

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0022

BETWEEN:

JTRUST ASIA PTE LTD.

Appellant

and

**[1] MITSUJI KONOSHITA
[2] A.P.F. GROUP CO. LTD. (IN RECEIVERSHIP)**

Defendants

and

**NICHOLAS JAMES GRONOW AND JOHN DAVID AYRES
(as Receivers of the Second Defendant)**

Receivers

and

SHOWA HOLDINGS CO., LTD.

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C Farara
The Hon. Mde. Vicki-Ann Ellis

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Vernon Flynn, QC with him, Mr. Peter Ferrer for the Appellant
Mr. Adrian Francis and Ms. Olga Osadchaya for the Respondent
Mr. Hefin Rees, QC with him, Mr. Iain Tucker and Ms. Yegâne Güley for
the Receivers

2021: February 23;
May 31.

Commercial appeal – Insolvency Law - Appointment of receiver on application of JTrust – Application by appellant for information from receivers - Locus standi – Whether JTrust had legitimate interest in the outcome of the receivership - Whether the learned judge erred in holding that appellant lacked standing to seek a variation of the independent review committee order - Whether the learned judge erred by not exercising case management powers to substitute the Receivers in place of JTrust - Whether Court of Appeal ought to consider judge’s failure to substitute Receivers where this was not pleaded or argued in the court below

In July 2018, JTrust Asia PTE Ltd. (“JTrust”) obtained a receivership order (“Receivership Order”) over A.P.F. Group Co. Ltd. (“A.P.F.”), a company incorporated in the Territory of the Virgin Islands (the “BVI”), with Mr. Nicholas Gronow and Mr. John Ayres (“the Receivers”) being appointed joint and several receivers.

A.P.F. is also the majority shareholder of Showa Holdings Co. (“Showa”), the latter which is a Japanese company. By virtue of A.P.F.’s receivership, the Receivers are entitled to exercise majority shareholder voting rights over Showa. Pursuant to their powers under the Receivership Order, the Receivers changed the Board of Directors of A.P.F. and appointed Mr. Nicholas Gronow and Mr. Atushi Hosono as additional directors of Showa together with Showa’s President and Showa’s Chief Executive Officer, Mr. Tatsuya Konoshita, the Chief Financial Officer and Chief Operating Officer, Mr. Tomohiko Shoji, and five further directors, two of whom are designated ‘independent’ directors.

The Receivers then filed an application (“the Receivers’ Application”) seeking relief against Showa regarding an investigation into certain questionable transactions. At the hearing of the application (“the IRC Hearing”), the court made an order (“the IRC Order”) by which Showa and the Receivers were required to agree to the terms of an order to establish an independent review committee (an “IRC”) by 25th December 2019. The IRC Order made time of the essence for the IRC to be formed. At this hearing, JTrust was invited by the court to make submissions in relation to the Receivers’ Application.

Less than a month after the IRC Order was made, JTrust filed an application (“the JTrust Application”) seeking: (i) an update from Showa as to the status of the establishment of the IRC; (ii) that the IRC Order be varied so that the Receivers be put in control of the IRC rather than the directors of Showa; and (iii) the Receivers be directed to call an extraordinary general meeting of the shareholders of Showa for the purposes of a vote on removing members of Showa’s Board (together “the Three Heads of Relief”).

In response, Showa filed an application to strike out the JTrust Application (“the Showa Application”), relying on several grounds which related to JTrust’s lack of standing to make

the JTrust Application, the court's lack of jurisdiction over Showa and JTrust's non-entitlement to an update.

On 30th September, the learned judge delivered a written judgment in which he dismissed the JTrust Application in relation to the Three Heads of Relief and held that the Receivers' support of the JTrust Application was immaterial to its determination. He acceded to Showa's Application to strike out the JTrust Application and further ordered that JTrust should pay Showa's costs on both the JTrust and Showa Applications. Additionally, the learned judge determined that JTrust should pay the Receivers' costs on those applications.

JTrust, being dissatisfied with the decision of the learned judge has appealed. The two issues that emerge for determination by this Court are: (i) whether the learned judge erred in finding that JTrust lacked standing to seek a variation of the IRC Order; and (ii) whether the learned judge erred in law by not exercising his case management powers to substitute the Receivers in place of JTrust in JTrust's Application.

Held: dismissing the appeal; affirming the judgment of the judge and ordering that JTrust pays costs to Showa to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs in the court below, if not agreed within 21 days of this judgment, that:

1. It is settled law that receivers are officers of the court and therefore are answerable to the court and not to the party at whose behest they were appointed. As an exception to the general rule, the party who was instrumental in securing the appointment is entitled to bring an application against the receivers if they have acted in bad faith or their decision was so perverse that no reasonable receiver could have come to it. Accordingly, absent any bad faith and utter unreasonableness, the decision-making process is a matter for the receiver and the court will only interfere with the acts of a receiver in very limited and defined circumstances.

Deloitte & Touche AG v Johnson and Another [1999] 4 LRC 281 applied; **Portman v Mill** [1835-42] All ER Rep 669 applied; **Re Edenote Limited** [1996] 2 BCLC 389 applied; **Re Hans Place Ltd (in liquidation)** [1993] BCLC 768 applied.

2. Neither section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act nor the court's inherent jurisdiction places any restrictions on the persons who may apply for the appointment of a receiver. Nonetheless, where the court is asked to exercise its statutory or inherent powers in relation to receivership, the applicant must demonstrate that he is the proper person to invoke the court's jurisdiction. Consequently, the applicant must show that he not merely has an interest in making the application or is one who may be affected by its outcome but one who has a legitimate interest in the relief sought. It is common ground that the Receivers were appointed on the application of JTrust and while it was not disqualified from making the application and does have a general interest in the outcome of the receivership, that is not the same as a legitimate interest in the outcome which accords with the threshold as outlined in **Deloitte & Touch AG**. Furthermore, neither the fact that JTrust was permitted to make submissions nor the Receivers' support for the

application was sufficient to confer standing on JTrust. Accordingly, the learned judge did not err in the exercise of his discretion and cannot be faulted for concluding that JTrust lacked the requisite standing to request that the Receivers provide it with updates. The judge's decision cannot be impugned.

Deloitte & Touche AG v Johnson and Another [1999] 4 LRC 281 applied; **ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and Others v Kenneth Krys et al** 2017] ECSCJ No. 255 (delivered 20th November 2017) followed; **Kevin Gerald Stanford v Stephen John Akers et al (as Joint Liquidators of Chesterfield United Inc)** [2018] ECSCJ No. 200 (delivered 12th July 2018) followed.

3. As a general rule, a party is unable to prosecute a point before the appellate court unless it was taken in the court below, save in limited circumstances. The complaint about the judge's failure to substitute the Receivers, being an entirely new point, cannot and should not be interrogated in this appeal. In the totality of the circumstances, it would be unfair to criticise the judge for not doing so in circumstances where this argument was not canvassed with the judge either during or after the hearing and before the rendering of the judgment.

Marie Makhoul v Cicely Foster et al [2015] ECSCJ No. 34 (delivered 23rd February 2015) followed.

JUDGMENT

Introduction

- [1] **BLENMAN JA:** This is an appeal by JTrust Asia PTE Ltd. ("JTrust") against the judgment and order of Wallbank J [Ag.] by which the learned judge dismissed JTrust's application for relief ("the JTrust Application") in respect of the receivership over A.P.F. Group Co. Ltd. (In Receivership) ("A.P.F."). JTrust also appeals the judge's decision to grant the application by Showa Holdings Co., Ltd. ("Showa") to strike out JTrust's Application ("the Showa Application"). JTrust appeals the judge's decisions on the basis that he erred both in law and in fact in dismissing its application and in granting Showa's application. The learned judge did so on the basis that JTrust had no standing to seek and obtain the relief contained in its application, JTrust's appeal against the learned judge's judgment and order is vigorously resisted by Showa, which contends that JTrust's challenges to the learned judge's decision is without basis in law or principle.

- [2] It is necessary to set out the relevant background in some detail in order to provide the requisite context. I do so now.

Background

- [3] JTrust is a company incorporated in Singapore. It had on several occasions between March 2015 and September 2017, invested in a company called Group Lease Public Company Limited (“Group Lease”) that is listed on the Thai Stock Exchange. In October 2017, the Thailand Securities and Exchange Commission announced that it had filed a criminal complaint against Mr. Mitsuji Konoshita (“Mr. Konoshita”), for committing fraud, misappropriating Group Lease’s assets and falsifying Group Lease’s accounting records. Mr. Konoshita was the director of Group Lease and its Chief Executive Officer until the time of the filing of the criminal complaint.
- [4] A.P.F. is a company incorporated in the Territory of the Virgin Islands (the “BVI”). It is allegedly a nominee of Mr. Konoshita, as well as a holding company through which he operated a number of his investments. It also holds the controlling stake in Group Lease. On 21st December 2017, JTrust commenced proceedings in the BVI claiming approximately USD \$95 million from Mr. Konoshita and A.P.F., which represents the amount of JTrust’s Funds which JTrust alleged was misappropriated by Mr. Konoshita and A.P.F. through receiving, concealing and/or laundering some or all of the funds in question. JTrust claimed that it had relied upon representations made by Mr. Konoshita as the basis for its investment in Group Lease and also, upon Group Lease’s accounts, which JTrust alleged were intentionally misstated by Mr. Konoshita. JTrust obtained a worldwide freezing injunction against Mr. Konoshita and A.P.F. in support of its claim over the assets of both parties. The injunction also required that Mr. Konoshita and A.P.F. provide details of their asset by a prescribed time. On 5th July 2018, JTrust obtained a receivership order (“Receivership Order”) over A.P.F., with Mr. Nicholas Gronow and Mr. John Ayres

(“the Receivers”) being appointed joint and several receivers to protect and preserve the assets of A.P.F.

- [5] A.P.F is also the majority shareholder of Showa, which is a company incorporated in Japan and listed on the Tokyo Stock Exchange. As of 31st May 2020, A.P.F. holds 58.10% of the shareholding in Showa. By virtue of A.P.F.’s receivership, the Receivers are entitled to exercise majority shareholder voting rights over Showa. In accordance with their powers under the Receivership Order, the Receivers changed the Board of Directors of A.P.F. and appointed Mr. Gronow as well as Mr. Atushi Hosono as directors of Showa. In addition to these two new members, the Board is comprised of Showa’s President and Showa’s Chief Executive Officer, Mr. Tatsuya Konoshita, the Chief Financial Officer and Chief Operating Officer, Mr. Tomohiko Shoji, and five further directors, two of whom are designated ‘independent’ directors (“the Majority Board”).
- [6] In October, the Receivers filed an application (“the Receivers’ Application”) seeking relief against Showa regarding an investigation into the questionable transactions. At the hearing of the Receivers’ Application in December (“the IRC Hearing”) the court made an order (“the IRC Order”) under which terms Showa and the Receivers were required to agree to the terms of an order to establish an independent review committee (an “IRC”) by 25th December 2019, which would be charged with an independent review of Showa’s finances. The IRC was to have an independent chairman appointed by a body called the ‘Committee for Rating Third Party Committee Reports’ (“the Committee”). The IRC Order made time of the essence for the IRC to be formed. At this hearing, JTrust was invited by the court to make submissions in relation to the Receivers’ Application.
- [7] Within just under a month of the making of the IRC Order, JTrust filed the JTrust Application seeking: (i) an update from Showa as to the status of the establishment of the IRC; (ii) that the IRC Order be amended so that the Receivers be put in control of the IRC rather than the directors of Showa; and (iii) the Receivers be directed to

call an extraordinary general meeting of the shareholders of Showa for the purposes of a vote on removing members of Showa's Board (together "the Three Heads of Relief"). JTrust claimed that a month had gone by with no news as to whether the IRC had been appointed and about any progress it had made. Additionally, JTrust claimed that the IRC Order did not prescribe who would provide instructions to the IRC and the Committee and, as such, the IRC Order would have to be amended to provide certainty. Further, JTrust claimed that it made this application out of concern to ensure that the Board of Directors of Showa had no involvement in directing or instructing the investigations of the IRC into Showa.

- [8] In the court below, Showa in response to JTrust's application, filed an application to strike out the JTrust Application, relying on several grounds which related to JTrust's lack of standing to make the JTrust Application, the court's lack of jurisdiction over Showa and JTrust's non-entitlement to an update.

Issues in the Court Below

- [9] These are the five (5) issues that were dealt with by the court below:
- i. Whether JTrust had standing to make its application or to restrain the actions of Showa or the Receivers;
 - ii.
 - iii. Whether Showa was subject to the jurisdiction of the court;
 - iv. Whether JTrust was entitled to be updated on the actions or investigations of the Receivers;
 - v.
 - vi. Whether the IRC Order should be amended to direct Showa's Board of Directors and the Receivers that all communication with the Chairman of the IRC and/or with the Committee be conducted by the Receivers only; and
 - vii. Whether the Receivers should be directed to call an extraordinary general meeting of Showa to remove all of Showa's directors save for Mr. Gronow and Mr. Hosono.

viii.

Judgment in the Court Below on Both applications

- [10] On 30th September 2020, the learned judge, having given deliberate consideration to the competing arguments, delivered his written judgment and held that the JTrust Application should be dismissed. The learned judge in delivering his written judgment focused on the Three Heads of Relief sought by JTrust. As it related to the first head of relief sought, the learned judge found that Showa did in fact provide an update to JTrust, thus making this head of relief otiose. While the update provided was short, this, in the learned judge's estimation, did not render the update any less of an update. In relation to the second head of relief, the learned judge was not persuaded that JTrust was the 'proper person' to seek this relief and that JTrust did not show the court that the order sought was reasonably necessary or appropriate. Lastly, as it related to the third head of relief, the learned judge held that this head was to be dismissed for the same reasons as those under the second head of relief. For completeness of his judgment, the learned judge also determined that the Receivers' support of the JTrust Application was immaterial in determining the application. The learned judge therefore acceded to Showa's Application to strike out the JTrust Application.
- [11] On the issue of costs, the learned judge found that costs should follow the event and that JTrust ought to pay Showa's costs on the JTrust Application, which was unsuccessful, and on the Showa Application, which was successful. Additionally, the learned judge found that JTrust should pay the Receivers' costs on those applications for their 'trouble and expense' in addressing them.
- [12] The learned judge's written judgment is accompanied by an order of even date, made by the learned judge. The order states as follows:
- (1) the JTrust Application is dismissed.
 - (2) the Showa Application is granted.

- (3) JTrust shall, within 21 days, pay the Receivers' and Showa's respective costs of the JTrust Application and the Showa Application.
- (4) in the event the parties are unable to agree to costs, the parties have liberty to apply for a further hearing to deal with the issue of costs.
- (5) the time for filing an appeal shall run from 12th October 2020, being the date upon which the final judgment was published by the court.

Grounds of Appeal

- [13] JTrust, being dissatisfied with the learned judge's decision has appealed the judgment and order of the learned judge. JTrust has filed four (4) grounds of appeal, challenging both the learned judge's conclusions of fact and law and his overall disposition of the application. With no disrespect intended, I do not propose to recite the grounds of appeal in their entirety. In summary however, three of JTrust's grounds of appeal relate to the issue of JTrust's standing and the fourth ground challenges the exercise of the judge's case management discretion.

Condensed Issues on Appeal

- [14] The following are the two condensed issues, which arise to be resolved as a consequence of the refined arguments of counsel during oral submissions and a careful reading of the written submissions filed by both parties:
- i. Whether the learned judge erred in finding that JTrust lacked standing to seek a variation of the IRC Order ("the Locus Standi Issue"); and
 - ii.
 - iii. Whether the learned judge erred in law by not exercising his case management powers to substitute the Receivers in place of JTrust in JTrust's Application ("the Substitution Issue").

Submissions on behalf of JTrust

(i) The Locus Standi Issue

[15] Learned Queen's Counsel, Mr. Vernon Flynn, argued that the learned judge erred in finding that JTrust lacked standing to seek a variation of the IRC Order in respect of the relief sought. He stated that in considering whether JTrust had standing, the learned judge placed insufficient weight on the fact that the court, in the IRC Hearing, had already determined JTrust had sufficient interest in the implementation of the IRC Order. He said that at the IRC Hearing, notwithstanding Showa's objection to JTrust's counsel attending the hearing, the court specifically invited submissions from Mr. Flynn himself in relation to the Receivers' Application on more than one occasion. On this basis alone, JTrust had an expectation of standing. Mr. Flynn also asserted that the presence of the 'liberty to apply' provision in the IRC Order, on which the learned judge accepted that JTrust could rely,¹ also gave rise to an expectation of standing. Mr. Flynn did not provide this Court with any authority for his submission.

[16] In advancing the above position, Mr. Flynn said that it was the learned judge's failure to properly interpret **Deloitte & Touche AG v Johnson and Another**² that ultimately lead to his arrival at the incorrect conclusion. **Deloitte & Touche AG**, Mr. Flynn reminded this Court, laid down the relevant legal test - that for a person to have an interest or to have standing to challenge a decision of an officeholder, that person must have a 'recognisable economic interest in the insolvent estate.' He also relied on **Michael Carter v Roy Bailey and Keiran Hutchison (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd)**³ to support this interpretation of **Deloitte & Touche AG**. JTrust, Mr. Flynn strenuously asserted, undoubtedly has a 'economic interest' or financial interest in A.P.F.'s assets being that it was on JTrust's application in the BVI Claim, that Receivers were appointed by the court to protect A.P.F.'s assets for its benefit. Further, if the value of those assets (i.e. A.P.F.'s shares in Showa) are devalued in the course of the receivership, then it would be JTrust who would lose out when the time came to enforce judgment against A.P.F. He therefore urged this Court to set aside the learned judge's order

¹ Paragraph 70 of the judgment below.

² [1999] 4 LRC 281.

³ [2020] EWHC 123 (Ch).

and find that JTrust has a sufficient legitimate interest in the receivership and therefore had standing and was entitled to seek the relief in JTrust's Application.

- [17] In order to buttress his arguments on JTrust's standing, Mr. Flynn contended that the learned judge failed to have any, or any proper regard to the fact that the Receivers supported JTrust's Application and erred in law by not giving sufficient weight to that fact when exercising his discretion with regard to JTrust's standing to bring the JTrust Application. Mr. Flynn complained that the learned judge only dealt with the Receivers' support of JTrust's Application in one paragraph of his judgment. At paragraph 71 of the judgment, the learned judge stated that 'it is nothing to the point that the Receivers supported [JTrust's] Application' and gave no further consideration to this matter. Mr. Flynn contends that this is completely at odds with the rest of the judgment. He pointed out that the learned judge indicated that the Receivers could bring the same application for the same relief. In these circumstances, where the Receivers supported JTrust's Application, it would result in them gaining the benefit of the relief sought by JTrust. Therefore Mr. Flynn submitted that the conclusion reached by the learned judge, is contrary to the overriding objective and should be set aside.

(ii) The Substitution Issue

- [18] Turning to the question of the substitution of the Receivers for JTrust, Mr. Flynn asserted that the learned judge erred in law by not exercising his case management powers to substitute the Receivers in place of JTrust in JTrust's Application. Mr. Flynn posited that, at the time the judgment was handed down, the learned judge was aware that the Receivers had already filed the Receivers' Application, under a Certificate of Urgency, on 16th September 2020, seeking materially that the Receivers should be directed to call an extraordinary general meeting of Showa to remove all of Showa's directors save for Mr. Gronow and Mr. Hosono. The Receivers' Application was granted by the court on 30th November 2020 and the Receivers now have sanction to require the requisition of an extraordinary shareholders meeting of Showa to appoint/remove the directors of Showa.

[19] Mr. Flynn further asserted that the Receivers were already a party to JTrust's Application and attended the IRC Hearing to support JTrust's Application. He reminded this Court that pursuant to rule 19.3(1) of the **Civil Procedure Rules 2000** (the "CPR" or the "ECSC CPR") the court has the power to 'add, substitute, or remove a party on or without application'. He referred to rule 19.2(5) of the CPR which provides the circumstances under which the court may order a new party to be substituted for an existing one. Mr. Flynn posited that rule 19.2(4) of the UK CPR mirrors that of rule 19.2(5) of the ECSC CPR. Additionally, he contended, rule 19.2(4) of the UK CPR and rule 19.2(5) of the ECSC CPR are not to be construed narrowly and further that the court's power to add or substitute a party is wide. In support of these propositions, Mr. Flynn relied on the English Court of Appeal decision of **London Borough of Hounslow v Cumar**.⁴ He accepted that whilst it may not have been appropriate to substitute the Receivers' at the time of the IRC Hearing, once the Receivers filed their application on an urgent basis prior to the judgment being handed down, the court ought to have taken steps at that stage to substitute JTrust for the Receivers, or have invited the parties to make submissions or attend a hearing on substitution of JTrust for the Receivers. This, Mr. Flynn argued, would have saved the court and parties significant time and legal costs, and would have been a step taken in accordance with the overriding objective, as the Court heard the Receivers' Application over two hearings in addition to the hearing of the JTrust Application. The process has been unnecessarily elongated. In the totality of the circumstances, Mr. Flynn asked this Court to allow the appeal and to set aside the decision of the learned judge in its entirety.

Submissions on behalf of Showa

(i) The Locus Standi Issue

[20] Learned counsel Mr. Adrian Francis countered that the learned judge did not err in finding that JTrust lacked standing to seek a variation of the IRC Order in respect of the relief sought. He disagreed with JTrust's position, arguing that while JTrust was

⁴ [2012] EWCA Civ 1426.

not disqualified from making the JTrust Application, it did not, as the learned judge correctly determined, have a 'legitimate interest' in seeking the relief sought in the court below. As it related to JTrust's assertion that it had an expectation of standing due to its invitation by the court to make submissions, Mr. Francis submitted that the granting of an indulgence to make submissions on an application is not tantamount to a determination of *locus standi* to seek particular, or indeed any, relief. It is not uncommon for a party to be invited to make submissions on an application, irrespective of standing, where it has an interest in the relief sought. Therefore, JTrust should not conflate these two separate and distinct issues and the court should not treat the judge's indulgence as conferring standing on JTrust.

[21] Mr. Francis also strenuously resisted JTrust's characterisation of the learned judge's findings in relation to the 'liberty to apply' provision. He was adamant that the learned judge's acceptance that JTrust was not disqualified from making the JTrust Application, should not be interpreted as JTrust having the 'legitimate interest' required to seek the reliefs sought. The fact that a party has liberty to apply does not confer the liberty to apply for anything it cares to seek regardless of whether it has a legitimate interest in the relief sought.

[22] As it relates to JTrust's contention that the learned judge construed the test in **Deloitte & Touche AG** too narrowly, failing to recognise JTrust's status as the appointing claimant as a factor conferring a legitimate interest in the relief sought, Mr. Francis, citing paragraph 63 of the judgment, insisted that the learned judge considered this at length and with great care and concluded that the relief sought went beyond JTrust's legitimate interests as claimant and amounted to an improper interference with the receivership. As it related to JTrust's reliance upon **Michael Carter v Roy Bailey and Keiran Hutchison (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd)**, Mr. Francis argued that this authority does not change or advance the legal test laid out in **Deloitte & Touche AG** and applied by the judge below. The English High Court in the **Michael Carter** case merely applied the established **Deloitte & Touche AG** principles to the specific

application before it. The case merely serves to confirm the settled proposition that to have standing to apply to challenge the actions of a liquidator in an insolvent liquidation, it is necessary for the applicant to have an economic interest in the insolvent estate. It does not state that such economic interest is *per se* sufficient for the applicant to have a legitimate interest in the relief sought (as required by **Deloitte & Touche AG**), neither does it address what a sufficient interest would be.

- [23] Mr. Francis found no fault with the weight the learned judge placed on the fact that the Receivers supported JTrust's Application when exercising his discretion with regard to JTrust's standing to bring JTrust's application. He directed this Court's attention to paragraph 71 of the learned judge's judgment and submitted that the learned judge's reasoning was correct and not susceptible to serious challenge. The question of whether the Receivers supported, opposed or were neutral as to the JTrust Application, and the issue of whether the Receivers benefitted from it or not, were irrelevant to the issue of whether JTrust had standing to make it. Despite JTrust seeking to conflate them, he argued, these three questions are separate and distinct and there is no logical connection between them. JTrust's case on this aspect of the matter is therefore a *non sequitur* and misconceived and should be dismissed on that basis, Mr. Francis emphasised.

(ii) The Substitution Issue

- [24] Finally, in relation to JTrust's complaint that the learned judge erred in law by not exercising his case management powers to substitute the Receivers in place of JTrust in JTrust's Application, Mr. Francis posited that at no point during the hearing of the JTrust Application did the Receivers or JTrust suggest or make an application to the effect that substitution was open to the learned judge or appropriate. Further, he argued that, in any event, had an application been made and refused, the learned judge would not have erred in law because, he had no power to order substitution; and even if he had the power, he would have been plainly correct not to exercise it.

[25] While Mr. Francis accepts that Part 19 of the CPR finds its equivalent under Part 19 of the UK CPR, he disagrees that the substitution of the parties under this part refers to substitution of parties in interim applications. Alternatively, he suggested that if the judge below had power to substitute the Receivers as applicants, and an application had been made, he submitted that it would clearly have been an improper exercise of the learned judge's discretion to have permitted it. In support of his contention, Mr. Francis said Showa would have objected to this, first, on the grounds that the application would have to be adjourned to enable Showa, to consider the implications of the development, and secondly, the application, when made by the Receivers, would have been decided by reference to a different legal test and set of factors. Additionally, Mr. Francis highlighted that JTrust was given ample warning, over the course of almost 6 months, that it lacked standing to make its application; that what it was attempting to do amounted to an improper interference with the Receivers' conduct of the investigation, and that its application was liable to be struck out. Mr. Francis therefore submitted that the learned judge's decision cannot be impugned, and the appeal should be dismissed with costs to Showa.

Discussion and Conclusion

The Locus Standi Issue

[26] For the sake of clarity, I state that the critical question that emerges for consideration in this appeal is whether the learned judge erred in his determination that JTrust lacked the requisite standing to request that the Receivers provide it with updates. The corollary to this matter is whether the learned judge erred in granting Showa's Application to strike out JTrust's Application.

[27] In effect, this appeal interrogates the question of whether the Receivers are required to provide updates on the receivership to the party at whose behest they were appointed. It is common ground that the Receivers were appointed on the application of JTrust. As such, the essential question that has to be resolved by this Court is whether the fact of this being so, JTrust has a right to be provided with

updates by the Receivers. Inextricably linked to this matter is the resolution of the competing positions between JTrust and Showa on the allied and important matter of whether JTrust has standing to apply to the court, as it did, for the court to direct the Receivers to provide JTrust with an update as to the status of the appointment of IRC.

- [28] Of great significance, and also inextricably linked to the first matter is the fact that JTrust sought the IRC Order to be amended to include the following provision:

“The board of directors of Showa, be ordered and the Receivers be directed that all communications with the chairperson and/or the committee for Rating Third Party Committee Members for the purposes of constituting an independent committee and providing the committee with instruction and/or any communications whatsoever be undertaken by the Receivers only.”

- [29] On the basis of the above quoted relief, the breadth of the order which JTrust sought is readily apparent. This is so, leaving aside the gravamen or crux of the appeal, which is the question of *locus standi*. To properly contextualise this discussion, it must be emphasised that it was based on the Receivers’ Application that the learned judge had ordered that unless the board of directors of Showa (“the Showa Board”) appointed an IRC on certain specific terms by 25th December 2019, the Receivers were permitted to reconstitute the Showa Board of Directors and the Showa Board then resolved to appoint the IRC. JTrust then issued its application seeking a number of reliefs. This was opposed by Showa and Showa applied to strike out its application on the basis that JTrust lacked standing.

- [30] The starting point of this discussion must be to ask, ‘who are court appointed Receivers?’. The answer, without hesitation, is that they are officers of the court. Indeed, this much is settled law. The judge correctly acknowledged that the Receivers, as a general rule, are answerable to the court and not to the party who was instrumental in securing their appointment.⁵ As an exception to the general rule, it is well established that the party at whose behest receivers are appointed is

⁵ Supra note 2; Portman v Mill [1835-42] All ER Rep 669.

entitled to bring an application against the receivers if they are acting or have acted utterly unreasonably or in bad faith.

[31] JTrust's appeal revolves around the second and third heads as identified by the judge. Its submissions before this Court are essentially those made before the judge and have been indicated earlier. Though I have not recited them in full, I have given deliberate consideration to the detailed complaints made by JTrust. On the other hand, the lynchpin in the submissions of Mr. Francis is that the judge below applied the relevant principles that were enunciated by Lord Millett in **Deloitte and Touche AG** and considered all of the relevant circumstances. He maintained that in so doing the learned judge did not err.

[32] In ascertaining whether JTrust had standing, the learned judge quite properly determined that neither section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**⁶ ("the Supreme Act") nor the court's inherent jurisdiction placed any restrictions on the persons who might apply for the appointment of receivers. In seeking to resolve this issue, the judge therefore, quite properly paid regard to the principles that were enunciated by Lord Millett in **Deloitte & Touche AG** where His Lordship stated that- '[w]here the court is asked to exercise its inherent jurisdiction, it will only act on the application of a party with sufficient interest to make it.'⁷

[33] In a carefully reasoned judgment, the judge considered who was the proper person to invoke the court's jurisdiction, in the sense of the court's entertaining the application and to grant the relief sought. In my view, the judge was properly guided by the pronouncements of Lord Millett when he determined that a proper person is one who not merely has an interest in making the application or who may be affected by its outcome, but one who has a 'legitimate interest in the relief sought'.

⁶ Cap. 80, Revised Laws of the Virgin Islands 1991.

⁷ [1999] 4 LRC 281 at 288

- [34] A review of the judgment reveals the judge's close analysis and reasoning in relation to the three distinct heads. It is in relation to the second and third heads and his application of the relevant principles in disposing of those two heads that form the crux of this appeal. It is noteworthy that central to JTrust's appeal are the orders the judge made in relation to the second and third heads. Indeed, as alluded to earlier, JTrust urges this Court to set aside the judge's orders in relation to the second and third heads.
- [35] By way of emphasis, it is settled law that as a matter of general principle, once a receiver is appointed by the court, absent bad faith and perversity the decision-making process is a matter for the receiver.⁸ In **Re Edennote Limited**, Nourse LJ pronounced that- 'the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable person would have done it'. In the appeal at bar, there were no allegations of wrongdoing by the Receivers. It is well established that the court only intervenes in very limited circumstances, which will be dealt with in some detail shortly. It is noteworthy that the effect of JTrust's Application was to seek directions against Showa which was not a party to the Receivership Order and in circumstances where the receiver has not applied for those directions. This does not negate the fact that JTrust was permitted by the judge to address the court in relation to other applications.
- [36] Paragraph 52 of the judgment evinces that the learned judge was alive, at all times, to the role of the court vis-à-vis the receiver; and the relationship, if any, between the Receivers and the competing parties. In fact, it is quite commendable that the judge took the time to recite the well-established principles which, for the sake of brevity, do not need to be restated here. At paragraphs 53 to 59 of the judgment, the learned judge quite skillfully examined the relevant principles, in particular, those that relate to standing. For the present purposes, the case of **Deloitte & Touche AG** which provide the guiding principles are relevant, as it has stood the test of time.

⁸ Re Hans Place Ltd (in liquidation) [1993] BCLC 768; Re Edennote Limited [1996] 2 BCLC 389.

[37] In our Court, there is a consistent stream of jurisprudence which has applied the **Deloitte & Touche** principles. The position is made clear in **ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and Others v Kenneth Krys et al**⁹ and **Kevin Gerald Stanford v Stephen John Akers et al (as Joint Liquidators of Chesterfield United Inc)**.¹⁰ In **ABN AMRO Fund Services**, the learned Pereira CJ in her judgment, adopted and applied the principles, set out by Lord Millett in **Deloitte** as being 'of more general import in a consideration of the issue of locus standi'¹¹ and in finding the following passage of Lord Millett useful in analysing how the question of standing is to be approached:

"Where the court is asked to exercise a statutory power, ... the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean... that he has an interest in making the application or may be affected by its outcome. It means that he has a legitimate interest in the relief sought. Thus, even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made.

...

The company is insolvent ... The only persons who could have any legitimate interest of their own in having the liquidators removed ... are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. ... The appellants are not merely strangers to the liquidations; their interests are adverse to the liquidation and the interests of the creditors."

[38] Similarly, in **Kevin Gerald Stanford**, at paragraphs 77 and 79, I adopted and applied the principles set out in **Deloitte & Touche AG** that where a court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of the party with a sufficient interest to make it. In so doing, I followed **ABN AMRO Fund**.

⁹ [2017] ECSCJ No. 255 (delivered 20th November 2017).

¹⁰ [2018] ECSCJ No. 200 (delivered 12th July 2018).

¹¹ Supra note 9 at para 35.

- [39] In passing and contrary to what has been urged on this Court, I am unpersuaded that **Michael Carter v Roy Bailey** has placed a gloss on **Deloitte & Touche AG** by introducing the requirement of recognisable economic interest. In relation to the second head, the critical issue in this appeal is whether the learned judge erred in his determination that the establishment of the IRC was a matter for the Receivers and that it was the Receivers who have a legitimate interest in ensuring it is formed without any undue influence.
- [40] The judge quite properly recognised that JTrust had a general interest but did not satisfy the **Deloitte & Touche AG** threshold. In so deciding, in my considered opinion, the judge clearly took into account the relevant factors. I hasten to underscore the principle that the appellate court should exercise restraint in reviewing the exercise of discretion by the lower court and should refrain from trawling through the factors in a manner that is open to the first instance court. I do not, for my part, criticise the judge. I think that it would be pedantic to do so. His approach was commendable, given the circumstances of the case and his application of the **Deloitte & Touche AG** test to them.
- [41] In any event, before arriving at his conclusions, the judge in his judgment made an important finding to which I attach some significance, namely, that while JTrust was not disqualified from making the JTrust Application it did not have a legitimate interest in the relief. I am in complete agreement with the judge. For what it is worth, the judge cannot be faulted for holding that JTrust obviously has an interest in the outcome of the receivership but that was not the same as a legitimate interest in the outcome which accords with the **Deloitte & Touche AG** test.
- [42] I agree with the learned judge that the fact that JTrust was permitted to make submissions earlier, without more, cannot confer standing. Based on what I have foreshadowed and for the sake of completeness, it is evident that I am of the view that the judge took into account the relevant factors and did not err by declining to

attach weight to the fact that the Receivers supported JTrust's Application. Like the judge, in my view, this is of no moment to the court's determination of the issue of standing. There is either standing or not and this is a matter which falls within the exclusive purview of the court. It is simply not open to a receiver to seek to confer standing on another person by asserting its support for the application that was brought by that other. To be clear, I am not in any way stating that the Receivers attempted to do this, even inadvertently.

[43] I am not of the view that the judge failed to properly interpret/apply the **Deloitte & Touche AG** principles. To the contrary, the judge's closely reasoned judgment paints a very good picture of the thorough appreciation and application of the principles, that is worthy of commendation. JTrust has placed much emphasis, on the fact that at previous hearings the judge had permitted JTrust to make submissions and had even on occasion granted liberty to apply. I fail to see how these events without more can undergird an argument of standing. It is apparent that in spite of whatever courtesies may have been extended by the court to JTrust to make submissions, these could in no way have conferred the **Deloitte & Touche AG** standing on JTrust.

[44] In relation to the first issue and, in my view, despite its numerous arguments, JTrust has failed to disarm or neutralise the submissions that have been advanced by Showa in support of the learned judge's conclusion that JTrust lacked standing to apply. JTrust's appeal in relation to the first issue therefore fails.

The Substitution Issue

[45] I turn now to the complaint that the judge failed to substitute the Receivers for JTrust in the application. Learned Counsel Mr. Francis underscored the fact that the complaint about the judge's failure to substitute the Receivers for JTrust raises an entirely new point which was not raised in the court below. He explained that, at no point, did the Receivers or JTrust even suggest to the judge that the Receivers should be substituted for JTrust. Mr. Francis insisted that there was no formal or

informal application to that effect. A perusal of the record does not reflect that this point about the Receivers' substitution for JTrust was ever raised. This being the case, it would be unfair to criticise the judge for not doing so.

- [46] More importantly, I pay cognisance to the principle that, as a general rule, a party is unable to prosecute a point before the appellate court unless it was taken in the court below. In our Court, this general rule was applied by the learned Pereira CJ in **Marie Makhoul v Cicely Foster et al**,¹² who stated that it is 'trite that it is not permissible to argue on appeal a case which was not placed before the court below save in limited circumstances'. In my view, it would be unfair to criticise the judge for not so doing when the point appears not to have been canvassed with the judge either during or after the hearing and before rendering his decision. It is also noteworthy that at paragraph 71 of the judgment, the judge stated as follows:

"The net result is simply that the Receivers do not get the benefit of any of the relief that the claimant had applied for. This does not preclude the receivers making their own application for directions even for the same heads of relief."

- [47] The above quotation fortifies my view that since this issue was not raised before the judge and should not be interrogated in this appeal for the orders in relation to the second and third heads that were earlier identified. The judge's decision cannot be impugned. The appeal therefore also fails on this issue.
- [48] Further, had the judge exercised his discretion so as to refuse to substitute the Receivers for JTrust, this would have been a short point. In essence, JTrust by way of this appeal complains against the judge's alleged refusal to substitute the Receivers as a party. In so doing it would, in effect, be an appeal against the exercise of the judge's case management discretion.
- [49] For the sake of completeness, I will briefly address the allied point of the exercise of discretion. The law in relation to the appellate court interference with the exercise of

¹² [2015] ECSCJ No. 34 (delivered 23rd February 2015).

discretion by the court of first instance has long been settled. Indeed, the law is clear that in order for the appellate court to interfere with an exercise of discretion, there is a heavy burden placed on the applicant to prove that the exercise of the discretion was plainly wrong or falls outside the general ambit within which reasonable disagreement is possible. The leading authority on this principle in our Court is the well-known case of **Michel Dufour and Others v Helenair Corporation Limited and others**¹³ in which Sir Vincent Floissac held that the appellate court could only interfere if:

“(a) the judge in exercising his discretion has erred in principle by either failing to take into account or giving too little or too much weight. As relevant factors or considering or being influenced by irrelevant factors; and (b) as a result of the error the trial judge’s decision exceeds the generous ambit within which reasonable disagreement is possible and may be said to be clearly wrong.”

[50] This principle has been enunciated in a number of recent decisions of this Court such as **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**¹⁴ and **Throne Capable Investment Limited v Agile Star Group Limited**.¹⁵ At paragraph 28 of **Throne Capable**, in applying the **Dufour** principles, I stated as follows:

“In so far as Throne appeals against the exercise of the judge’s discretion, in not awarding costs against Agile, it must satisfy this Court that the learned judge committed an error of principle or was plainly wrong in the exercise of his discretion...the circumstances in which an appellate court may interfere with the exercise of a judge’s discretion are well-known and have been restated in a strong stream of jurisprudence from this Court.”

I am still of that view.

[51] In the appeal at bar and for what it is worth, it was clearly open to the judge to refuse to substitute the Receivers for JTrust in the exercise of his case management powers. It could in no wise be said to be blatantly wrong or to put another way, to

¹³ (1996) 52 WIR 188.

¹⁴ [2021] ECSCJ No. 529 (delivered 16th April 2021).

¹⁵ [2021] ECSCJ No. 433 (delivered 14th January 2021).

be outside of the generous ambit within which reasonable disagreement is possible. This finding is sufficient to dispose of JTrust's arguments. Given the totality of circumstances, I am of the view that there is no force in JTrust's myriad of complaints against the learned judge. Indeed, they are unsustainable. JTrust's appeal fails in its entirety and the decision of the judge is affirmed.

Costs

- [52] Showa has prevailed in resisting JTrust's appeal. Showa is accordingly entitled to its costs to be assessed by a judge of the Commercial Court at no more than two thirds of the costs in the court below, if not agreed within 21 days of this judgment.¹⁶

Conclusion

- [53] For the reasons I have provided, I would make the following orders:
- (i) JTrust's appeal is dismissed in its entirety and the judgment of the learned judge is affirmed.
 - (II) JTrust shall pay costs to Showa to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs in the court below, if not agreed within 21 days of this judgment.

¹⁶ The Receivers made no submissions on this appeal and therefore are not entitled to costs.

[54] I gratefully acknowledge the assistance of all learned counsel.

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

I concur.

Vicki-Ann Ellis
Justice of Appeal [Ag.]

By the Court

Chief Registrar