SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	**John Deere Limited ("JDL") and John Deere Credit Inc. ("JDCI")**
Date of Document:	**11 March 2003**
Summary of Order/Relief sought or Statement of Purpose in filing:	**Application of the Receiver for:** **1. Direction from the Court with respect to Phase 2 of the investigation process.** **2. An order requiring production of Bank records from the Canadian Imperial Bank of Commerce.** **3. Direction from the Court with respect to the sale of certain units of the Hickman Equipment inventory.**
Court Sub-File Numbers:	**7:52/7:54/7:55**

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF A Court ordered Receivership of Hickman Equipment (1985) Limited ("Hickman Equipment") pursuant to Rule 25 of the ***Rules of the Supreme Court*, 1986** under the ***Judicature Act***, RSNL 1990, c. J-4, as amended

AND IN THE MATTER OF the ***Bankruptcy and Insolvency Act***, RSC 1985, c. B-3, as amended.

MEMORANDUM OF AUTHORITIES

Michael F. Harrington, Q.C.
STEWART MCKELVEY STIRLING SCALES
Suite 1100, 100 New Gower Street
P.O. Box 5038
St. John's, NL AlC 5V3
Solicitors for John Deere Limited and John Deere Credit Inc.

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	**John Deere Limited ("JDL") and John Deere Credit Inc. ("JDCI")**
Date of Document:	**11 March 2003**
Summary of Order/Relief sought or Statement of Purpose in filing:	**Application of the Receiver for:** **1. Direction from the Court with respect to Phase 2 of the investigation process.** **2. An order requiring production of Bank records from the Canadian Imperial Bank of Commerce.** **3. Direction from the Court with respect to the sale of certain units of the Hickman Equipment inventory.**
Court Sub-File Numbers:	**7:52/7:54/7:55**

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF A Court ordered Receivership of Hickman Equipment (1985) Limited ("Hickman Equipment") pursuant to Rule 25 of the ***Rules of the Supreme Court***, 1986 under the ***Judicature Act***, RSNL 1990, c. J-4, as amended

AND IN THE MATTER OF the ***Bankruptcy and Insolvency Act***, RSC 1985, c. B-3, as amended.

MEMORANDUM OF AUTHORITIES OF JOHN DEERE LIMITED ("JDL") AND JOHN DEERE CREDIT INC. ("JDCI")

MEMORANDUM OF AUTHORITIES OF
JOHN DEERE LIMITED ("JDL") AND JOHN DEERE CREDIT INC. ("JDCI")

STATUTES AND REGULATIONS:	**TAB NUMBER**
Bennett, F., ***Bennett on Receiverships*** 2nd ed., (Toronto:Carswell, 1999)	1
Walton, R., ***Kerr on the Law and Practice as to Receivers and Administrators,*** 17th ed., (London: Sweet & Maxwell, 1989)	2
Dunn, Brinklow v. Singleton, [1904] 1 Ch. 648	3

BENNETT

ON

RECEIVERSHIPS

Second Edition

by

Frank Bennett

LL.M., LL.M.

Toronto, Canada

CARSWELL

In setting the standard of care, the court-appointed receiver must act with meticulous correctness,[97] but not to a standard of perfection.[98] As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. If the cost of responding is excessive in the circumstances, the receiver can fix a fee for that cost, or otherwise apply to the court for directions.[99] The court-appointed receiver owes no duty to any individual creditor who may attempt to interfere in the receivership.[100] The receiver's position is classically described in the leading Canadian case of *Parsons v. Sovereign Bank of Canada*,[101] by Viscount Haldane:

> A receiver and manager appointed . . . is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business.

As an officer of the court, the receiver's fiduciary duty extends to a high standard of care in the operating of the business comparable to the "reasonable care, supervision and control as an ordinary man would give to the business were it his own".[102] Where the receiver fails to provide such a standard of care, the receiver may be liable for negligence. In *Doncaster v. Smith*,[103] the receiver failed to appreciate the effect of certain amendments to the *Income Tax Act*. As receiver of two companies, the receiver knew or ought to have known that they were going to have substantial tax losses. The court held that the receiver failed to obtain tax advice on the amalgamation of the companies which would have resulted in tax savings. If the receiver breaches any statutory duty, the receiver is liable.[104]

---

97 *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, 8 C.B.R. (3d) 31, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280 (C.A.), allowing an appeal from (1989), 75 Alta. L.R. (2d) 185, 80 C.B.R. (N.S.) 84 (Q.B.); followed in *Toronto Dominion Bank v. Usarco Ltd.* (1997), 50 C.B.R. (3d) 127, 40 M.P.L.R. (2d) 293 (Ont. Gen. Div.) where the receiver breached this standard in failing to pay outstanding municipal taxes.

98 *Continental Bank of Canada v. Maple Leaf Helicopters* (1983), 50 C.B.R. (N.S.) 265 (B.C. S.C.).

99 *Royal Bank v. Vista Homes Ltd. et al.* (1984), 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124 (S.C.).

100 See *Bank of N.S. v. MacCulloch & Co.* (1983), 49 C.B.R. (N.S.) 251 (N.S. T.D.). See Chapter 9, "1. Notice and Reports—Duty to Account".

101 [1913] A.C. 160 at p. 167 (P.C.). See also *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.*, above, note 97, and *Re Philip's Manufacturing Ltd.*, above, note 95.

102 *Plisson v. Duncan* (1905), 36 S.C.R. 647. This case has been referred to in many cases: *Re Ursel Investments Ltd.* (1992), 97 Sask. R. 170, 10 C.B.R. (3d) 61, [1992] 3 W.W.R. 106, 89 D.L.R. (4th) 246 (C.A.), allowing an appeal from (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.). In a court appointment, both a receiver and a receiver and manager owe the the same standard of care of reasonable prudence to the creditors: *Willows Golf Corp. (Receiver of) v. International Capital Corp.* (1995), 134 Sask. R. 81, 34 C.B.R. (3d) 82, [1995] 9 W.W.R. 1 (C.A.), affirming (1994), 122 Sask. R. 75, 16 C.L.R. (2d) 206 (Q.B.).

103 (1985), 65 B.C.L.R. 173, 57 C.B.R. (N.S.) 143 (S.C.), reversed in part (1987), 15 B.C.L.R. (2d) 58, 65 C.B.R. (N.S.) 133, [1987] 5 W.W.R. 444, 40 D.L.R. (4th) 746 (C.A.).

104 *Standard Trust Co. (in liquidation) v. Lindsay Holdings Ltd.* (1994), 29 C.B.R. (3d) 297 (B.C. S.C.) where this passage was cited from the first edition and made applicable to a receiver's breach of statutory duty concerning environmental issues. The above passage is equally applicable to liability for a breach of any other statutory duty.

However, it is possible that the receiver may be relieved of a statutory breach if the receiver acted honestly and reasonably. In deciding whether the receiver acted reasonably, the court will consider whether the receiver obtained legal advice.[105]

This standard of care is somewhat different than the standard of care imposed upon a privately appointed receiver. As a fiduciary to all, the court-appointed receiver must manage and operate the debtor's business as though it were its own. The receiver cannot, therefore, without court approval, close the business down or repudiate executory contracts.

In view of the fact that a court-appointed receiver is a principal, the receiver will be personally liable to others in respect of torts committed by its employees in the performance of their duties. The receiver will also be personally liable to those with whom it enters into contracts unless the receiver has expressly excluded its liability. However such liability is usually indemnified from the property under the receiver's administration,[106] except perhaps in situations where the receiver or its employees were negligent or not qualified to perform the tasks they undertook.[107]

Depending upon the nature of the breach of duty, the court may discharge the receiver and appoint another in its stead, deprive the receiver of remuneration in connection with the performance of the particular duty, deprive the receiver of an indemnity, or order the receiver to do that which is proper. Furthermore, the court could grant the applicant leave to sue the receiver for damages if the nature of the breach has caused a loss to the realization.[108]

As a general matter, the court-appointed receiver, unlike the privately appointed receiver, owes a duty to the holder and the debtor to preserve the goodwill of the business and the property. Eventually, there will be a realization or liquidation of the debtor's business. If the receiver wants to break contracts which may damage the goodwill of the business, the receiver should apply to the court for approval.[109] Similarly, if the receiver wants to close down the debtor's business, it would be prudent for the receiver to obtain court approval unless the power to do so is provided in the initial order. The receiver must demonstrate that it is a losing proposition before the court will permit the receiver to break contracts and terminate the debtor's business. However, while court approval may be desirable, it is not necessary for such approval to close down the business if the receiver's general power of management of the debtor's business is broad.

---

105 *Doncaster v. Smith* (1987), 65 C.B.R. (N.S.) 133 (B.C. C.A.), allowing an appeal from (1985), 57 C.B.R. (N.S.) 143 (B.C. S.C.).

106 *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q.B. 276 (C.A.).

107 The above passages in the first edition were cited in *Roynat Inc. v. Allan* (1989), 70 Alta. L.R. (2d) 231, 77 C.B.R. (N.S.) 133, [1990] 1 W.W.R. 698 (Q.B.); for related proceedings, see (1988), 61 Alta. L.R. (2d) 165, 69 C.B.R. (N.S.) 245, [1988] 6 W.W.R. 156 (Q.B.).

108 The above passages in the first edition were cited in *Canadian Co-operative Leasing Services v. Price Waterhouse Ltd. (No. 2)* (1992), 128 N.B.R. (2d) 1, 322 A.P.R. 1 (Q.B.).

109 *Re Newdigate Colliery, Ltd.; Newdegate v. The Company*, [1912] 1 Ch. 468 (C.A.), followed in *R. v. Bd. of Trade; Ex parte St. Martins Preserving Co.*, [1965] 1 Q.B. 603, [1964] 2 All E.R. 561.

See also *Capital Funds (I.A.C.) Ltd. v. Park Marine Apts., Ltd. et al.* (1967), 62 D.L.R. (2d) 230 (B.C. S.C.).

In such a case, the receiver then could cease operations where the debtor was not operating at a profit and where there was no goodwill remaining.[110]

Finally, throughout the receivership, any interested person may apply to the court if the court-appointed receiver is failing to perform its duties properly or is otherwise abusing them. In reviewing the conduct of a court-appointed receiver, the court will first assume that the receiver is acting properly unless the contrary is shown. It is incumbent upon the person alleging the abuse to prove it. The court presumes that the receiver is acting honestly and in good faith unless it is otherwise established. Secondly, the court will be reluctant to second-guess the receiver on its decisions with the benefit of hindsight. And thirdly, the court should review the receiver's conduct in light of the specific mandate in the order.[111]

(ii) Private Appointment

The primary duty of the privately appointed receiver is to take possession of the property and to account to the mortgagee, debenture holder or secured party at whose instance it was appointed. As in a principal-agency relationship, the receiver is entrusted as a fiduciary with enumerated powers and it is to account to the holder for all sums received and paid out as well as all the information about the receivership.[112] The receiver is under no duty to preserve the debtor's goodwill or business unless and until the receiver takes possession.[113]

With respect to the debtor and execution creditors, the receiver has no fiduciary duty to them except that it may become a trustee for surplus moneys realized over and above that which is owing to the security holder and, to that extent, the receiver has a duty to turn over such moneys. The receiver also has a duty to account to the debtor for what it has taken into possession, sold and applied to the secured debt. These two exceptions do not flow from any corresponding power granted to the receiver, but arise from the circumstances of the receivership and the dispossessing of the debtor's property.

The role of the privately appointed receiver is clearly embedded in Canadian case law. It has been defined in the leading English case of *Re B. Johnson & Company (Builders) Ltd.*[114] as follows:

> . . . whereas a receiver and manager for debenture holders is a person appointed by the debenture holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture, and, as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the

110 *Re Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159, 86 D.L.R. (4th) 127 (C.A.), dismissing an appeal from (1990) 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.) where the court concluded that the receiver's power to manage extended to terminating the debtor's business especially when at the time of the decision, the business was not operating at a profit and had no goodwill.

111 *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at pp. 5-6, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.). See Chapter 6, "2.(f) Standard of Care on Court Approval".

112 *Re Magadi Soda Co.* (1925), 94 L.J. Ch. 217.

113 *AIB Finance Ltd. v. Debtors*, [1998] 2 All E.R. 929 (C.A.).

114 [1955] Ch. 634 at pp. 661-662, [1955] 2 All E.R. 775 (C.A.).

passed, they may be penalized in costs.[77] Once the receiver's final accounts are passed, the security holder may proceed to obtain an order discharging the receiver.

4. REMUNERATION OF RECEIVER AND MANAGER

(a) Court Appointment

As the court-appointed receiver is neither agent of the debtor nor of the security holder, the receiver must look to the assets under its control for its remuneration. The term remuneration includes fees or salary together with the costs, charges and expenses properly incurred in the administration.[78] The court has no fund to indemnify the receiver's remuneration but the court can protect the remuneration in the initial order by granting a lien over the assets insofar as they extend to expenses properly incurred.[79] Usually a lien is granted where the receivership is invoked by an unsecured creditor or by a government authority in protecting the public. If a lien is granted, the lien ranks the receiver as a secured creditor under the *Bankruptcy and Insolvency Act* if the debtor is placed into bankruptcy,[80] and in the proper case, the court may also provide that the receiver's

---

77 *Marylou Drywall Ltd. et al. v. Grand Banks Holdings (Ont.) Ltd.: Guar. Trust Co. of Can. v. Victorian Way Corp.* (1983), 20 A.C.W.S. (2d) 469 (Ont. Master) and (1983), 47 C.B.R. (N.S.) 319 (Ont. S.C.).

78 The term "costs, charges and expenses" is broad enough to cover the receiver's legal expenses on a solicitor and own client basis: see *Crown Life Insurance Co. v. Granisle Shopping Centres Inc.* (1987), 21 B.C.L.R. (2d) 58 (S.C.) where there was a dispute as to the basis of the fees. The initial order should provide for the receiver to retain a solicitor. Some of the receiver's disbursements may be recovered from the parties to the action. For example, the receiver can charge for photocopying numerous documents: *Toronto Board of Education Staff Credit Union v. Skinner* (1985), 2 C.P.C. (2d) 247 (Ont. S.C.).

79 See *Boehm v. Goodall*, [1911] 1 Ch. 155 at p. 161; *Credit foncier franco-canadien v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734 at pp. 745-746 (Alta. T.D.), affirmed (1966), 56 W.W.R. 623n (Alta. C.A.); *Evans v. Clayhope Properties Ltd.*, [1987] 2 All E.R. 40, affirmed [1988] 1 All E.R. 444 (C.A.); *Mellor v. Mellor et al.*, [1992] 4 All E.R. 10 (Ch. Div.). As stated in the trial decision of the *Evans* case, p. 44, "A receiver should not take office unless he is satisfied that the assets of which he is appointed a receiver will be adequate to meet his remuneration, or that he has an enforceable indemnity by a party to the litigation capable of meeting his remuneration."

See also *Virani v. Virani* (1995), 15 B.C.L.R. (3d) 38, 36 C.B.R. (3d) 265 (S.C.). While the court does not have the fund to pay the receiver, the court can ensure payment out of the available assets. Under section 233 of the B.C. *Company Act*, the court had the right to impose costs of an inspector and create a charge on the assets of an affiliate company even though that affiliate is out of the jurisdiction.

In a partnership receivership where one partner was appointed by the court as receiver, that receiver can subsequently apply for wages even though he agreed to act without salary at the outset: *Harris v. Sleep*, [1897] 2 Ch. 80 (C.A.).

80 *Birch (in trust) v. Lacasse Enterprises Inc.* (1991), 2 O.R. (3d) 465, 4 C.B.R. (3d) 256 (Gen. Div.). In this case, there does not appear to be any secured creditor who initiated the court appointment.

remuneration extend to trust assets.[81] In a receivership invoked under the proposal provisions of the *Bankruptcy and Insolvency Act*, or in protection of a secured creditor under a section 244 notice, the court has the power to make the fees and disbursements of the interim receiver a charge ranking ahead of all secured creditors in respect of the assets of the debtor.[82] As a matter of practice, the receiver attempts to obtain an indemnity from the security holder who seeks the appointment, with such indemnity covering the receiver for the lawful performance of its duties.[83]

As an alternative to a lien, the receiver could obtain a guarantee from a third party, an indemnity from the security holder initiating the appointment, or request a provision in the order directing one or more parties to be responsible.[84] The receiver cannot look to any other party, including the party at whose instance the receivership order was made, for the remuneration if the assets are insufficient to indemnify.[85] Even if the order appointing the receiver is set aside, the receiver may still be able to recoup fees and expenses from the assets, including trust

81 *Ontario Securities Commission v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385, 14 C.B.R. (3d) 6, 11 C.P.C. (3d) 352 (C.A.), dismissing an appeal from (1991), 9 C.B.R. (3d) 278 (Ont. Gen. Div.) where under subsections 17(2) and (4) of the *Securities Act*, R.S.O. 1990, c. S.5, the O.S.C. invoked a receivership to protect investors. That section provided that a receiver may take control over trust assets. However, Galligan J.A. restricted this principle to the facts of the case and did not want to extend the claim against trust assets in other cases without review. See also the *Matrix* case below, note 86.

And see *Re Eron Mortgage Corp.* (1998), 2 C.B.R. (4th) 184 (B.C. S.C.) where the court concluded that it had jurisdiction, although it was premature at this stage, to create a charge against the trust assets for the remuneration and expenses of a committee of investors if the work done is beneficial to the trust property or is necessary for the management and preservation of the trust assets. In the proper case, where there are many creditors and sufficient assets to carry the costs, it makes sense to fund a committee of creditors who can assist the receiver and the court in the administration of the estate. The committee provides a useful check on the receiver and alleviates the role of the court in second-guessing the administration.

82 Subsection 47.2(1). For further treatment, see Chapter 13, "5. Appointment of Interim Receiver Pursuant to the Bankruptcy and Insolvency Act".

83 *Bank of Montreal v. Lundrigans Ltd.* (1992), 100 Nfld. & P.E.I.R. 36, 12 C.B.R. (3d) 170, 92 D.L.R. (4th) 554, 318 A.P.R. 36 (Nfld. T.D.) where the bank applied to the court for an order appointing a receiver and manager and for directions as to the extent of the indemnity covering an environmental loss.

In a situation where the court appointed a monitor under *CCAA* proceedings and an interim receiver, there can be conflict as to priority for fees and expenses if there are insufficient assets to pay both. See *Re Philip's Manufacturing Ltd.* (1993), 19 C.B.R. (3d) 57 (B.C. S.C.) where the bank paid the receiver and became subrogated to its claim against the monitor.

84 *Howell v. Dawson* (1884), 13 Q.B.D. 67 (D.C.)

85 *Braid Bldrs. Supply & Fuel Ltd. et al. v. Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.), applied in *Oberman v. Mannahugh Hotels Ltd.; Mannahugh Hotels Ltd. v. Oberman; Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd.* (1980), 4 Man. R. (2d) 312, 34 C.B.R. (N.S.) 181, [1980] 5 W.W.R. 487 (Q.B.); considered in *Crown Life Ins. Co. v. Granisle Shopping Centres Inc.*, above, note 78.

assets, if the receiver acted in good faith and pursuant to the order.[86] Usually, the court permits the receiver to recover remuneration and costs, charges and expenses out of the property under the receiver's administration, after the costs of realization, in priority to the security holder who initiated the appointment, if there is a deficiency.[87] The indemnity extends to all assets in the receivership and not simply the assets which the receiver has taken into possession. Moreover, the receiver is entitled to assert the rights to an indemnity over the assets even though the receivership has been terminated and control of the assets has returned to the legal owner.[88]

The court generally protects the receiver's remuneration out of the assets even though the receivership was improperly obtained, did not prove to be beneficial or where the receiver was removed.[89] However, there may be circumstances where the indemnity does not apply. For example, the court may refuse to indemnify the receiver or it may disallow excessive claims arising from improper or misguided conduct if the receiver exceeds its authority or breaches any of the duties in carrying out the powers entrusted to the receiver.[90] The receiver's fees will be reduced if the receiver involves itself in matters where it has little or no experience, uses expensive personnel when less expensive personnel should be employed, spends too much time on reports, and fails to delegate tasks to those who have experience.[91]

---

86 *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 106 D.L.R. (4th) 132, 67 O.A.C. 49 (C.A.). In absence of evidence, the court awarded one-half of the receiver's fees against the trust beneficiaries and the other half against the Registrar. This seems to be a harsh conclusion as the trust beneficiaries should not be saddled with costs for a wrongful appointment. But see *Ernst & Young Inc. v. Ontario* (1995), 25 O.R. (3d) 623, 44 C.P.C. (3d) 204 (Gen. Div.) where on appeal the court set aside a receivership in a matrimonial action which was invoked by the trial judge [*Wunsche v. Wunsche* (1994), 18 O.R. (3d) 161, 114 D.L.R. (4th) 314 (C.A.)] and made no order as to fees. The receiver then sued the government for its fees, and the court at this hearing dismissed a motion to strike out the claim on the basis that there was no cause of action against the Crown.

And see *Chartrand v. De la Ronde* (1997), 115 Man. R. (2d) 73, 44 C.B.R. (3d) 301, [1997] 3 W.W.R. 305 (C.A.) where the court, after setting aside the receivership, imposed the costs of the receivership on the debtor even though the court appointed a receiver on its own initiative which was subsequently set aside.

87 *Batten v. Wedgewood Coal & Iron Co.* (1884), 28 Ch. D. 317; *Re London United Breweries, Ltd.; Smith v. London United Breweries Ltd.*, [1907] 2 Ch. 511; *Re Glyncorrwg Colliery Co.; Ry. Debenture & Gen. Trust Co. v. The Company*, [1926] Ch. 951, where the receiver's remuneration had priority over the plaintiff's costs in the action.

88 *Mellor v. Mellor*, above, note 79.

89 *Mellor v. Mellor*, above, note 79. See also *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 67 O.A.C. 49, 106 D.L.R. (4th) 132 (C.A.) where the court protected the receiver for its fees even though the order appointing the receiver was set aside.

90 See, for instance, *Re Potter Oils Ltd. (No. 2)*, [1986] 1 All E.R. 890 (Ch. D.), where the liquidator (trustee in bankruptcy in Canada) challenged the receiver's fees on the basis that they were excessive and unreasonable; *Re Philip's Manufacturing Ltd.* (1992), 69 B.C.L.R. (2d) 44, 12 C.B.R. (3d) 149, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161 (C.A.), dismissing an appeal from (1992), 68 B.C.L.R. (2d) 162, 12 C.B.R. (3d) 133, [1992] 5 W.W.R. 537, 91 D.L.R. (4th) 766 (S.C.) where the receiver was required to return advances that it made to itself.

91 *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* (August 23, 1993), Master Linton, Doc. No. 43435/89 (Ont. Master).

The standard of care of a court-appointed receiver is to act in good faith and to manage the debtor's assets in a business-like manner pursuant to the terms of the order, pursuant to common law, or pursuant to the legislation under which the receiver is appointed. The order may set out the receiver's powers as may provisions in the legislation. If the legislation is silent, the common law prevails. As held in *Plisson v. Duncan*,[92] the common law standard of a court-appointed receiver is well recognized:

> Creditors of an estate, the running business of which is placed by a court in the hands of a receiver and manager, are entitled to exact from him such reasonable care, supervision and control as an ordinary man would give to the business were it his own.

The role of an interim receiver appointed under the *Bankruptcy and Insolvency Act*, for example, is different from a receiver appointed under the *Courts of Justice Act* in a mortgage action. In the former situation, the receiver usually takes possession of the assets but otherwise does not interfere with the carrying on of the business. In a mortgage receivership, the receiver manages the property. In other types of receiverships, the receiver may only supervise and concur in the management, but not manage the assets. If the receiver does not comply with the standard of care imposed on court-appointed receivers, or does not comply with the powers set out in the legislation, then the receiver must be able to justify its acts or omissions, if challenged, in order to claim remuneration. It is not enough if the receiver shows that it acted *bona fide* and in the ordinary course of business. Something more is required and such relevant factors as the nature and type of receivership are considered by the court.[93]

For example, if the receiver borrows money in excess of an amount authorized by an order, the receiver may be deprived of the fees associated with the loan.[94] However, the receiver may be able to justify this act if it can show that such borrowings were incurred in good faith and were beneficial to the estate.

Another example where the court may deprive the receiver of remuneration is the situation where the receiver does not obtain the court's permission to institute or to defend legal proceedings. If the receiver's actions cannot be justified after the event, by showing that the proceedings were necessary for the benefit of the estate, the receiver will be denied the indemnity for remuneration

---

92 (1905), 36 S.C.R. 647, followed in *Thompson v. Northern Trust Co.*, [1924] 2 W.W.R. 237, [1924] 1 D.L.R. 1135 at p. 1137, [1925] 4 D.L.R. 184 (Sask. C.A.); *Doncaster v. Smith* (1985), 65 B.C.L.R. 173, 57 C.B.R. (N.S.) 143 (S.C.), reversed in part (1987), 15 B.C.L.R. (2d) 58, 65 C.B.R. (N.S.) 133, [1987] 5 W.W.R. 444, 40 D.L.R. (4th) 746 (C.A.). See Chapter 5, "3.(b) Duties" and Chapter 6, "2.(f) Standard of Care on Court Approval."

93 *Deloitte & Touche Inc., Re, (sub nom. Ursel Investments Ltd., Re)* (1992), 10 C.B.R. (3d) 61, *(sub nom. Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* 97 Sask. R. 170, [1992] 3 W.W.R. 106, 89 D.L.R. (4th) 246 (C.A.).

94 See *Re Edinburgh Mtge. Ltd. et al. and Voyageur Inn Ltd.; Rothberg v. Fed. Bus. Dev. Bank* (1977), 24 C.B.R. (N.S.) 187 (Man. Q.B.), affirmed (1978), *(sub nom. Rothberg v. Fed. Bus. Dev. Bank)* 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 (Man. C.A.), where the receiver was denied an indemnity for additional borrowings over an amount initially authorized.

even though the receiver acted *bona fide*.[95] Furthermore, the court may prevent the receiver from recovering costs in any action taken against the receiver in the receiver's personal capacity while administering the estate unless the receiver acted properly and the actions benefited the estate. In other words, if the complainant was justified in that the receiver erred or breached its authority, the receiver will not be able to claim fees and costs by way of indemnity from the estate.[96]

The order appointing the receiver usually contains a term providing for the passing of accounts and assessment or taxation of remuneration from time to time during the receivership, and prior to discharge. While a judge retains jurisdiction to do so, it is in Ontario more conveniently referred to a Master or the Registrar in Bankruptcy who is generally familiar with the subject matter.[97]

On the return of such motion, the receiver may request a current assessment or taxation or simply be content to seek an order permitting the receiver to draw fees on account, subject to taxation. The receiver need not obtain court approval to pay expenses. In both cases, that is, on a current taxation or one permitting draws on account, it is customary for the receiver to prepare a short summary of the actions for a particular period of time together with a statement of the time spent. If there is further work contemplated in the administration, the Master or Registrar may permit the receiver to draw on the remuneration up to a certain percentage of the time involved, subject however to a final accounting and assessment. On such motions, the receiver should present evidence that there are sufficient proceeds available to pay the remuneration and that the receiver's time exceeds the amount being claimed as a draw. The court assesses the receiver's performance having regard to the nature of the receivership, the time spent and hourly rates, the complexity of affairs and the results obtained to date. The receiver's performance is covered in more detail below. Alternatively, if the initial order provides that the receiver may pay itself reasonable amounts from time to time as advances on its remuneration, but subject to taxation, the receiver may subsequently be required to return such amounts where the court is of the opinion that the advances are unreasonable.[98]

If the receiver's final motion for remuneration is contested, the court may defer adjudication until such time as the issues of liability and damages are decided. Otherwise, the court may be permitting a form of garnishment before judgment.[99]

---

95 See above for analogous law. If the receiver accepts an appointment while being in a conflict position, the receiver will have breached its fiduciary duties to the court and therefore, it will be deprived of its remuneration: *Canadian Co-operative Leasing Services v. Price Waterhouse Ltd.* (No. 2) (1992), 128 N.B.R. (2d) 1, 322 A.P.R. 1 (Q.B.).

96 See *Re Dunn; Brinklow v. Singleton*, [1904] 1 Ch. 648, where the receiver was unable to justify the benefit to the estate.

97 See above "3. Passing the Accounts of Receiver and Manager".

98 *Re Philip's Manufacturing Ltd.*, above, note 90.

99 *Re Alta. Aspen Bd. Ltd.; Bank of Montreal et al. v. Alta. Aspen Bd. et al.* (1981), 40 C.B.R. (N.S.) 177 (Alta. Q.B.).

If an interim receiver is appointed by the court under section 47 (at the request of a secured creditor) or section 47.1 (under a proposal) of the *Bankruptcy and Insolvency Act*, the court may make an order giving the receiver a charge for its fees and disbursements ranking ahead of any or all secured creditors. There is no such protection for an interim receiver appointed under section 46 after the filing of a petition or on an appeal from a receiving order.[100] Section 47.2 of the Act gives the court jurisdiction over fees and expenses. It provides:

> (1) Where an appointment of an interim receiver is made under section 47 or 47.1, the court may make such order respecting the payment of fees and disbursements of the interim receiver as it considers proper, including an order giving the interim receiver a charge, ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of his claim for fees or disbursements, but the court shall not make such an order unless it is satisfied that all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court.
>
> (2) In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.
>
> (3) With respect to interim receivers appointed under section 46, 47 or 47.1,
>
> (a) the form and content of their accounts,
>
> (b) the procedure for the preparation and taxation of those accounts, and
>
> (c) the procedure for the discharge of the interim receiver
>
> shall be as prescribed.

The section gives the interim receiver protective costs upon being appointed. However, before the court makes such an order, the secured creditors are given an opportunity to make representations. In making an order under section 47, the court ought to deal with the interim receiver's fees and disbursements at the time of the appointment rather than wait for further developments in the proceedings.[101] If the petition for a receiving order is dismissed, the interim receiver is effectively discharged, in which case the petitioning creditor becomes liable for the fees and disbursements of the interim receiver.[102] If a receiving order is made, the interim receiver's fees and disbursements are payable out of the assets of the estate in priority to those of the trustee.[103]

---

100 *Burlingham Associates Inc. v. McIvor* (1998), 62 Sask. R. 60, 3 C.B.R. (4th) 100, [1998] 7 W.W.R. 698 (Q.B.) where the court held that there was no authority under the Act giving the interim receiver the right to invoice its fees on an interim basis.

101 *Re N.T.W. Management Group Ltd.* (1994), 29 C.B.R. (3d) 139 (Ont. Gen. Div.), where the court awarded the costs of the interim receiver against the debtor's assets in priority to the secured creditor. However, the court did not grant priority to the proposal trustee for its fees after the debtor failed to file a proposal. In practice, once the interim receiver is appointed, there should be an immediate return of the motion to determine the priority of the interim receiver's fees as once time passes, the other secured creditors may become increasingly prejudiced if they do not have the opportunity to object at the outset.

102 *Re 361246 Alberta Ltd.* (1990), 74 Alta. L.R. (2d) 55, 79 C.B.R. (N.S.) 200 (Q.B.).

103 *Re Jenny Lind Candy Shops Ltd.* (1941), 22 C.B.R. 56 (Ont. S.C.).

(b) Private Appointment

Unlike a court appointment, there is no statutory requirement that a private receiver pass accounts or tax its remuneration. In most cases, the security instrument contains a provision providing that the costs of enforcing the security are a charge against the assets that are payable by the debtor and recoverable out of the proceeds of realization.

Where the instrument is silent as to the costs of receivership, the receiver looks to the security holder, at whose instance the receiver was appointed, for reimbursement. As a matter of contract, the debtor may not be liable for the costs. However, the debtor might be liable if the court implies a right of remuneration, or permits a *quantum meruit* claim based on restitution. If the instrument provides that the receiver is deemed to be the agent of the debtor, the receiver may be entitled to look to the debtor's assets for payment. The receiver's entitlement to fees is not based on the premise that the costs are part of the debt secured, but on the premise that the receiver has liquidated a debt on behalf of the debtor pursuant to an appointment that the debtor contracted for at the time the loan was granted. If the debtor has executed several forms of security whereunder one of them contains a provision that the receiver's fees are to be added to the debt, the court will package a single scheme of security so as to entitle the security holder to recover the receiver's fees.[104]

The receiver's remuneration in a private appointment is generally negotiated with the holder irrespective of whether there is a deficiency after realization. The receiver's remuneration must be reasonable in all the circumstances of the particular case. The debtor and any guarantors may challenge the reasonableness of that remuneration in an action for an accounting and assessment of fees.

Unlike a court receivership where the receiver must assess or tax its remuneration, there is, apart from special legislation, no direct judicial mechanism to bring the reasonableness of the receiver's remuneration, including the costs of the solicitor, into question. A private receivership, such as that conducted under a mortgage, is a form of self-help remedy without judicial control. Thus, the debtor, subordinate secured creditors, execution creditors and guarantors must pursue individual remedies. But a receivership governed by *Personal Property Security Act* legislation gives all interested persons a right to apply to the court for a variety of relief, including the assessment of costs.

There are a number of avenues open to challenge the reasonableness of a private receiver's remuneration. Such avenues depend upon the nature of the receivership and the legislation that may govern it. If the receivership is governed under Part XI of the *Bankruptcy and Insolvency Act*,[105] then any interested person may apply to the court within six months after the end of the receivership for an order requiring the receiver to submit the statement of accounts to the court for

104 *Harry D. Shields Ltd. v. Bank of Montreal* (1992), 7 O.R. (3d) 57 at pp. 90 ff., 8 B.L.R. (2d) 169 (Gen. Div.).

105 Subsection 248(2).

review, including its fees and charges. If the receivership is governed under the *Personal Property Security Act*,[106] then any interested person may apply to the court to approve the accounts and fix the remuneration of the receiver. If the receivership is not governed by any specific legislation which gives the debtor and any creditor the right to apply to the court, the debtor, execution creditors and the debtor's trustee in bankruptcy may commence an action for an accounting. If the debtor is bankrupt, the trustee in bankruptcy may have the right to challenge the receiver's remuneration as a reviewable transaction pursuant to the *Bankruptcy and Insolvency Act*.[107] If the solicitor's bill of costs to the receiver is unreasonable, the *Solicitors Act*[108] gives the debtor the right to have the account assessed.

A guarantor may defend a security holder's action for recovery of the deficiency pursuant to the terms of his or her guarantee on the basis that the receiver's remuneration is excessive.[109]

(c) Quantum of Remuneration

There is no statutory guideline controlling the quantum of fees in a receivership as there is with a licensed trustee under the *Bankruptcy and Insolvency Act*.[110] Even with an interim receivership under the *Bankruptcy and Insolvency Act*, there are no guidelines to govern the manner in which the interim receiver's services are to be remunerated. As a result, the fees are to be assessed or taxed on the general principles of taxation.[111] Such principles include "the work done by the trustee [interim receiver]; the responsibility imposed on the trustee [interim receiver]; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained".[112] In assessing a receiver's fees, the court is required to put a fair value on the receiver's efforts without regard to the realization and distribution to the creditors.[113]

There are two techniques employed in assessing the reasonableness of the receiver's remuneration. The first technique is that the quantum of remuneration should be a percentage of the proceeds of realization and the second is that the remuneration should be assessed on a basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. Often, both techniques are employed to arrive at a fair recompense.

---

106 Ontario *PPSA*, subsection 60(2)(c).

107 Section 100.

108 R.S.O. 1990, c. S.15 [am. 1997, c. 12, section 81].

109 See *Belyea et al. v. Fed. Bus. Dev. Bank* (1983), 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244, 116 A.P.R. 248 (C.A.).

110 See subsection 39(2), under which the trustee can claim a minimum sum of seven and one-half percent as remuneration out of the proceeds of realization after the claims of the secured creditors have been satisfied.

111 *Re Hoskinson* (1975), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

112 *Re West Toronto Stereo Centre Ltd.* (1975), 19 C.B.R. (N.S.) 306 (Ont. S.C.).

113 *Genelcan Realty Ltd. v. Wiseman* (1987), 65 C.B.R. (N.S.) 108, 17 C.P.C. (2d) 97 at p. 102 (Ont. Assess. O.).

The leading case in this area is *Belyea et al. v. Federal Business Development Bank*.[114] Here, the bank sued the guarantors for a deficiency balance outstanding under a guarantee for the debts of the primary debtor. The bank invoked a private appointment and subsequently sold the assets for $36,566. The receiver charged a fee of $11,730 which was challenged by the guarantors as being unreasonable. There was no evidence that the receivership was complex. In fact, the officers of the debtor corporation assisted the receiver in disposing of the assets. The New Brunswick Court of Appeal concluded that the receiver's fee was unreasonable in view of the amount realized and reduced it to the sum of $6,000. In coming to this conclusion, Stratton J.A. stated initially:[115]

> There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.[116]

With respect to the percentage of receipts approach, the court may look to the rate afforded to a trustee in bankruptcy as a guideline. In a bankruptcy, the trustee's remuneration of seven and one-half percent of receipts after payment to secured creditors can be varied by the court depending upon the time involved and the complexity of the estate. In practice, the trustee must establish why it is entitled to an increased fee and in doing so, the trustee employs the general principles referred to above. In receiverships, the seven and one-half percent rule appears to be high especially where receipts are easily generated. In older case law, it has been held that if the receiver had not encountered exceptional difficulties during the administration, the receiver was entitled to a commission of five percent of the funds coming into its hands.[117]

However, even five percent may be too great, having regard to the nature of the receivership. In *Ibar Developments Ltd. v. Mount Citadel Ltd.; Mount Citadel*

---

114 See above, note 109.

115 See above, note 109.

116 Above, note 109, at p. 246 (C.B.R.). Followed in *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (3d) 315, 78 C.B.R. (N.S.) 85 (C.A.), allowing an appeal in part from (1988), 22 B.C.L.R. (2d) 316 (S.C.); for related proceedings see *Bank of Montreal v. Nican Trading Co.* (1988), 68 C.B.R. (N.S.) 309 (B.C. C.A.); and *Olympic Foods (Thunder Bay) v. 539618 Ont. Inc.* (1987), 65 C.B.R. (N.S.) 143, 22 C.P.C. (2d) 195 (Ont. Reg.), application to vary refused (1987), 65 C.B.R. (N.S.) 285, affirmed (1988), 68 C.B.R. (N.S.) 320n (Ont. S.C.); *Olympic Foods (Thunder Bay) v. 539618 Ont. Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. S.C.), second taxation: *Bolands Ltd. v. 052897 N.B. Ltd.* (1994), 144 N.B.R. (2d) 9, 368 A.P.R. 9 (Q.B.).

117 See *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.); *Indust Dev. Bank v. Garden Tractor & Equip. Co.*, [1951] O.W.N. 47 (S.C.).

Ltd. v. Ibar Developments Ltd.,[118] the court concluded that the receiver's claim for remuneration on a five percent basis was too high. Instead, the court awarded a sum based on *quantum meruit*, having regard to the time, trouble and degree of responsibility involved. In a mortgage receivership, the receipts may be more easily generated than in a receivership of a manufacturing plant. The ease of collection including the frequency and size of payments should affect the amount of remuneration. In a mechanics' or construction lien receivership, a receiver's remuneration is fixed at seven and one-half per cent of the gross recovery except in extraordinary cases.[119]

The difficulty in imposing a fixed percentage rate as the sole criterion for remuneration is that it disregards other factors relating to the nature of the receivership. For example, as in the *Ibar Developments* case, the receiver's remuneration on a percentage basis was found to be excessive. Moreover, a fixed rate of commission does not reflect the time spent nor the difficulties encountered by the receiver. The fixed rate rewards the receiver if the assets generate a regular income and the assets are sold quickly. However, the fixed rate does not consider, for example, that the debtor's operation may generate small amounts of money, and that the fulfilling of the receiver's responsibilities does not bear any relationship to the income and does not reflect the time involved in creating an accounting and business record system in order to enhance a higher sale price.[120] Insofar as the receiver's responsibilities are concerned, the fixed rate does not take into account the receiver's initial responsibilities upon being appointed. The receiver is required to account and report more frequently if Part XI of the *Bankruptcy and Insolvency Act* applies. The receiver is required to marshall all the assets and identify the problems associated with the receivership. A fixed rate does not compensate the receiver for this general and preliminary investigation nor does it compensate the receiver for replying and responding to inquiries from creditors and claimants, managing the assets until sale, and completing reports. The fixed rate may be entirely inappropriate if these other factors are not taken into account.

As a result, the courts commonly evaluate the receiver's remuneration on a fixed rate in conjunction with a *quantum meruit* basis.[121] In considering the

---

118 (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.), since followed in *Peat Marwick Ltd. v. Farmstart et al.* (1983), 30 Sask. R. 31, 51 C.B.R. (N.S.) 127, [1984] 1 W.W.R. 665 (Q.B.), where the receiver was appointed by a mortgagee to manage a large apartment building. In turn, the receiver appointed an agent to collect the rents and to some extent there was duplication of work.

119 *Lando & Partners Ltd. v. Bank of Nova Scotia* (1986), 17 C.L.R. 184 (Ont. S.C.).

120 *Genelcan Realty Ltd. v. Wiseman*, above, note 113; *Alta. Treasury Branches v. Sluco Energy Management Systems Ltd.* (1989), 68 Alta. L.R. (2d) 180, 75 C.B.R. (N.S.) 308, [1989] 6 W.W.R. 66 (Master), where the court reduced the receiver's fees and disbursements in a receivership which was not complicated, where the principal of the debtor assisted throughout in the realization, where the amount realized was not significant and where the receiver had given an estimate of fees before starting.

121 Except in the case of a mortgage receivership where the industry usually charges on a percentage basis, there appears to be a swing in favour of the *quantum meruit* approach: *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 49 Alta. L.R. (2d) 93 (C.A.); *Master Design Jewellery Ltd. v. 288230 Alberta Ltd. (Receiver of)* (1990), 104 A.R. 64, 78 C.B.R. (N.S.) 141 (Master).

factors to be applied when using a *quantum meruit* basis, Stratton J.A. in *Belyea v. Federal Business Development Bank* stated:[122]

> The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

The court therefore reviews the following criteria in setting a fee for the receivership:

(1) the nature, extent and value of the assets;
(2) the complications and difficulties encountered by the receiver;
(3) the degree of assistance provided by the debtor;
(4) the time spent by the receiver;
(5) the receiver's knowledge, experience and skill;
(6) the diligence and thoroughness displayed by the receiver;
(7) the responsibilities assumed;
(8) the results of the receiver's efforts; and
(9) the cost of comparable services.

While the above criteria set out most, if not all, of the considerations that ought to be employed in determining a receiver's remuneration, it is clear that previous case law stressed only some of these criteria and not others. Creditors often challenge the receiver's remuneration. They challenge the efficiency of services alleging that the amount claimed bears little resemblance to the amount realized, that the staff in the receiver's office duplicated their efforts, that their hourly rates were too high and that the fees included specific charges by clerical and secretarial staff.

With respect to time spent, the court should not necessarily penalize a receiver who expends considerable time in administering the estate, although recovery may be small.[123] When the receiver is appointed, the receiver frequently finds the debtor's business affairs unorganized and somewhat chaotic. The receiver may have to spend considerable time organizing the affairs in order to

---

122 Above, note 109, at p. 247 (C.B.R.). Followed in *Arnold v. Rockwood* (1989), 93 N.S.R. (2d) 14, 242 A.P.R. 14, 75 C.B.R. (N.S.) 316 (headnote only) (T.D.); *Bank of Montreal v. Nican Trading Co.* above, note 116; *Chartrand v. De la Ronde* (1997), 122 Man. R. (2d) 241, 46 C.B.R. (3d) 120, [1997] 8 W.W.R. 605 (Master), additional reasons relating to the costs of the hearing (1997), 122 Man. R. (2d) 251, 48 C.B.R. (3d) 182, [1997] 9 W.W.R. 35 (Master).

See *Bolands Ltd. v. 052897 N.B. Ltd.*, above, note 116, where the court reduced the receiver's fees from $21,704 to $7,000 on the basis that there was nothing unusual about the receivership.

See *Del Grande v. McCleery* (1998), 2 C.B.R. (4th) 284 (Ont. Gen. Div.) where the court fixed the receiver's fees virtually in full. In this case, the court also considered the fact that the receiver took the appointment in the midst of bitter litigation rather than one acting in the orderly liquidation of a business, and then carried on the business for the benefit of the shareholders and the franchisees.

See *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.*, above, note 91, where the receiver's fees were reduced on several grounds.

123 *Fed. Bus. Dev. Bank v. Belyea et al.* (1982), 38 N.B.R. (2d) 162, 40 C.B.R. (N.S.) 157 (Q.B.) (trial decision). This point was not specifically dealt with in the appeal.

be in a position to administer the receivership properly. Such time may not be productive from a financial point of view, but may be required in order for the receiver to fulfill its duty to account to the debtor and other interested persons and may be necessary for the preservation and realization of the assets. On the other hand, the receiver must not permit itself to become involved in every aspect of the business where that will serve no useful purpose.

The receiver's efforts in maximizing the realization may not be successful and the receiver may not produce the highest dollar. The receiver should not necessarily be penalized where, with the benefit of hindsight, the actions did not yield the greatest realization. Nor should the court penalize the receiver for taking steps to preserve the property for sale, if the sale price turns out to be unproductive. In *Walter E. Heller, Canada Ltd. v. Sea Queen of Canada Ltd.*,[124] the trustee, on an application by a receiver to pass accounts, criticized the method of realization. There, the trustee contended that the court-appointed receiver should not be compensated for part of the account as a result of not selling the debtor's business immediately. Although there was no finding of fraud, negligence or mismanagement, the court found that perhaps more money could have been realized had the business assets been sold earlier or had the receiver not carried on the business at all. In reviewing the receiver's remuneration, the court decided that where the receiver carries on a business for a number of months, and in this case it was six months, a percentage of the receipts and disbursements is not a fair calculation. The court held that the "time spent times an hourly rate is probably the fairest method, but even that cannot always be accurate". The court must look "at the number of hours in relation to what was done and the length of time involved". There should be some correlation of the costs to the benefits derived from the receivership[125] although that may not be possible if the receiver is required to spend considerable time in administering the estate. On a *quantum meruit* approach, the court does not penalize the receiver in taking steps that are unproductive, but are necessary for the preservation and sale of the assets, as compared to the cost/benefit approach.

Similarly, in *Ontario Development Corp. v. I.C. Suatac Construction Ltd.*,[126] it was demonstrated that, had the receiver completed certain construction contracts, there might have been a small profit or at least the losses would have been minimized. However, the court held that the receiver was justified in not risking a greater loss.

While the time spent may not have any correlation to the results obtained, the receiver may nevertheless be able to recover the hourly rates of its staff where such staff are chartered accountants. In *Prairie Palace Motel Ltd. v. Carlson;*

---

124 (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.), reheard and affirmed (1976), 21 C.B.R. (N.S.) 272 (Ont. S.C.).

125 *Canadian Imperial Bank of Commerce v. Acchione Construction Co.* (1989), 36 C.L.R. 144 (Ont. S.C.), following *Re Hoskinson*, above, note 111, where the court dealt with the cost/benefit aspect of the services rendered by a trustee in bankruptcy. In *Continental Bank of Canada (Lloyds Bank Canada) v. Snow* (1987), 77 N.S.R. (2d) 208, 191 A.P.R. 208 (T.D.), the court was very critical of the system in cases of small loans where the receiver's expenses exceeded the amount of realization.

126 (1978), 26 C.B.R. (N.S.) 55 (Ont. S.C.).

Eston Dodge-Chrysler Ltd. v. Carlson et al.; Carlson et al. v. Big Bud Tractor of Canada Ltd.,[127] the court rejected the argument that a receiver's fees should be restricted to only five percent of the assets and allowed fees at "the going rate" that the receiver, as a chartered accountant, would charge all of its clients.[128]

Although the receiver can charge the usual professional accounting rates, the receiver may not be able to pass on amounts for secretarial and clerical staff as part of the professional services. Such non-professional charges are usually part of the receiver's overhead and ought not to be included in the account of professional services.[129] On the other hand, there is no principle of law that requires receivers to adhere to the same billing format as lawyers. The two professions are different in that accountants use more support staff than lawyers. Therefore, the receiver should be able to charge for secretarial and support staff separately.[130] To reconcile both positions, the court must carefully scrutinize the receiver's accounts for duplication of services and charges by the receiver and staff. The court must satisfy itself that the services were reasonably necessary having regard to the amounts involved for instances where the receiver retains agents, and shows such accounts as disbursements instead of part of the overhead. In short, subject to duplication, the receiver should be able to charge for support staff.[131]

If the receiver does not employ appropriate personnel to manage the debtor's affairs where their expertise is necessary, or does not manage the business properly, the court will reduce the receiver's fees.[132]

5. DISCHARGE OF RECEIVER AND MANAGER

(a) Grounds

Once the goals of the receivership have been achieved, the appointment of the receiver should be terminated. In addition, the appointment of the receiver may be terminated where there is a conflict of interest. A receiver ought not to continue the appointment if there is any apparent conflict of interest. For example, a receiver who accepts an appointment as trustee in bankruptcy or as trustee under a proposal pursuant to the *Bankruptcy and Insolvency Act*, or *vice versa*.

---

127 (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.); *Northland Bank v. G.I.C. Industries Ltd.* (1986), 45 Alta. L.R. (2d) 70, 60 C.B.R. (N.S.) 217, [1986] 4 W.W.R. 482 (Master).

128 See also *Peat Marwick Ltd. v. Farmstart et al.*, above, note 118, where the court obviously compared both techniques in determining the proper remuneration.

129 *Peat Marwick Ltd. v. Farmstart et al.*, above, note 118; *Chartrand v. De la Ronde*, above, note 122. The propriety of such charges was questioned, but not resolved in *Columbia Trust Co. v. Coopers & Lybrand Ltd.*, above, note 121.

130 *Peat Marwick Ltd. v. Farmstart et al.*, above, note 118.

131 *Northland Bank v. G.I.C. Industries Ltd.*, above, note 127; *Olympia Foods (Thunder Bay) Ltd. v. 539618 Ont. Inc.*, above, note 116; *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (3d) 315, 78 C.B.R. (N.S.) 85 (C.A.) allowing an appeal in part from (1988), 22 B.C.L.R. (2d) 316 (S.C.). For related proceedings, see *Bank of Montreal v. Nican Trading Co.* (1988), 68 C.B.R. (N.S.) 309 (B.C. C.A.).

132 *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.).

KERR

on the Law and Practice as to

RECEIVERS AND ADMINISTRATORS

SEVENTEENTH EDITION

BY

Sir Raymond Walton, M.A., B.C.L.,
Lately one of Her Majesty's Justices
and a Bencher of Lincoln's Inn

Supervising Editor

Muir Hunter, M.A.
One of Her Majesty's Counsel
and a Bencher of Gray's Inn

with Specialised Chapters on

Taxation Liabilities of Receivers and Administrators

Andrew Thornhill, B.A.
One of Her Majesty's Counsel,
of the Middle Temple, Barrister

The Receiver in Scotland

David A. Bennett, M.A., LL.B. (EDIN.), W.S.
Solicitor, Edinburgh

LONDON
SWEET & MAXWELL
1989

It seems that, if a receiver is directed to pay to a successful litigant costs of proceedings to which the receiver is a party, such costs will be payable in priority to his own claim for costs, charges, and expenses.[31] If, with leave of the court, a liquidator or the company brings, or defends, proceedings for the benefit of the debenture holders, the costs of such proceedings will have priority over the claims of the debenture holders[32]: but where a proceeding is brought by the liquidator of a company on an indemnity from the receiver, the liability to the liquidator for costs paid by him will, in default of order to the contrary, have no precedence over other liabilities of the receiver.

Where the court gives a receiver authority to advance money for the benefit of the estate of which he is receiver, interest at 5 per cent. was formerly allowed[33] on the advance; but this is not a fixed rule, and a lower rate may be fixed: he is given a charge on the assets for that sum and interest. If a receiver advances money without such previous authority, he is entitled only to an indemnity out of the assets.[34]

A receiver has not such a vested right to the collection of money payable in respect of the estate over which he is receiver as to be entitled to prevent such money from being paid into court without passing through his hands, where poundage may be saved by a direct payment into court.[35]

Extraordinary expenses. A receiver may be granted allowances, beyond his salary, for any extraordinary trouble or expense he may have been put to in the performance of his duties,[36] or in bringing actions, or in defending legal proceedings which have been brought against him,[37] even though defended without leave,[38] though leave should always be obtained as soon as the action against the receiver is commenced.[39] Where, for example, an adverse application had been made against a receiver by a party to the cause, and had been refused with costs, the applicant being wholly unable to pay those costs, it was held that the receiver was entitled to be indemnified, and to have his costs as between solicitor and client out of a fund in hand, although it belonged to incumbrancers.[40]

Again, where one of two partners in a business of agricultural implement makers, being the defendant in an action for dissolution of the partnership, had been appointed receiver and manager of the business without salary, he was allowed in his accounts £2 a week, as wages,

[31] As is the case with a liquidator: *Re Pacific Coast Syndicate* [1913] 2 Ch. 26.
[32] See *Re Wrexham, Mold and Connah's Quay Co.* [1900] 1 Ch. 261.
[33] *Ex p. Izard* (1883) 23 Ch.D. 75.
[34] *Ex p. Izard* (1883) 23 Ch.D. 75.
[35] *Haigh* v. *Grattan* (1839) 1 Beav. 201.
[36] *Potts* v. *Leighton* (1808) 15 Ves. 273: *Harris* v. *Sleep* [1897] 2 Ch. 80.
[37] *Bristowe* v. *Needham* (1847) 2 Ph. 190; *Re W.C. Horne & Sons Ltd.* [1906] 1 Ch. 271. Distinguish *Re Dunn* [1904] 1 Ch. 648, *infra*.
[38] *Bristowe* v. *Needham*, *supra*: the defence succeeded.
[39] *Anon.* (1801) 6 Ves. 287.
[40] *Courand* v. *Hanmer* (1846) 9 Beav. 3. Distinguish *Re Dunn* [1904] 1 Ch. 648, p. 236, *infra*.

for a period of 18 months during which he had worked as a common workman in the business of which he was receiver. The Court of Appeal, however, pointed out that, in not asking for the wages at the time of his appointment, he had committed a technical irregularity, and had run a great risk of not getting any remuneration for his extraordinary services.[41] The costs of litigation undertaken, with the permission of the court, to preserve the assets are part of the receiver's costs of administration, and ought to be included in his accounts.[42]

If any extraordinary expenses have been incurred by the receiver without the approbation of the court,[43] allowances for them will not generally be sanctioned, unless the estate has been benefited thereby.[44] Accordingly, where a receiver, without the leave of the court, defended an action arising out of a distress for rent made by him, and compromised it on the terms of the plaintiff abandoning it and each party bearing his own costs, he was not allowed his costs.[45] Nor was he allowed his costs of proceedings improperly taken and abandoned, although he acted bona fide and succeeded in subsequent proceedings.[46]

A receiver, appointed and acting in proceedings for the administration of an estate, is not entitled to indemnity in respect of the costs of defending a purely personal action against him, having no relation to the estate, except so far as the acts complained of were done by him while acting as an officer of the court: for no benefit to the estate can result from his defending such an action.[47] Nor is he entitled to litigate for the profit of his receivership; his only interest is in his remuneration.[48]

The receiver of an estate is not entitled to be reimbursed the expenses of journeys to and residence in a foreign country, for the purpose of prosecuting proceedings before the tribunals of that country for the recovery of property belonging to the estate, unless he has the express sanction and authority of the court for such journeys and residence[49]; though if such proceedings are successful, and it appears that the success has been due to the presence of the receiver, the court may consider it inequitable for the parties to take the benefit of the receiver's exertions, without defraying his expenses.[50] The fact that some of the parties interested in the estate may have given the receiver authority furnishes no ground for the allowance by the court of his expenses out of the estate.[51]

[41] *Harris* v. *Sleep* [1897] 2 Ch. 80 at pp. 84, 85.
[42] *Re W.C. Horne & Sons Ltd.* [1906] 1 Ch. 271; these costs had been omitted from the receiver's accounts, and the solicitor was granted a charging order.
[43] *Harris* v. *Sleep*, *supra*; *Re Ormsby* (1809) 1 Ba. & Be. 189; *Ex p. Izard* (1883) 23 Ch.D. 75. As to allowances to a receiver and manager in respect of liabilities incurred by him, see pp. 223 *et seq.*, *ante*.
[44] *Bristowe* v. *Needham* (1847) 2 Ph. 190; *Malcolm* v. *O'Callaghan* (1837) 3 My. & C. 52; and see *Viola* v. *Anglo-American Cold Storage Co.* [1912] 2 Ch. 305 at p. 311.
[45] *Swaby* v. *Dickon* (1833) 5 Sim. 629.
[46] *Re Montgomery* (1828) 1 Moll. 419.
[47] *Re Dunn* [1904] 1 Ch. 648, 655, 657.
[48] *Ex p. Cooper* (1887) 6 Ch.D. 255.
[49] *Malcolm* v. *O'Callaghan* (1837) 3 My. & C. 52.
[50] *Malcolm* v. *O'Callaghan* (1837) 3 My. & C. 52 at p. 58.
[51] *Ibid.* at p. 61.

If the property involved is small, the court may appoint a receiver without remuneration.[52]

If a trustee,[53] or party interested, asks leave to propose himself as receiver, he will usually be required, if appointed, to act without salary.[54]

Where a receiver in an action is served with a proceeding in it, which makes no personal charge against him, he should not appear, and will get no costs of appearance if he does.[55] In a case under the old practice, in which a receiver had incurred costs which the parties had long neglected to provide for, he was allowed to petition for the payment of them.[56]

If a receiver suffers any costs to accrue which ought to have been prevented, he may have to pay them out of his own pocket.[57]

The costs of drawing out a scheme of an estate over which a receiver has been appointed, and of the holdings of the tenants, are chargeable, if at all, as part of the receiver's costs, and not of the solicitor's; but no allowance will usually be made to the receiver for such an item where he is paid by a percentage, though it may be necessary for the due performance of his duties.[58]

The receiver must obey the terms of orders made in the suit: thus where a receiver was directed by the order appointing him to make a specified payment to a party to the suit, and without leave he paid the money to judgment creditors of that party, pursuant to a garnishee order, the creditors were ordered, on motion in the suit by the party aggrieved, to repay the money so paid to them, and a direction was also given that, in default of such repayment, the amount should be disallowed to the receiver on the passing of his account; and the receiver, as well as the creditors, was held liable to pay the costs of the motion.[59]

In a case where the receiver's default in bringing in his accounts on the appointed days was known to the parties, and the accounts had been passed and poundage allowed without objection, no loss having been sustained by the receiver's fault, and no balance being due from him, the court would not afterwards listen to an application to strike out his allowance of poundage and costs at the instance of the parties who had the benefit of his services[60]; but the amount of the allowance made to a receiver may be reconsidered, where, though an objection was originally made to it, the particular circumstances of the case and the nature

[52] *Marr* v. *Littlewood* (1837) 2 My. & C. 458.
[53] *Sykes* v. *Hastings* (1805) 11 Ves. 363; *Pilkington* v. *Baker* (1876) 24 W.R. 234; *ante*, p. 105.
[54] *Ante*, p. 105.
[55] *Herman* v. *Dunbar* (1857) 23 Beav. 312. In *General Share Co.* v. *Wetley Brick Co.* (1882) 20 Ch.D. 260, 267, an applicant who had improperly served the receiver was ordered to pay his costs of appearance, but the circumstances were peculiar.
[56] *Ireland* v. *Eade* (1844) 7 Beav. 55: application would now be by summons in the action.
[57] *Cook* v. *Sharman* (1844) 8 Ir.Eq.R. 515.
[58] See *Re Catlin* (1854) 18 Beav. 511.
[59] *De Winton* v. *Mayor, etc., of Brecon* (1859) 28 Beav. 200.
[60] *Ward* v. *Swift* (1848) 8 Hare 139.

of the items were not taken into consideration.[61] If a receiver is guilty of a breach of duty, he does not necessarily, as is the case with agents,[62] forfeit his remuneration, but the court will usually deprive him of it if any improper profit has been made by him.

Balances in hand. A receiver who submits his accounts and pays his balances regularly, is not entitled on that ground to make interest for his own benefit, out of money which comes into his hands, in his character of receiver, during the intervals between the times of passing his accounts.[63]

Receiver of life interest. If it is necessary, not from the conduct of the parties, but owing to the condition of the estate, to have a receiver appointed over the life interest of a tenant for life of real estate, it is the right of the remainderman to have the ordinary expenses incidental to the appointment paid out of the life interest.[64]

[61] *Day* v. *Croft* (1840) 2 Beav. 488. See *Re Carton Ltd.* (1923) 39 T.L.R. 194.
[62] See *Andrews* v. *Ramsay* [1903] 2 K.B. 635; *Rhodes* v. *Macalister* (1923) 29 Com.Cas. 19.
[63] *Shaw* v. *Rhodes* (1827) 2 Russ. 539. See, too, *(Lord) Lonsdale* v. *Church* (1788) 3 Bro.C.C. 40.
[64] *Shore* v. *Shore* (1859) 4 Drew. 510.

BENNETT

ON

RECEIVERSHIPS

Second Edition

by

Frank Bennett

LL.M., LL.M.

Toronto, Canada

CARSWELL

BYRNE J.
1904
Feb. 10, 11.

In re DUNN.
BRINKLOW *v.* SINGLETON.

[1897 D. 1242.]

Receiver—Costs—Indemnity—Charges of Personal Fraud—Costs of defending Action—Benefit of Trust Estate.

Though a receiver while acting in the discharge of his duty is entitled to be indemnified against all loss, including the costs of actions brought against him as receiver, still the guiding principle laid down by *Walters* v. *Woodbridge*, (1878) 7 Ch. D. 504, is that the defence to the action was for the benefit of the trust estate.

Where an action had been brought against a receiver and administrator pendente lite charging him with personal fraud and misconduct while acting as administrator and receiver, but otherwise having no relation to the estate except so far that the acts complained of were acts done by him while acting as an officer of the Court:—

Held, that the receiver was not entitled to be indemnified against the costs incurred in successfully defending this action.

Courand v. *Hanmer*, (1846) 9 Beav. 3, and *Bristowe* v. *Needham*, (1847) 2 Ph. 190, distinguished.

ON the further consideration of this action for the administration of the estate of the late Alexander Douglas Dunn, the defendant Singleton, who had been administrator pendente lite and also the receiver in the action, claimed to be indemnified against certain costs incurred by him in defending an action brought against him as receiver under the following circumstances.

In April, 1897, A. D. Dunn died, having appointed a Mrs. Addison and a solicitor named Hinks executrix and executor of his will. Litigation then ensued in the Probate Division respecting his will, and in May, 1897, an order was made appointing Singleton administrator pendente lite. In July following, this action was commenced by a creditor, in which the usual order for administration of Dunn's estate was made. In April, 1898, probate was granted to the executors named in the will, and, in May following, the present action was stayed as against Singleton, he being no longer the representative of the estate, and he was appointed receiver in the action and

manager of Dunn's estate. In July, 1899, an order was made in an action of *Day* v. *Singleton* [1897 D. 2298] directing damages to be paid out of Dunn's estate to the plaintiff Day. (1) In July, 1902, Singleton was discharged from being receiver, his accounts were passed, and his remuneration and costs were paid.

In December, 1902, an action of *Addison* v. *Singleton* [1902 A. 1838] was commenced by Mrs. Addison, as personal representative of Dunn and a beneficiary under his will, against Singleton and the representatives of Hinks, the other executor, who was dead, charging Singleton with having fraudulently conspired with Hinks to bring about unnecessary litigation, and charging Singleton with gross personal fraud and negligence in the management of Dunn's estate, both as administrator pendente lite and as receiver, and claiming 6000*l.* damages.

In February, 1903, a summons was taken out in this action on behalf of Singleton, asking that he might be at liberty to defend the action of *Addison* v. *Singleton*, upon which no order was made except that the plaintiff in this action was to give notice to Singleton of the further consideration coming on, and he was to be at liberty to appear at his own risk.

The action of *Addison* v. *Singleton* was eventually dismissed with costs without being heard, as the plaintiff did not support her action when it came on in due course for trial. These costs had not been paid, and were not likely to be paid, owing to Mrs. Addison's want of means, and Singleton now claimed to be indemnified in respect of these costs out of Dunn's estate, which was insolvent.

W. M. Cann, for the plaintiff.

Rowden, K.C., and *Stokes*, for Singleton. A receiver as an officer of the Court is entitled to full indemnity from the trust estate against the consequences of all acts done by him in the discharge of his duty. The fact that he has passed his final account and been discharged makes no difference to a receiver's right to be indemnified: *Levy* v. *Davis*. (2) Singleton was attacked for acts alleged to have been done by him as receiver

(1) See [1899] 2 Ch. 320.

(2) [1900] W. N. 174.

BYRNE J. 1904 DUNN, *In re.* BRINKLOW v. SINGLETON.

and administrator pendente lite, and the Court will protect its officer and allow him the costs he cannot recover from the plaintiff attacking him: *Courand* v. *Hanmer* (1); this right of indemnity is a first charge on the fund in court: *Morison* v. *Morison* (2), in priority to the creditors in this action. The fact that Singleton had not first obtained the sanction of the Court does not disentitle him to his costs, since the defence proved successful: *Bristowe* v. *Needham*. (3) A receiver is in a similar position to that of a trustee; the Court is very strict in dealing with trustees, but it is the duty of the Court to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust: *Walters* v. *Woodbridge*. (4) The receiver must be indemnified out of the fund in court before anything can be distributed, either for the plaintiff's costs or for dividends: *Batten* v. *Wedgwood Coal and Iron Co.* (5); *Strapp* v. *Bull, Sons & Co.* (6) Singleton is therefore entitled to be paid his costs already incurred in defending the action, and also to have something set aside to indemnify him against the costs of an appeal or any other proceedings to set aside the judgment. [Kerr on Receivers, 4th ed. pp. 211 to 213, was also referred to.]

Levett, K.C., and *W. A. Peck*, for Dunn's executors. Singleton is not entitled to any payment in respect of, or indemnity against, the costs of the action of *Addison* v. *Singleton*. A receiver is not entitled to be indemnified against the costs of any action that is brought against him; he is entitled to be repaid any costs or expenses incurred in defending the trust estate, or in carrying out the directions of the Court, or in the honest discharge of his duties as receiver. The guiding principle in all these cases, as can be gathered from *Walters* v. *Woodbridge* (4), is that the defence has been for the benefit of the trust estate. In the present case no benefit could result to the trust estate from the defence of the action: the damages claimed, had they been recovered, would have gone to increase Dunn's estate. The action was not brought against Singleton

(1) 9 Beav. 3.
(2) (1855) 7 D. M. & G. 214.
(3) 2 Ph. 190.
(4) 7 Ch. D. 504, 510.
(5) (1884) 28 Ch. D. 317.
(6) [1895] 2 Ch. 1.

as receiver, but for personal misconduct in the management of this estate, and was started on the footing that he had been guilty of fraud as administrator pendente lite a year before he was appointed receiver. *D'Oechsner* v. *Scott* (1) shews that a receiver has no charge upon the capital for his costs. These costs were not "an outlay in strict line of his duty" towards his cestuis que trust: *Hosegood* v. *Pedler* (2), which, except that it was the case of an executor, is very like the present case.

[BYRNE J. *Walters* v. *Woodbridge* (3) does not appear to have been cited in that case.]

Singleton is not entitled to defend his character at the expense of the trust estate unless the defence is also for the benefit of the trust estate.

P. Wheeler, for a creditor having liberty to attend, supported this argument.

Rowden, K.C., in reply. In *Hosegood* v. *Pedler* (2) the executor had distributed the assets, and the action was no longer one it was his duty to defend. A cestui que trust is bound to save his trustee harmless as to all damages relating to the trust: *Balsh* v. *Hyham* (4), and per Lord Lindley in *Hardoon* v. *Belilios* (5); and a receiver is in the same position. This right to indemnity against all costs and expenses properly incurred in the execution of the trust is a first charge on all the trust property: *Stott* v. *Milne*. (6) If Singleton had not been receiver, this action could not have been brought against him. *Walters* v. *Woodbridge* (3) does not lay it down as an invariable rule that the only test is the benefit of the trust estate.

Cur. adv. vult.

Feb. 11. BYRNE J., after referring to the nature of the question raised, which he characterised as one of some importance, and stating the circumstances under which it was raised, and observing with reference to the dismissal of the action of *Addison* v. *Singleton* with costs that it would be wrong under

(1) (1857) 24 Beav. 239.
(2) (1896) 66 L. J. (Q.B.) 18.
(3) 7 Ch. D. 504.
(4) (1728) 2 P. Wms. 453.
(5) [1901] A. C. 118, 124.
(6) (1884) 25 Ch. D. 710, 715.

BYRNE J. 1904 DUNN, *In re.* BRIDGLOW v. SINGLETON.

the circumstances to take it that a single word of the charges there made had any foundation in fact, and that it was only necessary to say that the action had been dismissed with costs, continued:—

Mr. Singleton says that under the well-known rule that a receiver, or an officer of the Court such as an administrator pendente lite, is entitled to full indemnity from the trust estate for his acts done in that capacity, he ought now to be indemnified against the costs he has been put to in the action of *Addison* v. *Singleton*, the plaintiff in that action being impecunious, and it not being disputed that there is no chance of recovering anything from her by way of costs. I do not want to state in a concise form exactly and precisely the limits and extent of the nature of the indemnity to which receivers, officers of the Court, and trustees are entitled. It has been treated throughout, and I think reasonably so, on the footing that the nature of the indemnity given in the case of trustees is similar to that given by the Court to its officers and receivers. A general statement of the rule is given in Kerr on Receivers. After speaking, on p. 211 of the last edition, of a receiver being entitled out of the fund to "his costs, charges, and expenses properly incurred in the discharge of his ordinary duties, or in extraordinary services which have been sanctioned by the Court," the author goes on in a subsequent passage, at p. 213, to say: "A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties, or in bringing actions, or defending legal proceedings which have been brought against him. Where, for example, an adverse application had been made against a receiver by a party to the cause, which was refused with costs, the applicant being wholly unable to pay those costs, it was held that the receiver was entitled to be indemnified, and have his costs as between solicitor and client out of the fund in hand, although it belonged to incumbrancers. So also where a receiver defended an action at law, and the defence was completely successful, the extra expenses were allowed, although the receiver had acted without the leave of the Court." Then other instances are referred

to. I think of all the authorities that have been referred to, the one most useful for trying to get at the principle to be applied is *Walters* v. *Woodbridge*. (1) The report in the Court below is in 20 W. R. 520. In that case there had been an action by trustees and executors to obtain the sanction of the Court to a certain agreement for the sale of the testator's share in a brewery business. That agreement was approved. "In December, 1868, the suit of *Woodbridge* v. *Teesdale* was instituted by the next friend of certain infant grandchildren of the testator against the trustees and executors of his will. The bill contained various charges of gross misconduct on the part of Teesdale, with respect to the sale of the testator's share in the brewery business, and it prayed that it might be declared that the decree in *Woodbridge* v. *Woodbridge* was obtained by fraud, alleging that sufficient information had not been brought before the Court as to the value of the share sold. Teesdale applied in chambers in the above suit of *Walters* v. *Woodbridge* (which was instituted in 1863 for the purpose of administering the testator's estate) for leave to defend *Woodbridge* v. *Teesdale*." That was ordered to stand over, and leave was never given. So that there is a remarkable similarity so far between what took place in that action and in this with regard to an application having been made in due time, but not being granted. Then Lord Romilly said: "A trustee may be allowed to institute or defend a suit at the cost of the estate, where the suit has reference to the estate. Where, for instance, a claim is made upon the estate, the Court allows the trustee his cost of resisting such claim, though his personal conduct is not called in question; but the Court will not allow a trustee his costs of defending a suit solely for the purpose of repelling charges of personal misconduct. I regret that the Court cannot assist the trustee in cases where the plaintiff or the next friend is a man of straw, and I wish that there was some rule of the Court by which plaintiffs and next friends under circumstances like these might be required to give security for costs." He held he had no power to grant the application and refused it. Then that came on to be heard

(1) 7 Ch. D. 504.

BYRNE J. 1904 DUNN, *In re.* BRINKLOW *v.* SINGLETON.

before the Court of Appeal, and there some very valuable observations were made by Sir George Jessel as to the principle. He speaks of the circumstances, and then he says (1): "Then, as regards the merits, the suit of *Woodbridge* v. *Teesdale* was in substance a step towards impeaching a compromise which has been decided to be a compromise beneficial to the estate. It was in form a suit to impeach the decree sanctioning that compromise—a decree without which that compromise could not have been carried out, since it was requisite to bind persons under disability. A decree, therefore, setting aside the decree in *Woodbridge* v. *Woodbridge* would have gone a long way towards doing away with the compromise. It is true that the bill in *Woodbridge* v. *Teesdale* proceeds on the ground of personal fraud imputed to one of the trustees in obtaining the decree; but whatever the ground was on which the decree was impeached, the suit was defended by the trustee, not on his own behalf, but simply as trustee. It seems to me, therefore, to come within the principle that where an action is brought against a trustee in respect of the trust estate, whether it be an action of ejectment, trespass, or of any other description, and is defended by the trustee, not for his own benefit, but for the benefit of the trust estate, he is entitled to indemnity. Here the defence by the trustee was for the benefit of the trust estate; it is true that at the same time he defended his own character, but that was merely an incident. If he had died, and his co-trustees had defended the action, they must at the same time have defended him. The defence of his character, therefore, does not make the defence less a defence on behalf of the trust estate, and there is no reason why he should be left to bear his own costs." Then follows this passage, that was very much relied on by counsel for Mr. Singleton: "The principle that a trustee shall not make any profit from his office is rigidly enforced by the Court, and the principle that while he acts in the due discharge of his duty he is to be indemnified against all loss ought to be enforced with equal strictness." James L.J. was of the same opinion, and he said (2): "The Court is very strict in dealing with trustees, and it is the duty of the

(1) 7 Ch. D. 509. (2) 7 Ch. D. 510.

Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts, and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have part of the costs." Thesiger L.J. agreed with the other learned judges. Now I gather from what was stated by the Court of Appeal in this case that the principle they acted upon was, that a trustee or receiver is not entitled to be indemnified against every action that may be brought charging fraud against him personally, but only in cases where it is part of his defence as trustee or receiver in an action brought in respect of the estate that he is also defending the estate. I do not understand the Court of Appeal there to have differed with Lord Romilly, had Lord Romilly's view been the correct view of the facts of the case, namely, that he ought to treat it as though it were a separate action brought against the trustee on the ground of personal fraud or misconduct.

Now when I come to consider what was the nature of the action brought in the present case, I cannot avoid seeing that it was an action the defence of which could not have resulted in any benefit to the trust estate. It is true that the charges brought against Mr. Singleton were charges brought against him for acts done while he was administrator pendente lite and while he was receiver; but the charges against him are charges of gross personal fraud, and however successful he might have been, as he was, in the defence of the action, that could result, and has resulted, in no benefit to the estate. Again I want to say that I am not laying down any general rule that it must be shewn to be for the benefit of the estate, although, as at present advised, I do not quite see how any action, the result of which could not be for the benefit of the

BYRNE J. 1904 DUNN, *In re* BRINKLOW v. SINGLETON.

estate, would be allowed to be defended at the expense of the estate.

I have dealt at some length with *Walters* v. *Woodbridge* because it appears to me the most important case in question; but I will refer to a few others to shew that I have not overlooked them. The first is *Courand* v. *Hanmer*. In that case a clergyman created a number of incumbrances on his living. A bill was filed and a receiver was appointed, and then Hanmer presented a petition seeking to charge the receiver on account of various alleged neglects and defaults, but the Master of the Rolls dismissed it with costs. The argument is not given at length, but it is stated that Mr. Chandless was heard for an incumbrancer; and the Master of the Rolls said: "I have no doubt that the receiver must be indemnified, and have his costs as between solicitor and client out of the fund." That was a proceeding in an action with reference to accounts brought in by the receiver; but it appears to me it is analogous to a case where opposition has been made to a receiver by parties entitled to appear on passing his accounts seeking to disallow items in his account. In those circumstances I think it was natural that his costs should be allowed out of the estate as against the incumbrancer who took knowing that it would be subject to the proper costs to be incurred in an incumbrancer's suit, and the receiver was appointed as much for their benefit as for the benefit of the mortgagor. It appears to me, therefore, that that case is an authority for doing what is asked in the present case.

Another case referred to was *Bristowe* v. *Needham*. There the receiver did not obtain the sanction of the Court. He defended an action brought against him by a party to the cause. What the nature of the action was I do not know. It appears to have been an action brought against him at law by the defendant, and he successfully defended it. It was probably an action that in the ordinary course would have affected the estate, had the result been different. The Lord Chancellor said though that circumstance (that is, that he made the

(1) 7 Ch. D. 504. (2) 9 Beav. 3.

(3) 2 Ph. 190, 191.

defence without the sanction of the Court) would have deprived the receiver of his right to reimbursement if he had failed in his defence, "yet, as he had succeeded without putting the estate to the expense of an application to the Court, which he might have made for his own security, there was no reason why he should not stand in the same position as to indemnity, as if he had made that application." The decision there only is that, by not applying to the Court for leave, the receiver is not deprived of that indemnity which, if he had applied for leave and obtained it, he would in a proper case have been entitled to.

The case of *Hosegood* v. *Pedler* (1) before Charles J. that was cited I will not refer to at length, because there the circumstances were very different from those of the present case; but there are certain observations in it with regard to the right to indemnity being a right of indemnity while the office is continuing, and in respect of acts done in the course of that office, which, so far as they have any bearing on the present case, are hostile to the claim on the part of Mr. Singleton.

I of course regret very much that Mr. Singleton should suffer by reason of the impecuniosity of the person who has brought an action of such a nature against him; but, without going into the illustrations that were put, it is perfectly obvious that a line must be drawn somewhere, and that a receiver cannot be entitled to indemnity in respect of the costs of an action brought against him, if it is a purely personal action against him and not having relation to the estate, except so far as the acts complained of were acts done by him while acting as an officer of the Court. I think, therefore, that the present application by the late receiver for costs incurred and for indemnity against these costs out of this estate must be refused.

Solicitors: *Stanley J. Attenborough; Pownall & Co.; Crawford & Chester; A. F. V. Wild; Roberts & Wrightson.*

(1) 66 L. J. (Q.B.) 18.

W. C. D.