Neutral Citation Number: [2021] EWHC 910 (Ch)

Case No: BL-2020-MAN-000014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Civil Justice Centre
Manchester

Date: 15 April 2021

Before :

MR JUSTICE SNOWDEN

(Vice-Chancellor of the County Palatine of Lancaster)

- -

Between :

BLACKPOOL FOOTBALL CLUB (PROPERTIES) LIMITED	**Claimant**
- and -	
(1) PAUL COOPER	**Defendants**
(2) DAVID RUBIN	

- -

Matthew Collings QC (instructed by **Fieldfisher LLP**) for the **Claimant**
David Mohyuddin QC (instructed by **BLM**) for the **Defendants**

Hearing date: 9 February 2021

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is 10.30 a.m. on Thursday 15 April 2021.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. This is an application brought by Blackpool Football Club (Properties) Limited ("the Claimant") in respect of proceedings ("the Proceedings") it has issued against Paul Cooper and David Rubin ("the Defendants") who were at one time appointed by the court as receivers over the assets of the Claimant by way of equitable execution. The issue I have to determine on this application is whether the Claimant requires the permission of the Court to bring the Proceedings and if it does, whether it already has that permission. If I decide that permission is required and has not been obtained, the question of whether it should be granted would fall to be decided at a later hearing.

Background

2. The background to the Proceedings is an unfair prejudice petition presented by VB Football Assets ("VBFA") against the Claimant, Mr. Owen Oyston and Mr. Karl Oyston in respect of Blackpool Football Club Limited ("the Football Club"). On 6 November 2017, Marcus Smith J made an order requiring the Claimant and Messrs Oyston to buy VBFA's shares in the Football Club ("the Buy Out Order").

3. After some time, the Buy Out Order remained unsatisfied and VBFA sought the appointment of receivers by way of equitable execution. Marcus Smith J appointed the Defendants as receivers on 13 February 2019 ("the Receivership Order").

4. On 5 June 2019, Marcus Smith J approved the Defendants' proposal to sell, in one transaction, Mr. Owen Oyston's shares and VBFA's shares in the Football Club, so that the purchaser would acquire the overwhelming majority of the shares in the Football Club. The sale completed on 13 June 2019.

5. The sale still left a sum outstanding on the Buy Out Order. However, on 16 December 2019, VBFA reached a confidential settlement with the Claimant and Messrs Oyston ("the Settlement").

The Discharge Hearing and Order

6. On 17 December 2019, Marcus Smith J heard an application to discharge the receivership following the Settlement. It appears this hearing had originally been scheduled to deal with other matters relating to the receivership. The Claimant was represented at that hearing (as before me) by Mr. Matthew Collings QC. The Defendants were represented at the hearing by Mr. Mark Phillips QC, rather than by Mr. Mohyuddin QC who appeared before me.

7. At that hearing Marcus Smith J discharged the Receivership Order ("the Discharge Order"). The Defendants also sought a discharge from liability in reliance on IRC v Hoogstraten [1985] QB 1077, CA. The following passage from the transcript deals with the bringing of proceedings against the Defendants:

> "MR JUSTICE MARCUS SMITH: … before I hear [Counsel for the Defendants]. It seems to me that there are two issues regarding the receivership, which is their expenses and the

> question of their release. You haven't addressed me on that. What is the likelihood of claims against the receivers emerging?
>
> [Counsel for the Claimant]: I don't know because we haven't had visibility of the receivership. We have limited reports, limited receipts and payments.
>
> …
>
> MR JUSTICE MARCUS SMITH: I understand that you want to scrutinise the expenses of the receivership. My other point was: what do you say not about the negative point of scrutiny, but the positive question of whether there is a claim? You have no idea, but-
>
> [Counsel for the Claimant]: That is right.
>
> MR JUSTICE MARCUS SMITH: do you have any question regarding the sort of timeframe within which the claim should be made.
>
> [Counsel for the Claimant]: Yes, my Lord. Plainly this is not something that can drag on forever.
>
> MR JUSTICE MARCUS SMITH: No.
>
> [Counsel for the Claimant]: But also, it would in these circumstances be inappropriate for there to be a release because of these questions that there are. They may go nowhere, but they may, on the other hand, and we shouldn't be shut out of that, and it would also be quite inappropriate for receivers to have a release when they have a continuing function to perform. To have a release now would mean that we couldn't take any point upon the final receipts and payments account which we haven't even seen…"

8. Counsel for the Defendants then addressed the Judge on the terms of the release they sought:

> "[Counsel for the Defendants]: In relation to the accounts and payments, we will do that by Friday, and we are then going to invite your Lordship to make an order similar to the order that was made in IRC v Hoogstraten, that unless Mr. Oyston commences proceedings 28 days after that, we have our release. That is what I am going to invite your Lordship to do. Your Lordship may take the view that, given it's Christmas, that should be 31 January, which, as it happens, accords precisely with the proposal that was put to my learned friend's instructing solicitors-

> [Counsel for the Claimant]: Yes, no objection to that.
>
> …
>
> [Counsel for the Defendants]: That is the direction I am inviting your Lordship to make, and it is that if Mr. Oyston does not institute proceedings to establish whatever claims he may seek to bring by the end of January or within – and I would include "within such longer period as the court may in its discretion allow" because your Lordship may be persuaded that, for whatever reason-
>
> MR JUSTICE MARCUS SMITH: You haven't provided the information that Mr. Oyston needs.
>
> [Counsel for the Defendants]: - something hadn't come up.
>
> MR JUSTICE MARCUS SMITH: Yes.
>
> [Counsel for the Defendants]: But that's the direction that we are seeking in relation to the release…"

9. After the Judge had heard from counsel, there was a discussion on the terms of the order:

> "[Counsel for the Defendants]: The third is the release in the same terms and conditions.
>
> MR JUSTICE MARCUS SMITH: Contingent release, yes, 31 January, but just to be clear, subject to the court's ability to extend.
>
> [Counsel for the Defendants]: Yes, absolutely, and I have written down, "or such longer period as the court may in its discretion allow", which is tracking the Court of Appeal language.
>
> MR JUSTICE MARCUS SMITH: Yes…
>
> [Counsel for the Defendants]: … The "unless claims are made" is important because if Mr. Oyston wishes to bring claims against receivers for something we have done, we need to know what it is.
>
> MR JUSTICE MARCUS SMITH: Yes.
>
> …
>
> MR JUSTICE MARCUS SMITH: It's a semi-hard date. That's what it is.

> [Counsel for the Defendants]: But I think Mr. Oyston needs to understand that it may be semi-hard, but raising frivolous points is not going to extend it, so it has to be real.
>
> …
>
> [Counsel for the Defendants]: Let me make it crystal clear to my learned friend: claims means claims… I accept that claims doesn't cover what might be raised on the accounting, but I have used claims deliberately. What I do not want is my learned friend to write letters saying "We intend to claim against you, transaction – that you have sold at an undervalue" or any of the above. If he wants to do that, he needs to issue a claim…
>
> [Counsel for the Claimant]: That I completely understand…"

10. The relevant terms of the Discharge Order are as follows:

> "1. The Receivership Order be discharged at 12.39pm on 17 December 2019 save for paragraphs 8, 10 and 16 thereof and the Receivers shall vacate office forthwith.
>
> 2. The Receivers shall be at liberty to register a caution against the property Travelodge, Seasiders Way, Blackpool FY1 6JJ in respect of the lien securing the fees, liabilities, costs, expenses and disbursements of the Receivers.
>
> …
>
> 5. Other than in respect of matters arising on the Final Account, the Receivers shall be released and discharged from all claims arising out of or in connection with the Receivership on 31 January 2020 unless such a claim is commenced by claim form before that date, or within such longer period as the Court may in its discretion on application allow.
>
> 6. The Receivers shall be released and discharged from all claims and issues arising out of their Final Account on 31 January 2020 unless a claim is brought for surcharge and falsification before that date. If a claim is brought for surcharge and falsification the Receivers shall be released and discharged from such claims upon the finalisation of the Final Account or upon such date as the Court may in its discretion direct…"

The Proceedings

11. The Claim Form in the Proceedings was issued on 30 January 2020. The main allegation is that the Defendants were negligent in the performance of their functions as receivers by selling assets at an undervalue of some £78 million.

12. The Claim Form and Particulars of Claim in the Proceedings were served on the Defendants on 29 May 2020. After service, the Defendants suggested a stay should take place to comply with the Pre-Action Protocol. District Judge Bever made a consent order staying proceedings on 25 June 2020. On 25 September 2020, District Judge Carter made a consent order extending the stay to 30 October 2020.

13. On 6 August 2020, the Defendants raised an objection that the Claimant required permission to bring the Proceedings and asked for evidence that the same had been obtained. The Defendants' evidence is that this followed the receipt by them (in late July 2020) of the transcript of the hearing where the Discharge Order was made. The Claimants do not consider that they require permission to bring the Proceedings.

14. After further inter-party correspondence, the parties agreed that the issue should be determined by an application to the Court. The parties have further agreed that this hearing should be limited to the issue of whether the Claimant now requires permission to continue the Proceedings. If it does, a further hearing will take place to determine whether permission should be given.

15. I should add that the Claimants have also brought a Part 8 claim seeking surcharge and falsification of the Defendants' final account. That claim is not the subject of this application and the Defendants do not contend that any additional permission is required to bring the Part 8 claim.

The Parties' Cases in Outline

16. Mr. Collings QC, for the Claimant, submitted that although there are authorities indicating that permission is required from the Court before a person can sue a court-appointed receiver, this is merely a matter of practice rather than a rule of law and is concerned with protecting receivers who are in office and who are performing their functions from being subjected to vexatious claims. He submitted that after the receivership has terminated, the court retains a supervisory jurisdiction over the receiver as an officer of the court for the purposes of matters relating to the conclusion of the receivership, but the court's role in protecting its officer is limited to granting a release from liability; and there is no justification for further protection in the form of a requirement for permission to commence proceedings. Mr. Collings QC submitted that to the extent that any of the authorities refer to a requirement of permission in the context of claims against receivers who have left office, the point was either obiter or conceded by the parties. In the instant case, Mr. Collings QC submitted, the Proceedings are brought against receivers who have left office and they therefore are not being vexed in the course of the performance of their duties: no permission was therefore required.

17. Alternatively, Mr. Collings QC contended that if permission was required, the Discharge Order amounted to sufficient permission. He submitted that Marcus Smith J made directions for the date by which claims were to be brought against the Defendants and there was no suggestion in the order, or at the hearing, that there was any further requirement for a separate application for permission. Mr. Collings QC suggested that the relatively short deadline for the issue of proceedings made it unlikely in the extreme that Marcus Smith J intended any further application having to be made before such proceedings could be issued.

18. Failing all else, Mr. Collings QC sought to rely on a species of waiver or estoppel to contend that given their engagement with the Proceedings, it was not now open for the Defendants to raise the issue that permission had been required.

19. For the Defendants, Mr. Mohyuddin QC submitted that on the authorities there is a requirement for permission to bring proceedings against court-appointed receivers. He submitted that this requirement applies whether or not the receivers are in office, so long as the proceedings arise out of their actions in their capacity as receivers. Mr. Mohyuddin QC characterised this as a rule of common law founded on the protection the Court gives to receivers as its officers.

20. Mr. Mohyuddin QC further submitted that the Discharge Order could not constitute sufficient permission to bring the Proceedings. He submitted that the Court must critically examine any proposed proceedings in order to decide whether to grant permission, and would not grant a blanket permission, because to do so would be to fail to protect its own officers, leaving them exposed to any claim, no matter how vexatious. Mr. Mohyuddin QC also rejected any suggestion that the Defendants had waived the requirement for permission or were estopped from raising the issue of permission on the facts.

21. In addition, Mr. Mohyuddin QC submitted that a claimant who issues a claim without permission before the deadline for issue has expired should not be given permission on an application made after the deadline has expired. He relied in that contention on the decision of HHJ Paul Matthews in Ward v Hutt [2018] EWHC 77 (Ch) in the context of CPR rule 38.7.

The Authorities

22. The earliest case to which I was referred dealing with proceedings brought against court-appointed receivers is Aston v Heron (1834) 2 My & K 390. The case pre-dated the fusion of law and equity, and was very much concerned with questions of the allocation of jurisdiction between the Court of Chancery and the King's Bench Division. A receiver had been appointed by the Court of Chancery and had levied distress for unpaid rent against a tenant. In response, the tenant commenced an action for trespass against the receiver in the King's Bench Division. The Court of Chancery granted an injunction to restrain the action in trespass, and the Lord Chancellor (Lord Brougham) refused to discharge that injunction.

23. Lord Brougham LC first drew attention to two categories of case in which an action might be brought against a receiver appointed by the Court of Chancery. The first involved a direct challenge to the validity of his appointment, and the second involved an allegation that the receiver had abused his powers. Lord Brougham said, at page 393,

> "Wherever the title of its officers, whether receivers or committees, is disputed, the Court [of Chancery] has no choice: it cannot allow any proceedings of the kind to go on without abandoning its own jurisdiction; it must restrain as of course, otherwise it permits its own orders to be rescinded, and its jurisdiction to be questioned—its orders to be rescinded indirectly, and not by the Superior Court of Appeal; its

> jurisdiction to be questioned by Courts of inferior or co-ordinate authority … But where the process has been irregularly, that is illegally, used—where it has been made the pretext for doing wrong, no considerations, either of principle or of practical convenience, can require that the Court should, in every case, draw to itself the examination of the matter, prevent all other tribunals from punishing the wrong-doer, and exclude the injured party from access to all redress, save that which its own jurisdiction can afford."

24. Lord Brougham LC then stated, at page 395-396 that:

> "The two descriptions of cases to which I have adverted—those where the jurisdiction of the Court is disputed directly by resistance, or indirectly by obstruction, and those where complaint is only made of the irregular or oppressive, and therefore illegal, execution of its unquestioned decrees—do neither of them accurately embrace the facts of the present case, although they furnish a principle which exhausts the whole subject, and which, therefore, rules the present case, as well as all others. That principle is that, in the first class of cases, those where the jurisdiction is disputed, the Court has no choice, but must, at all events and at once, draw the whole matter over to its own cognisance; but that in the other class, where, admitting the Court's authority, redress is only sought for irregularity or excess in the performance of its orders, and, generally speaking, wherever the jurisdiction is not denied or resisted, the Court has an indisputable right to assume the exclusive jurisdiction, but may, if it think fit, on the circumstances being specially brought before it, permit other Courts to proceed for punishment or redress.
>
> The present case comes clearly within the latter description; for although it is not a case where an illegal or oppressive execution is complained of, it is one where a person admitting the jurisdiction asserts a claim of right which interferes with the rights sought to be exercised by the receiver, as standing in the shoes of the party of whose estate the Court has taken possession. The possession of the receiver is the possession of the Court, and no one can disturb it but through an application to the Court. The acts of the receiver, in the administration of the estate, are the acts of the Court; and the Court may, therefore, if it pleases, prevent any other jurisdiction from questioning those acts, because, strictly speaking, that would be to question the Court's administrative proceedings. Nevertheless, the Court is fully authorised, on a case being made, to leave the acts of its receiver to be questioned elsewhere, for the purpose of trying a right in those for whom it holds possession, just as it is fully authorised to leave a complaint of irregular or oppressive execution of its orders to

> be adjudicated elsewhere, if that, upon the facts disclosed, should appear to be the preferable course."

25. The decision in Aston v Heron was referred to in Re Maidstone Palace of Varieties Ltd [1909] 2 Ch 283. A receiver had been appointed in a debenture-holders' action in the Chancery Division and had taken possession of the eponymous theatre. An electric company sought to sue the receiver for rent in the King's Bench Division, and the receiver sought an order that the electric company should bring the claim in the receivership action in the Chancery Division. In a short judgment Neville J held that the action brought into question the conduct of the receivership and should be brought in the Chancery Division. He stated, at 286,

> "In this case the applicant is a receiver appointed by this Court in a debenture-holders' action, and by virtue of that appointment he has had the management of the theatre known as the Maidstone Palace of Varieties…It appears to me that a dispute of that kind is one which, as is shewn by Aston v. Heron, the Court will deal with itself, and that it will not allow its officer to be subject to an action in another Court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this Court in the action in which he was appointed. If any wrong has been done by the officer, the Court will no doubt see that justice is done, but no one has a right to sue such an officer in another Court without the sanction of this Court. The present application is accordingly right in form. The respondents must therefore bring in their claim in the debenture-holders' action within fourteen days, and must be restrained from commencing any other proceedings against the receiver."

26. It should be appreciated that in both Aston v Heron and Maidstone Palace of Varieties, the receiver was still in office. As explained in Aston, this meant that his possession of the estate was deemed to be the possession of the court which had appointed the receiver. The basis for decision in Maidstone Palace of Varieties was that the claim to compel the receiver to pay rent related directly to the manner in which the receiver was carrying out his duties as an officer of the court in managing the theatre. It was therefore for the court that had appointed him to determine whether to grant a remedy or to give its permission for the claim to be brought in another court.

27. In Re Botibol [1947] 1 All ER 26 a summons was issued in the action in which the receiver was appointed for permission to sue a receiver for breach of contract. After the issue of the summons, but before the hearing, the appointment of the receiver terminated. Evershed J agreed with a concession by counsel that permission to bring the proceedings was no longer necessary, commenting at 27-28 that:

> "It is stated by counsel for the company that the ground for this summons is that, so long as Mr Barclay was an officer of the court, it would not have been proper for a third party to bring an action in these courts against him, and that to have done so

> without the authority of this court might have involved the company in contempt of court. It is conceded, however, that from the time when Mr Barclay ceased to be receiver and manager, no such justification existed at all. If a cause of action lies against him in respect of his past transactions, then suit can be brought in respect of that and no possibility of contempt of court can be involved, because there could, in no sense, then be any interference with an officer of the court in the performance of his duty. Therefore, it follows, in my judgment, plainly, that as from 18 October 1946, this summons became unnecessary."

28. Although proceeding on the basis of a concession, Evershed J clearly considered that after a receiver has left office, a claim against him could not amount to an interference with the performance of his duties in the receivership or as a contempt of court, and hence no permission to bring the claim was necessary. That decision clearly supports Mr. Collings QC's submission that there is no requirement to seek permission to bring a claim against a court-appointed receiver after the termination of the receivership.

29. The next case is McGowan v Chadwick and Grant [2001] EWCA Civ 1758, [2003] BPIR 647. The defendant sought permission to commence proceedings against a receiver, who had been appointed in a partnership action and was still in office, for breach of duty in failing to accept the defendant's offer to buy the business, and for incurring trading losses. At paragraph [32], Jonathan Parker LJ stated:

> "[32]. Before Burton J [at first instance] it was common ground (as it is on this appeal):
>
> (a) that a party seeking to commence proceedings against a court-appointed receiver in respect of the conduct of the receivership must first obtain the permission of the court which appointed the receiver to do so (see Re Maidstone Palace of Varieties Ltd; Blair v Maidstone Palace of Varieties Ltd [1909] 2 Ch 283, at 286 per Neville J); …"

30. After considering the decision in Re Maidstone Palace of Varieties Ltd, Jonathan Parker LJ concluded at paragraphs [77]-[79]:

> "[77] In the instant case it is common ground that it would be inappropriate for Mr Chadwick's claim against the receiver to be tried out in the partnership action; a separate action is required. Hence the need to apply in the partnership action for permission to commence such an action.
>
> [78] As to the approach which the court should take to such an application, it is a matter for the court's discretion whether or not to give permission, and accordingly no hard and fast rules can be laid down as to the requirements which a prospective claimant must meet or as to the manner in which he brings forward his application. What can, in my judgment, safely be said is that permission will not be granted unless the applicant satisfies the court that his claim is a genuine one, in the sense

> that the allegations which he seeks to make are such as to call for an answer from the receiver. On the one hand, the receiver must not be subjected to vexatious or harassing claims; on the other hand, as Neville J observed, the court must see that justice is done."

31. All of the authorities thus far cited are explicable on the basis that possession of an estate by a court-appointed receiver is tantamount to possession by the court that made the appointment, and that claims alleging that the receivership has been or is being misconducted, which might therefore have an effect upon the on-going conduct of the receivership, should be made by application in the receivership or as the court with deemed possession may direct. In all cases except one, the receiver was still in office: and in the case in which the receiver had vacated office, the judge agreed with the concession by counsel that permission to bring the proceedings was no longer required because the proceedings could not amount to an interference with the performance of his duties by an officer of the court.

32. It is apparent, however, that in a number of more recent cases a wider view of the principles has been stated.

33. The first such case is Weston v Dayman [2006] EWCA Civ 1165, [2008] 1 BCLC 250 which concerned the construction of a consent order by which a receiver had been discharged from liability in respect of her conduct as receiver. Paragraph 10 of that consent order stated that 'the receiver shall not be liable for any failure by her to properly manage the estate of the defendant after the discharge of the receiver'. After discharge of the receivership, the claimant sought and obtained permission to commence proceedings against the receiver for failing to take proper care of a motor yacht. Whether such permission had been required was not the issue in the case: the question was whether the consent order had released the receiver from liability.

34. In the introduction to her judgment, Arden LJ noted at [2] that "Since [the receiver] had been appointed by the court, permission of the court was needed to commence those proceedings." After considering the court's power to release receivers from liability, Arden LJ commented further at [16] that:

> "The next matter peculiar to the practice of the court in relation to court officers, relied on by Mr Warwick, was the requirement that the permission of the court is sought before any proceedings are commenced against an officer of the court. The authority for this proposition is Re Maidstone Palace of Varieties Ltd [1909] 2 Ch 283. Mr Warwick submits that this is an important factor. In the present case, leave is required, so that in respect of claims made against the receiver as a receiver the receiver already has protection and therefore does not need to have a release of claims against her. He submits that this is a matter which must be borne in mind when the court interprets cl 10. But in my judgment there is a large distinction between an absolute release, such as the respondent contends cl. 10 confers, and simply a provision that the leave of the court is required before a claim is brought. It is established that, when the court considers an application for leave, it will give leave if

> a real prospect of success is shown. The authority for this is McGowan v Chadwick [2003] BPIR 647, cited by Mr Warwick in his skeleton argument."

35. As Mr. Collings QC submitted, it is clear that Arden LJ's comments about permission to bring proceedings were obiter, as that was not the issue in the case. That is also doubtless the reason that Arden LJ did not need to analyse more closely the rationale for the requirement but simply cited Maidstone Palace of Varieties by name as an authority. As I have indicated, however, contrary to what appears to have been the submission of counsel who appeared (Mr. Warwick), that case is not actually authority for the proposition that permission needs to be obtained to sue an ex-receiver who is no longer in office. It is also unclear whether Re Botibol was cited to the Court of Appeal: it is not mentioned in the report.

36. In Glatt v Sinclair [2011] EWCA Civ 1317, [2012] BPIR 306 the claimant sought to bring proceedings against a receiver appointed by the court under the Criminal Justice Act 1988 for selling one of the claimant's properties at an undervalue. The receivership had been discharged, but an application for permission to bring the proceedings was made to the administrative court, where it was refused: see [2010] EWHC 3082 (Admin). The judge, Kenneth Parker J, simply stated that "as the respondent was a court appointed receiver, the court's permission is required for the claim to proceed", and applied the principles set out in McGowan before refusing permission. The Court of Appeal allowed an appeal against that refusal, also applying the approach set out in McGowan, on the basis that claim raised genuine issues that needed to be tried.

37. It does not appear to have been disputed, either before Kenneth Parker J or the Court of Appeal, that permission to bring the claim was required. The issue raised by the case concerned the question of whether permission should be granted on the facts, applying the approach in McGowan.

38. McGowan and Glatt were both cited by Gloster J in Barclay Pharmaceuticals Ltd v Waypharm LP [2013] EWHC 503 (Comm), [2013] 2 BCLC 551 at [42] as authority for the proposition that permission was required for a claim to be continued against a court-appointed receiver. That was, however, a case in which the receiver was still in office.

Conclusion on the law

39. In my judgment, the authorities do not establish, and do not bind me to hold, that permission is required for proceedings to be commenced against a defendant who was a court-appointed receiver, but is no longer in office. As I have indicated above, in Aston v Heron and Maidstone Palace of Varieties, the receiver was still in office and the point did not arise. Although the receiver was not in office in Weston v Dayman and Glatt v Sinclair the point appears to have gone by default and was not the issue upon which argument appears to have been addressed to the Court of Appeal. It is also apparent that the only case in which the point appears to have been directly addressed, Re Botibol, was not considered in the judgments of the Court of Appeal in either of those cases.

40. Approaching the matter from first principles, there is an obvious need for the appointing court, which has deemed possession of the receivership estate through its officer, to retain the jurisdiction to determine for itself any issue affecting the on-going conduct of the receivership, or to decide the appropriate forum in which such an issue should be determined. It is also appropriate for the appointing court to be able to use that jurisdiction as a filter to protect a receiver who is in office from having to deal with claims which have no realistic prospect of success and would therefore disrupt the proper conduct of the receivership.

41. I also accept that it is necessary for the Court to retain a supervisory jurisdiction over a court-appointed receiver after that person has left office in order to ensure that the receivership is properly brought to a conclusion by matters such as the filing of an account.

42. However, after the receiver has left office and the court no longer has deemed possession of the receivership estate, there is no practical or logical need for the court to protect its ex-officer from interference in the performance of his duties, since *ex hypothesi* he will have no longer have any active duties to perform. There may also not be any live receivership proceedings in which an application could be made. As such I do not see that there should be any need for a claimant to seek permission from the court which made the appointment before bringing a claim. That analysis is consistent with the decision in Re Botibol, with which I agree.

43. That analysis is also consistent with dicta of Dillon LJ in IRC v Hoogstraten [1985] QB 1077. Although that case concerned the different question of whether a sequestrator should be granted a release from liability after leaving office, Dillon LJ did give some indication of how that issue related to the protections given to court-appointed receivers or sequestrators whilst in office. He stated, at page 1093,

> "It is abundantly clear, in my judgment, that there is no conceivable reason why the sequestrators should be immune from suit, or exempt from liabilities to the defendant for professional negligence. They would not have been exempt if appointed by contract…
>
> The rule that it is contempt of court to interfere with a receiver or sequestrator, who is an officer of the court, in the exercise of his duties is wholly different. That is to ensure that the receiver or sequestrator is not molested in the course of his duties. But a third party who claims that what a receiver or sequestrator is proposing to do will interfere with the third party's property or rights can always have his claim heard and decided by the court by an appropriate application in the proceedings in which the receiver or sequestrator was appointed."

44. It is notable that Dillon LJ focussed on the protection to be given to the receiver or sequestrator from being "molested *in the course of his duties*" and referred to the possibility that third parties could apply to the appointing court to issue applications in relation to "what a receiver or sequestrator *is proposing to do*" (my emphases). Dillon LJ gave no indication of the need for similar protection to be given to, or for

the appointing court to entertain claims or applications in relation to, persons who have ceased to be receivers or sequestrators.

The hearing before Marcus Smith J and the Discharge Order

45. My conclusion that it was not necessary for any permission to be obtained by the Claimant before commencing proceedings against the Defendants once they had left office also explains why this was not an issue that Marcus Smith J was asked to consider or did consider when he made the Discharge Order. Rather, it is entirely clear from the transcripts that Marcus Smith J was only asked to consider the logically different issue of whether to grant a post-termination release to the Defendants from any liability arising from their conduct of the receivership in accordance with the decision of the Court of Appeal in IRC v Hoogstraten.

46. In IRC v Hoogstraten, Dillon LJ held that the court did have the power to grant a release to protect an officer of the court who has left office from liability for acts done in the course of his duties. Dillon LJ indicated that the court would not provide such protection without investigating claims of which the court had notice, but otherwise could set a time limit for the institution of proceedings and did not need to wait for the limitation period to expire. He said, at page 1094,

> "…It has always been recognised that the court has power, by making an order for release and discharge, to protect its officer, whether a sequestrator or a receiver, from all liability for acts done in the course of his duties. As I have indicated earlier in this judgment, it would be wrong to exercise this power without first investigating or making provision for the investigation of claims of which the court has notice. But I do not see that the court is obliged to wait until the end of the limitation period before protecting the court's officer against a claim, if the claimant, having had ample opportunity to do so, neglects to prosecute the claim… I would none the less direct that if the defendant does not wish his possible claims against the sequestrators to be barred by the court granting a release and discharge to the sequestrators, he must institute proceedings to establish his claims within three months from today's date, or within such longer period as the court may in its discretion on application at first instance allow."

47. The Discharge Order in the instant case was an entirely conventional application of the principles outlined in IRC v Hoogstraten. Marcus Smith J first inquired as to whether there were any specific claims of which notice had already been given which would have required investigation before a release could be granted. None were indicated. Marcus Smith J then went on to set a deadline for commencement of any (as yet unnotified) claims which the Claimant might wish to bring, setting separate deadlines for claims arising out of the final accounts of the receivership and other claims.

48. It is entirely consistent with my conclusion that it was not necessary for the Claimant to seek permission from the court prior to commencing any claim against the Defendants after they had left office that at no stage during the hearing before Marcus

Smith J was there any suggestion that the Claimant would have to apply separately for permission to commence any such claims.

49. The possibility that such permission might have to be sought would also have raised, for example, the practical questions of whether Marcus Smith J or some other judge would be available to hear any such application or whether it would be possible for any such application to be determined in the comparatively short period prior to the deadline of 31 January 2020.

50. Neither of the two very experienced leading counsel who appeared raised the possibility that such permission was necessary. Moreover, if Marcus Smith J had for some reason thought that permission would be required prior to the 31 January 2020 deadline that he set for commencement of any claims, it is inconceivable that he would not have raised and discussed the issue with counsel. There was no such discussion.

51. The wording of the Discharge Order is also entirely silent on the need for the Claimant to obtain any permission to commence a claim prior to 31 January 2020. I consider that the reason for that is simple: no-one at the hearing thought that such permission was required, and hence no provision was made in the order for a mechanism by which it would have to be obtained.

Did the Discharge Order amount to permission?

52. It follows that if I were wrong on my primary conclusion, and permission was required for the Claimant to bring the Proceedings against the Defendants notwithstanding that they had left office, I cannot construe the Discharge Order as amounting to the grant of permission. There is nothing in the wording of the order or the background to it that would enable me to conclude that this is what Marcus Smith J must have intended. Indeed, if (contrary to the view that I have expressed) Marcus Smith J had thought that permission would be required, it is implausible in the extreme that he would have been prepared to grant a blanket approval without any consideration of the merits of any proposed claim.

Mr. Collings QC's estoppel argument

53. Given my conclusion on Mr. Collings QC's first argument, I do not need to decide whether he was right in his third argument, namely that some form of estoppel operates to prevent the Defendants from now asserting that permission is required. I would simply observe that when I pressed Mr. Collings QC on this, he was unclear as to which species of estoppel he might be relying on for this argument. He did not, for example, identify any specific representation made by the Defendants upon which the Claimant had relied to its detriment which might make it unconscionable for the Defendants to resile from a position that they had previously taken.

54. Nor is it easy to see that the mere fact that the Defendants engaged with the Proceedings for a limited period before raising the point would be sufficient to amount to an estoppel by convention. It is generally thought to be insufficient for an estoppel by convention that the parties simply share a common assumption or mistake: there needs to be some agreement or convention by which the parties have regulated their dealings: see e.g. Bridgestart Properties v London Underground [2004]

EWCA Civ 793 at [23]-[24]. None was suggested here. Moreover, if the origins of a requirement for permission to be obtained lay in the need for the court to control actions against its own officer, there must be some doubt whether the involvement of the court in the process could be entirely bypassed as a result of some convention assumed between the parties.

Conclusion

55. In conclusion I do not consider that there was any requirement for the Claimant to seek permission of the Court to bring its Proceedings against the Defendants. The Proceedings can therefore continue. If necessary, I will make a declaration to that effect.

56. If, as they have indicated that they might, the Defendants consider that the Proceedings are liable to be struck out or dismissed on a summary basis for other reasons, then they can bring such applications under CPR 3.4 and/or 24.2 in the ordinary way.