

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

**IN THE MATTER OF AN APPLICATION BY WILLIAM RICHARD TACON, COURT
APPOINTED RECEIVER OF THE DEFENDANTS FILED ON 18 JANUARY 2011**

CLAIM NO: BVIH(COM) 2006/0293

BETWEEN:

**VISTRA TRUST COMPANY (JERSEY) LIMITED
(As trustee for the Alsam Settlement, the Colleen Settlement and the Logany Settlement)**

Claimant

and

**(1) PLYMPTON UNIVERSAL SA
(2) MAYTOWN UNIVERSAL SA**

Defendants

Appearances: Mr David Brownbill QC, Mr Michael Fay and Ms Clare-Louise Whiley for the Claimant
Mr Jack Husbands and Ms Julie Engwirda for the Receiver

JUDGMENT

[2011: 20, 21 January]

(Court appointed receiver – discharge – whether receiver entitled to release from liability arising out of acts done while in office – **IRC v Hoogstraten**¹ considered)

- [1] Bannister J [ag]:** On 11 December 2006 Mr William Tacon ('the Receiver') was appointed by order of the Court to be Receiver of each of the Defendant companies. Although I have not been taken in any detail to the background to the matter, the purpose of the appointment was to protect assets held in the two defendant companies which Vistra contended were property of Vistra and thus belonged to various trusts of which Vistra is trustee. The disputes which gave rise to the appointment were compromised in July 2010 and that compromise became operative on 23

¹ [1984] 3 WLR 933

September 2010. Vistra's nominees have been appointed to and, as I understand, now control the boards of the two defendant companies and the purpose of the receivership has been accomplished. In these circumstances Vistra wishes to discontinue these proceedings and seeks the discharge of the Receiver.

[2] The terms of an order to give effect to these wishes have substantially been agreed, but Vistra is not content to agree, as the Receiver asks, that upon his discharge the Court should grant him a release from liabilities which he may have incurred to either of the two defendant companies (or, perhaps, to Vistra as owner of their assets - it does not much matter which) in consequence of acts or omissions of his during the conduct of the receivership. So I have to decide that issue. Before doing so, I hasten to say that there is no present suggestion that the Receiver has acted negligently or that the estate has suffered as a result of any act or omission on his part and no intimation that any such suggestion is going to be made.

[3] Mr Husbands, who appeared together with Ms Engwirda for the Receiver, submitted that the Court has what he called a common law power (I think he probably meant an inherent power) to grant such a release. He relied upon the decision of the English Court of Appeal in **IRC v Hoogstraten**². In that case sequestrators had been appointed to take the property of the defendant into their custody. On 27 April 1983 Woolf J by consent made an order that the sequestration should come to an end and made certain consequential orders, the scope of which does not affect the present question. On 10 June 1983 the sequestrators issued a summons under the liberty to apply contained in the order made by Woolf J seeking, among other relief, an order that they be released from any liability in respect of their office. By this stage the defendant was making claims that he had suffered loss as a result of negligence on the part of the sequestrators in the conduct of their office. That summons was heard by Sir Neil Lawson on 5 July 1983. He accepted a submission that the order made by Woolf J was incorrect as omitting to include a release as well as a discharge. It appears that the form in *Seton's Judgments and Orders*³ contains such a release, although no copy was made available to me at the hearing. So Sir Neil Lawson made an order that on the passing of their final account and payment to the defendant of the balance found due to him,

² [1984] 3 WLR 933

³ 7th Ed., (1912) Vol 1 pp 452,453

the sequestrators be released and discharged from all liability in respect of their office. That part of the order was appealed by the defendant.

[4] Giving the only reasoned judgment in the Court of Appeal, Dillon LJ held, first, that the sequestrators had no immunity from suit for negligence merely by virtue of the fact that they were officers of the Court. He held that they were potentially liable in tort for negligence just as any other professional would be and he set aside that part of Sir Neil Lawson's order which granted the immediate release from liability, remarking along the way that there was nothing mandatory about the forms contained in *Seton*.

[5] Dillon LJ then went on to ask himself whether the Court had power to protect its officers from possible harassment by limiting the period within which any proceedings to establish negligence on the part of the sequestrators must be launched and, if so, whether it would be appropriate to exercise that power. He went on:

'It has always been recognized 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 claim⁴.'

[6] Having noted that counsel for the defendant 'in substance' accepted that this was the position, Dillon LJ went on to direct that a release would be granted unless the defendant commenced his negligence claims within three months, or such longer period as the Court might on further application allow.

[7] With respect to the very distinguished judge who decided it, this does not seem to me to be a very satisfactory authority. It is not referred to in any of the standard text book other than *Kerr & Hunter*

⁴ Ibid at 944G-H

on *Receivers and Administrators*⁵. No other authority is cited for the proposition that it has always been recognised that the Court has power to relieve its officer from liability for acts done in office. If, as Dillon LJ held and as I respectfully agree, a court appointed receiver can be liable under the law of negligence for acts done in office, just like any other professional man, it does not seem to me that it can be within the Court's inherent power to exempt him from the general law. Indeed and as I have set out, Dillon LJ expressly held that there was no general exemption for officers of the Court. How, it might be wondered, in that case, was it possible for him to go on to hold that the Court had an inherent *specific* power to relieve against liability or to impose a special limitation period for the bringing of complaints against officers of the Court.

[8] Some confusion may have arisen on the part of the sequestrators in that case from a misunderstanding of the nature of the 'release' contemplated in orders such as that contained in the precedent in *Seton*. As appears from the judgment, the release contemplated by the precedent there was linked to and tied in with the passing of the receiver's final account. In other words, once passed by the Court, those accounts were treated as *res judicata*. The liability from which the receiver was being relieved was further liability *to account*. In 1912, when the relevant edition of *Seton* was published, the tort of professional negligence had not been identified and would not be identified for decades. Releases granted to court appointed receivers in 1912 cannot have contemplated release from the tort of negligence. Once it is accepted, as Dillon LJ accepted in **Hoogstraten**, that officers of the Court are potentially liable in negligence under the general law, the Court cannot, in my judgment, relieve them from the consequences of that exposure by judicial decree. Only if statute confers a power which on its true construction allows the Court to grant release from liability imposed by the general law can the Court have jurisdiction to make an order of the nature sought in the present case by the Receiver.

[9] It is common ground that the Insolvency Act, 2003 ('the Act') confers no such express power upon the Court when it discharges its receivers. In that respect, there is a distinction between the position of a court appointed receiver and a liquidator appointed under the Act, since section 235 empowers the Court to grant releases to liquidators on termination of a winding up. Even then, however, the release may be made conditional and it is never absolute, since the Act preserves the

⁵ 18th Ed at para 12-13

liquidator's potential exposure to proceedings under section 254. In the absence of an express power to do so, it seems to me that I can have no jurisdiction to grant the Receiver a release from liability for acts or omissions of his done during his term of office and for which he may have incurred liability under the general law. The Receiver's application is accordingly dismissed with costs to be assessed if not agreed.

A handwritten signature in black ink, appearing to read 'Thomas', with a stylized flourish at the end.

Commercial Court Judge
21 January 2010