings or other hereditaments situate in Barbados or any instrument or certificate of title relating thereto, to a person resident outside Barbados.
- [82] Ultimately, it is a matter for judicial determination whether exchange control permission was required by any provision of the *Exchange Control Act* for any agreement that existed between Republic and WM Capital, or the transfer deed. However, it is not a task that can sensibly be essayed at this stage, in the absence of reliable evidence as to the nature and contents of any agreement between those entities and fuller argument on the provisions of the *Exchange Control Act*.
- [83] Clearly though, in order for the respondents to succeed on this ground, the Court must be satisfied that permission is required under the *Exchange Control Act*. It follows that regardless of any consensus between the parties on that point, that remains a serious issue to be tried.
- [84] The other submissions made by Counsel relate to the consequences of any breach of the requirements of the *Exchange Control Act*. Mr. Branche submitted that the failure to obtain any requisite permission rendered the transfer deed and by extension the applicant's appointment void. He cited *Sanitary Laundry et al v Chase Manhattan Bank et al Civ. App. No 9 of 1985, date of decision 4 November 1998* and *Kings Beach Hotel Limited et al v Marks Civ. App. No. 23 of 2006, date of decision 11 February 2011* (“*Kings Beach Hotel Limited et al*”) in support of this proposition.
- [85] Mr. Delany cited portions of the decision in *Kings Beach Hotel Limited et al* in contending that the respondents ought not to be permitted to benefit from any breach of the provisions

of the *Exchange Control Act*. He did so without prejudice to his primary argument that any requisite permission was obtained.

[86] In *Chase Manhattan Bank et al v. Sanitary Laundry Civ. App. No 9 of 1985, date of decision 4 November 1988* (“*Chase Manhattan Bank et al*”), the Court of Appeal upheld the decision of the trial judge (see: *Sanitary Laundry v Chase Manhattan Bank et al High Court Suit No. 72 of 1983, date of decision, 10 June 1983*) that a failure to comply with section 34(3)(a) of the *Exchange Control Act* rendered the affected assignment of mortgage and appointment of a receiver manager void.

[87] The general principle that the validity of a mortgage and appointment would be vitiated by non-compliance as held by the Court of Appeal in *Chase Manhattan Bank et al* was not commented on by the Privy Council when the case reached that court. In *Chase Manhattan Bank et al v. Sanitary Laundry [1990] UKPC 52*, the Privy Council overturned the Court of Appeal’s decision on the basis that there was no breach of the exchange control requirements.

[88] In *Kings Beach Hotel Limited et al*, the Court of Appeal reviewed the decision of Blackman J (see *Kings Beach Hotel Limited et al v Marks High Court Suit No. 995 of 2006, date of decision 21 July 2006*). He held that the Court of Appeal’s decision in *Sanitary Laundry* was limited to section 34 and did not apply to breaches of section 33 of the *Exchange Control Act*. He distinguished situations falling under that provision and involving the remittance of investment funds to Barbados from one under section 34 involving a lending of money to a company controlled by non-residents.

[89] The Court of Appeal upheld the order of Blackman J that the instrument under review was not invalid but adopted a different reasoning. It expressed the defining principle, at paragraph 32, in this way:

... the answer to the question raised by the current action of whether failure to receive permission from the Authority rendered the contract void, turns on the terms of the contract itself. If it is an implied term, or further an express term ... that permission would be a prerequisite to performance and the failure to obtain that permission would render the contract void. However, if such a term cannot be implied, then the contract is still subsisting.

[90] At paragraph 33, the court referred to section 37(1) of the *Exchange Control Act*, a provision that was not mentioned in *Chase Manhattan Bank et al*, and concluded that “the contract [did] not fall within the proviso to [that provision] and [could not] be deemed to be illegal as to form”. Section 37(1) provides that:

It shall be an implied term in any contract that, where by virtue of this law the permission or consent of the Authority is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:

Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of this law or for any other reason.

[91] I should add though, that prior to its decision in *Chase Manhattan Bank et al*, the Court of Appeal had expressed an opinion on section 37(1) of the *Exchange Control Act* in *Apthorp et v. Niblock et al (1976) 11 Barb. L. R.* Citing *Cummings v London Bullion Co. Ltd., [1952] 1 ALL E.R. 383*, Williams J, as he then was, delivering the judgement of the court, stated, at page 69:

... the proviso to the subsection is of extreme importance. It makes it clear that the subsection is not to be construed as validating a contract which may be illegal. But in my judgment the words “or for any other reason” would likewise exclude the provisions of the subsection where the parties to a transaction have

made it clear that Exchange Control Permission or consent is a condition precedent to the coming into being of contractual relations.

[92] I heard no submissions on whether these opinions on section 37(1) are consistent.

[93] In *Kings Beach Hotel Limited et al*, the court went on to hold at paragraph 33, that the failure to obtain permission did not invalidate the debt since the respondent did not have to rely on the illegality to found any claim. Further, at paragraphs 35, 37, and 38, it stated in sum that having benefitted from the loan advanced by the respondent, the appellant could not now use the Exchange Control Act to perpetuate a fraud on that company or ask the court to uphold its immoral conduct in that respect. At paragraph 36, it endorsed Blackman J's sentiments that to declare the transaction which involved the transfer of money into Barbados void would be more harmful to the economy than protective of it. At paragraph 35 of his decision, Blackman J had accepted the notion that the *Exchange Control Act* was designed to protect the economy.

[94] Mr. Delany adopted all those statements from set out in the preceding paragraph. On the other hand, Mr. Branche submitted that it could readily be implied in any contract between Republic and WM Capital that performance was conditional on the grant of exchange control permission since WM Capital had applied for some type of permission.

[95] Several questions arise from the above narrative. I have already identified the foundational one to be whether exchange control permission is required and, if so, what is the relevant statutory provision, or provisions. To that, one may now add the following: (i) what is the effect, if any, of a failure to obtain any requisite permission?; (ii) what is the approach to be taken in determining the answer to question (i) in light of the Court of Appeal's decisions in *Chase Manhattan Bank et al* and *King's Beach Hotel?*; (iii) if the correct approach requires a consideration of the terms of the contract, was there an implied or express term

in any contract between Republic and WM Capital and, if so, what was its effect?; (iv) to what extent, if at all, are the comments made by the Court of Appeal toward the end of its decision in *King's Beach Hotel* and mentioned at paragraph 93 above relevant, given any difference in factual matrices between this case and the latter.

[96] These questions are by no means insubstantial I would be ill-advised to comment on them without the benefit of fuller argument and more mature consideration. Indeed, the law does not expect me to do so at this stage and I am mindful that neither Republic nor WM Capital, entities which might be affected significantly by the outcome of this issue, are not parties to these proceedings. It is enough for me to conclude as I do that these are possible issues of law in this matter and, being so satisfied, the question as to whether any requisite exchange control permission was obtained remains a live one. This inclines me to the view that the first threshold, that of a serious question to be tried has been met in this case, and I so hold.

The alleged agreement

[97] I can now be more economical in my treatment of the other ground of objection relied on by the respondents. A summary of the evidence should be enough to demonstrate that there is an issue of fact as to the existence of any agreement. At paragraph 2(b) of the respondents' third affidavit, Mr. Collins and Mr. Luke deposed that an oral agreement was reached and that they were given "a few hours to accept the terms of the contract." Their further evidence is that they sent their written acceptance by e-mail to a representative of WM Capital on 23 November 2016.

[98] The deponents exhibited an e-mail purportedly sent to Mr. Jim Barr Coleman, a representative of WM Capital. A close examination of that e-mail suggests that it may have

been sent to Mr. Coleman on 18 November 2016 and forwarded by Mr. Collins to Mr. Branche on 23 November 2016. The e-mail refers to an earlier conference. It goes on to state that the authors “are prepared to accept the release of our guarantees in exchange for the peaceable transition of possession” and to invite the recipient to “have your attorneys send the agreement to our lawyers”.

[99] The applicant’s contra assertions are contained at paragraphs 3(ii) to (v) and 4 of the applicant’s second affidavit. Remarkably, he deposed that there was no agreement “as if such was made, it would have been communicated to me”. That is illogical. He deposed further that he was “informed and verily believe” that the e-mail “only speaks to the initiation of discussions” and that, subsequent to it, there were negotiations between WM Capital and the respondents.

[100] Without more, I would have dismissed that evidence as useless. However, the applicant produced three letters and a draft release which he deposed were sent by WM Capital’s lawyers to Mr. Branche. The first letter, dated 24 November 2016, refers to an earlier teleconference with respect to Mr. Luke and Mr. Collins’ “request for discharge” and goes on to set out terms and conditions on which, according to the writer, WM Capital would favourably consider that request. It also stipulates a deadline for the acceptance of those terms.

[101] The second letter is dated 29 November 2016. It contained a set of revised terms and purported to extend the deadline for acceptance. It purported to have enclosed a draft release and a copy of a draft release was exhibited with the affidavit. The final letter dated 5 December 2016, acknowledged receipt of and rejected what it described as comments to

the draft release attributed to Mr. Branche and indicated that the time for acceptance had elapsed.

[102] Again, this evidence left much to be desired as the applicant neither adduced any evidence as to the content of the telephonic conference referred to nor did he produce the correspondence containing the comments attributed to Mr. Branche. Evidently, the applicant has no direct knowledge of the events relating to this issue but it is troubling that he was put in a position to disclose some, but not all, of the correspondence that may be relevant. I am satisfied though, that there is an issue between the parties as to the existence of the agreement alleged by the respondents.

[103] I am less confident, however, about the materiality of this issue in the absence of detailed submissions aimed at demonstrating how the breach of any agreement would impact on the validity of the appointment. In that respect, Mr. Branche retracted an earlier argument based on estoppel but maintained his general position that the breach of the agreement in some way affected the validity of any appointment. Mr. Delany submitted that in the absence of an estoppel, Mr. Branche's submission could not be sustained. Neither party provided me with any authorities.

[104] I have wondered whether there is a sufficient legal footing for this issue to be considered a serious one to be tried. However, without the support of more penetrating analyses and supporting authorities, I will stop short of so stating. I will leave the parties to ventilate that issue further in any way they see fit as the litigation proceeds since I have held already on the basis of the exchange control permission issue that there is a serious question to be tried.

THE BALANCE OF JUSTICE

[105] I now turn to the second stage of the inquiry. In his written submissions, the applicant's counsel, without more, tersely states that "the balance of justice favours the granting of the orders". I must be more measured in my approach, assessing the factors of relevance but asking first whether damages would be an adequate remedy to make good any harm to the applicant if it turns out at trial that he is the validly appointed receiver.

[106] In his oral submissions, Mr. Delany submitted that the applicant is being prevented the opportunity to execute his duties. That opportunity brings with it, for the applicant, an opportunity to earn money. The appointment deed purports to provide for his remuneration and to enable him to draw part of that remuneration monthly. In any event, it is reasonable to assume that a receiver/manager is entitled to be remunerated reasonably for his services.

[107] If the applicant is delayed in executing his duties, the applicant may well lose the benefit of any money which he may have earned, had he commenced execution earlier. It may also be that his level of remuneration would be adversely affected by any fall in the value of the assets. Thus, it seems to me that any loss to the applicant is limited to a money loss that is remediable in damages. He has put nothing before me to suggest otherwise. He has adduced no evidence as to the nature or extent of any likely harm to him.

[108] However, this matter may not be so simple. In submitting that the balance of justice favours the grant of the injunction, Mr. Delany emphasised the extent of the respondents' indebtedness to WM Capital, something that would be established as a fact if the applicant were to succeed at trial. A court may consider the effect of granting or refusing an order for interim injunctive relief on non-parties. In *Garden Cottage Foods Ltd. v Milk Marketing Board [1984] A.C. 130*, the House of Lords accepted as a permissible factor,

the effect the injunction sought against the respondent may have had on four non-party distributors with whom they had already made commitments.

[109] It seems to me that WM Capital, though not a party to this action, would be sufficiently affected by any order I make to require me to consider the effect of the grant or refusal of the order on it. It is clear from the evidence that if the transfer to WM Capital is valid, the only object of its venture might be profit making, and any delay in the execution of the receivership function might delay the recovery of any money by them. The potential loss, therefore, like that of the applicant might be the delay in benefitting from their returns, if any, or a reduction in the extent of their benefits, if the assets diminish in value. If this is correct, any loss to them is remediable in damages.

[110] I have considered also that it is unlikely that the respondents can dispose of any real estate in the interim before trial given the existence of the 2005 Debenture and the transfer deed on the title, and the likelihood that they do not have possession of the title deeds. The position with respect to moveable property may be a little more troubling. If it is that the transfer arrangement and the applicant's appointment are held ultimately to be valid, it may well be that those items are subject to a fixed charge consequent upon any crystallisation of the floating charge and the respondents have no right to deal freely with those assets.

[111] There is, however, no presumption of validity. It would be for WM Capital to prove the validity of the appointment if they seek to rely on it, as it is for the applicant to do. I find support for that proposition in *Kasofsky v Kreegers* [1937] 4 ALL ER 374 and *Lochab Bros v Kenya Furfural* [1985] LRC 737. Whether or not WM Capital had any requisite exchange control permission is something which would be within their bosom. Clearly,

they have made some of the documentation available to the applicant and they could have furnished the Court with any further evidence that may have helped in establishing the validity of the transfer and consequential appointment. In such a circumstance, it would be unfair to treat the factor of WM Capital's interest as decisive.

[112] But what of the ability of RCTD and Silver Point Hotel to pay any damages that the applicant may be awarded in the event that he suffers some loss as a result of the refusal of the application for the interlocutory injunction, but succeeds at trial? Mr. Delany submitted that the respondents are insolvent. I have no evidence that this is so. It is true that they are significantly indebted under the 2005 Debenture but I do not know the value of their assets. The evidence is that they continue to operate as a going concern but that evidence helps none as to their present or likely cash reserves.

[113] Also, I am not satisfied that damages would be an adequate remedy if the injunction was granted and the respondents were successful at trial. Mr. Branche submitted that they would suffer irreparable harm if the injunction is granted and it turns out that the applicant is not entitled to act as a receiver. He urged that the impact on the respondents' business would be immediate and devastating.

[114] To properly evaluate this submission, I must reflect on the powers and duties of a receiver/manager. A review of clause 7 of the 2005 Debenture, section 118 of the *Property Act, Cap 236* and sections 274 and 276 of the *Companies Act, Cap 308* reveals that the powers of these agents are extensive and when exercised may have an irreversible effect. They include the power to take possession of assets, sell them, and realise the security. The respondents' assets include real estate, the sale of which would virtually bring their business operation to an end. No level of damages could restore that very real estate to

RCTD and Silver Point Hotel. What if they were able to persuade a financial institution to rescue them from their current position between now and trial?

[115] The powers reviewed demonstrate that company receivership involves an invasion of property rights and rights of privacy. I think this is sufficient to justify a cautious approach in a situation where the applicant has not demonstrated undoubtedly that his appointment is beyond challenge. Furthermore, I accept that the presence of the receiver at the respondents' business could impact negatively and devastatingly. The receiver's task is to realise the creditor's security interest. He is often perceived as an undertaker employed to deal with the remains of a corporate body. Hence, his presence strikes a blow to the standing and credit of debtors. Judicial and academic support for these general comments are well documented by *Andrew D. Burgess* in *The law of Corporate Receivers and Receiver-Managers*, at pages 9 to 11.

[116] The evidence is that the applicant's appointment has already been registered and, to that extent, it is public knowledge. However, he is not physically on location. There is nothing to suggest that there have yet been any other overt public manifestations of any appointment or purported appointment such as to render it obvious to the world that the respondents may be of poor credit standing.

[117] Having weighed those factors, I am inclined to think that the risk of injustice to the respondents would be greater. Not only could the grant of interim injunctive relief have a highly disruptive and irreparable effect on their business but, depending on the speed with which the applicant acts, an order in the terms sought could, in effect, amount to a final judgment without affording them the benefit of a trial.

[118] For the above reasons, I do not consider that the balance of justice favours a grant of this order. During the course of the hearing, Mr. Branche indicated that the respondents are willing to give an undertaking not to dispose of any of their assets pending the hearing. It seems to me that any interest that may be affected by the refusal of this order might be protected by a suitably worded undertaking from Silver Point and an order for an early trial. Both these options were canvassed at the hearing but not taken up by the applicant.

THE ORDER FOR THE MAREVA INJUNCTION

[119] I turn to the order sought at paragraph 2 of the application to restrain the respondents from dealing with, removing, disposing of, or diminishing the value of the assets. It is expressed to be made pursuant to *CPR 17.1 (1)(e)* and *CPR 17.4 (1)(d)*. *CPR 17.1 (1) (e)* allows for the grant of an order “referred to as ‘freezing order’ or, as “an injunction in the nature of a ‘Mareva injunction’”. However, *CPR 17.4(1)(d)* does not provide for the grant of any particular relief. It merely renders the regulatory provisions of *CPR 17.4* applicable to applications under *CPR 17.1 (1)(e)*.

[120] The core principles underlying a grant of this type of order are not obscure. Counsel for the applicant, referred me to paragraph 21 of the judgment of Gibson LJ in *Thane Investments v. Tomlinson [2003] EWCA Civ 1272* for a useful summary. That passage synthesises that before granting such an order, a court must be satisfied that (i) the applicant has “a good arguable case”; (ii) “there is a real risk that judgment would go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by the court from disposing of them”; and (iii) “it would be just and convenient in all the circumstances to grant the freezing order”. It also underscores that there should be “solid evidence” of the likelihood of dissipation.

- [121] In *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH (The Niedersachsen)* [1983] 2 Lloyd's Rep. 600 Mustill J explained the "good arguable case" to be "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have better than a 50 percent chance of success".
- [122] The good arguable case threshold is higher than that embodied in the serious question to be tried standard and I am not sure that the applicant has attained it. The applicant has not presented a clear case as to the applicable law, if any, on the exchange control issue. Furthermore, the evidence relating to the factual issue as to whether any requisite permission was obtained is insufficiently clear to meet the required threshold.
- [123] Even if I am wrong on that point, I am not persuaded that there is a real risk of dissipation of assets. There must be solid evidence of this risk. In *Customs and Excise Commissioners v Anchor Foods Ltd* [1999] 1 WLR 1139, Neuberger J stated that there must be a good and arguable case for a risk of dissipation. As Lloyd LJ explained in *3 Style Limited v Goss et al* [1990], *Court of Appeal, England and Wales (11 April 1990, unreported)*, all that is required is solid evidence of a real risk that a judgment in favour of the applicant will go unsatisfied. It is unnecessary to establish that the defendant's activities are designed to secure such an outcome.
- [124] Mr. Branche referred me to the following passage contained at page 558, paragraph **25.1.27** of the *White Book Service 2004 Vol 1* which addresses the evidential burden the applicant carries. Part of that passage reads:

The claimant should depose to objective facts from which it may be inferred that the defendant is likely to move assets or dissipate them; unsupported statements or expressions of fear have little weight (*O'Regan v Iambic Productions Ltd*, 139 New L. J. 1738 (1998) (Sir Peter pain); *Rosen v Rose* [2003] EWHC 309 (QB); January 27, 2003, unrep. (Fulford J.)). Great care should be taken in the presentation of evidence to the court so that the court can

see, not only whether the applicant has a good arguable case, but also whether there is a real risk of dissipation of assets.

[125] In his written submissions, on page 10, the applicant urged “that the risk of dissipation can be inferred from nature (*sic*) of the alleged conduct of the Respondents ... where **it is believed** that the fixtures and furniture in about 25 rooms of the Silver Point Hotel have been stripped and removed [**emphasis mine**].” That submission captured the essential weakness in the applicant’s related evidence.

[126] At paragraphs 17 and 18 of the applicant’s first affidavit, he deposed:

17. I have been told and verily believe that some items that form part of the Property ... have been removed from the premises of the Silver Point Villa Hotel and I have reason to believe that this is continuing.

18. I am concerned that without the assistance of the Barbados Court, the Directors, manager and Staff of the 1st and 2nd Respondents/Defendants will divest themselves of the assets and property ...

[127] Messrs. Collins and Luke denied that any items have been removed from the premises. They say that they have no “interest or advantage” in dissipating assets. They exhibited a letter dated 22 November 2016 in which Mr. Branche explained that they had transferred furniture and fittings from 25 rooms that are not being used to other rooms which are being used. They deposed that it made no sense purchasing new furniture for the rooms in use when furniture was available in unused rooms.

[128] Mr. Branche submitted that the applicant has not provided any substantial or pertinent evidence which could assist the Court. I agree. The applicant’s evidence in this respect is unreliable and unhelpful. He has no first-hand knowledge of the removal of any assets. He does not identify the source of his information, gives no details of the assets removed, and tells us not when they were removed or who removed them. He provides no details in relation to his belief that the removal of items is continuing.

[129] This shallow foundation, if foundation it be, can scarcely be a basis for the applicant's fear of future divestments of the assets, all of them. In effect, that is tantamount to a bare assertion, and as Kerr LJ so bluntly stated in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H UND CO KG [1983] 1 WLR 1412*, at page 1419, "[b]are assertions ... are clearly not enough". Meanwhile, the respondents' evidence that they moved fixtures and fittings from some rooms to others remain unchallenged.

[130] The applicant's evidence does not pass muster. However, mindful of the approach espoused by Sir Peter Pain in *O'Regan v Iambic Productions (1989) 139 N.L.J.R. 1378,1379*, I will consider the overall circumstances as they appear from the evidence. Sir Peter Pain stated:

"It has been made clear ever since *Third Chandris Shipping v. Unimarine [1979] 2 All ER 972* that it is the duty of a plaintiff applying for a Mareva order to provide the court with information about the defendant. In my judgment the court should approve the application of the very useful check list set out in *Gee and Andrews' Mareva Injunctions - Law and Practice (1st edn) pp 51 - 52* as to the sort of factors about which the court should have information before it decides to grant an application for a Mareva injunction.

[131] The applicant's attempt to meet that obligation was minimal. The list of factors to which Sir Peter Pain referred are contained in *Steven Gee, Commercial Injunctions, 5th edition*, at *paragraph 12.039*. It has been reproduced faithfully by Judge Richard Seymour QC in *Irish Response Ltd v Direct Beauty Supplies Ltd et al [2011] EWHC 37 (QB)*, at paragraph 28. I am content to consider such of those factors as are relevant along with any others thrown up by the circumstances of this case, mindful of the author's caution that it is impossible to lay down general guidelines and each case must depend on its own facts.

[132] I have already commented on the likelihood of the respondents being able to dispose of their real estate. There is no evidence of the nature of their chattels other than that we know that some hotel rooms contain furniture and fixtures.

[133] The respondents operate a hotel accommodation business. They have not denied that they defaulted on their obligations under the 2005 Debenture. Beyond that, I have no evidence of their general financial standing or past or existing credit record. I do not know the length of time they have actively operated their business or their track record. I have also considered submissions made by Mr. Delany in relation to the respondents' tactics in this matter and a suggestion that I might infer the risk of dissipation from what he proffered to be dishonesty on the respondents' part. I find no merit on either account.

[134] With respect to the respondents' tactics, Counsel referred to the fact that they had evinced a willingness to give up possession and submitted further that in respect of the validity of the appointment, they have shifted from one ground to another. On the evidence before me, I cannot infer any concession on the respondents' part as to the applicant's entitlement to possession. Their evidence and the exhibited e-mail to WM Capital is equally open to the interpretation that the respondents wanted to secure for Mr. Luke and Mr. Collins the benefit of the release from the guarantee and were prepared to hand over possession in exchange, whatever be the applicant's entitlement.

[135] In respect of the assertion of shifting grounds of objection, Counsel might well have had in mind a factor listed in *Gee* as "any pattern of evasiveness, the raising of thin defences, or total silence, in the face of the claimant's claim". The evidence demonstrates that the respondents have been anything but silent, electing to question the propriety of the applicant's actions from the outset. No evidence of a pattern of evasiveness has been

adduced, and however the “agreement defence” may ultimately be categorised, I do not consider the exchange control issue so trifling or baseless as to be described as “thin”. Were that so, I would not have regarded it as giving rise to a serious question to be tried.

[136] The evidence on which Mr. Delany relies to establish the shifting of grounds by the respondents leaves much to be desired. Nonetheless, even if it is that the respondents had previously based their concerns about the validity of the appointment on another statutory ground, I do not see how shifting to another “line of opposition”, as the applicant so characterises it, can be a factor supporting the grant of a freezing order particularly if the line cannot be summarily dismissed as being frivolous or vexatious.

[137] Mr. Delany also submitted that the risk of dissipation could be inferred from what he characterised as the respondents’ dishonesty. Evidence of dishonesty may be enough if the inference is justified in light of it but evidence of dishonesty, by itself, is not enough. This principle was enunciated by Gibson LJ in *Thane Investments Ltd. v Gill* [2003] EWHC 2082 (*Ch*). However, there must be evidence that there is an arguable case of dishonesty. The applicant adduced no such evidence and Mr. Delany’s attempt to raise allegations from the bar table was impermissible. Those allegations were refuted by Mr. Branche and, in any event, appeared to me to fall short of dishonest conduct. I need say no more on that.

[138] In the circumstances, the application for the mareva injunction fails.

THE ORDERS FOR CUSTODY, POSSESSION AND CONTROL

[139] I come now to the orders sought at paragraphs 3 and 4 of the application. At paragraph 3, the applicant seeks an order under *CPR 17.1(1)(b)(i)* for custody of the assets, and, at paragraph 4, an order pursuant to *CPR 17.1(1)(c)* for “entry into and full possession and control” of them.

[140] **CPR 17.1(1)(b)(i)** enables the Court to grant an interim order for the detention, custody or preservation of “relevant property”, a term defined in **CPR 17.2** to mean “property which is the subject of a claim or as to which any question may arise on a claim. That is one of a number of orders provided for in **CPR 17.1(1)(b)(i)** to (v). **CPR 17.1(1)(c)** provides for the making of an order authorising a person to enter any land or building in the possession of a party in order to carry out an order under **CPR 17.1(1)(b)**.

[141] Two things are immediately obvious. First, **CPR 17.1(1)(c)** can only be invoked if an order is made under **CPR 17.1(1)(b)(i)**. It is therefore necessary to consider that application first. Secondly, any order under **CPR 17.1(1)(c)** must be limited to the grant of authority to enter premises to execute the order granted under **CPR 17.1(1)(b)(i)**, if granted. No order can be made under **CPR 17.1(1)(c)** for possession or control of anything.

[142] Neither party addressed me on the approach required in considering the application under **CPR 17.1(1)(b)(i)**. In *Sports Network Ltd v Calzaghe* [2008] EWHC 2556, Coulson J, at paragraph 53, considered the two-stepped approach, now known in this jurisdiction as the *Toojays* guidelines, to be applicable on an application under rule **25.1(1)(c)** of the English rules, the equivalent to **CPR 17.1(1) (b)**.

[143] I have already stated that there is a serious issue to be tried. However, the balance of justice does not lie in granting this order. I have already considered the risk of the assets not being available in the future. Orders under **CPR 17.1(1) (b)** are generally designed to ensure the preservation of property pending trial and it would be unusual to order the property into the custody of one of the disputants. Such an order is not required here and to grant it would effectively paralyse the respondents’ business operations.

THE ORDER FOR THE DELIVERY UP OF ITEMS - PARAGRAPH 5.

[144] I come finally to the order sought at paragraph 5. The order sought is inelegantly drafted.

I will reproduce it once more rather than attempt a précis. It is in these terms:

An order that the 1st and 2nd Respondents/Defendants return any fixtures, books, records and other items appurtenant to the Property unlawfully removed prior to the granting of this Order of possession or subsequent to and accordance (*sic*) with an inventory generated by the Applicant/Claimant, that the said items identified therein be returned and/or restored to the control of the Receiver of the Property forthwith (*sic*);

[145] I have already dismissed as unreliable the applicant's evidence in which he asserted that items had been removed from Silver Point's property. The applicant produced no inventory of items. Mr. Branche submitted that the application must fail on account of this omission and the absence of a proper evidential basis. Mr. Delany urged that no inventory could be provided until the applicant gained possession of the assets.

[146] I must confess that I have had some difficulty construing the order sought at paragraph 5. Some things are clear though. The application contained in it must fail insofar as it seeks an order that items unlawfully removed *subsequent* to the grant of the order be returned. If the paragraph is to be construed as suggesting that the taken items to which the order is intended to relate would be those inventoried, then the failure to produce the inventory must cause the application to fail. In any event, there is no evidence capable of supporting this aspect of the application. Therefore, it must fail.

DISPOSAL

[147] In the circumstances, it seems to me that the best course is to give directions for an early trial of the claim but I am prepared to hear the parties on that. The interest of any persons who might be adversely affected by this order might be further protected by any

undertaking Silver Point is prepared to give with respect to the protection of the assets. I will hear them on the terms of any undertaking they propose. However, I am not satisfied that the applicant is entitled to any of the orders sought and, to that extent, the application is refused.

[148] I will hear the parties as to costs.

**OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT**