

THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

2021/CLE/gen/00232

Common Law and Equity Division

IN THE MATTER of the property comprised in Debenture Convertible into Common Shares dated the 11th day of May 2020, Recorded in Book 13434 at pages 276 to 293 and Supplemental Debenture dated the 21st day of May, A.D. 2020 recorded in Book 13475 at pages 291 to 294 respectively issued by Sun Island Transfers Ltd. (Borrower) in favour of Investar Securities Ltd. (as Lender).

AND IN THE MATTER of, inter alia, Sections 21 (1) (c) and 139 of the Companies Act, Section 26 the Conveyancing and Law of Property Act, Section 21 of the Supreme Court Act and Orders 30, 76 and 77 of the Rules of the Supreme Court

BETWEEN

INVESTAR SECURITIES LTD.

(Lender/Secured Creditor, pursuant to Debenture dated May 11, 2020 and Supplemental Debenture dated May 21, 2020)

Plaintiff

AND

SUN ISLAND TRANSFERS LTD.

(Borrower, pursuant to Debenture dated May 11, 2020 and Supplemental Debenture dated May 21, 2020)

Defendant

Before Hon. Mr. Justice Ian R. Winder

**Appearances: Alfred Sears QC with V. Moreno Hamilton for the Plaintiff
Courtney Pearce with Cheryl Cartwright for the Defendant
Oscar Johnson with Keith Major for the Central Bank of The Bahamas**

12, 19, 20 and 26 April 2021

DECISION

WINDER J.

On 26 April 2021 after having considered the written submissions of counsel for each of the parties and having heard their oral submissions, I dismissed the plaintiff's (Investar) application of the appointment of an Interim Receiver over the assets of the defendant (Sun Island) and refused the joinder application of the Central Bank of The Bahamas (the Central Bank). These are the promised reasons for my decision.

[1.] This action was commenced by Originating Summons filed 5 March 2021. The Originating Summons provides in part as follows:

'By this Summons, the Plaintiff claims against the Defendant and seeks an Order for the following relief under, inter alia, Section 21 (1) (c) and 139 of the Companies Act, Section 26 of the Conveyancing and Law of Property Act, Section 21 of the Supreme Court Act and Orders 30, 76 and 77 of the Rules of the Supreme Court:

1. An Order confirming the appointment of Mr. Philip Christopher Galanis, as Receiver-Manager to receive, manage and sell the secured premises, property and operations of the Defendant which are charged under the following security documents for and on behalf of the Plaintiff, the lender and secured creditor, namely
 - (a) The Debenture Convertible into Common Shares dated May 11, 2020 made between Sun Island Transfers Ltd. as Borrower and Investar Securities Ltd. as Lender...
 - (b) The Supplemental Debenture dated May 21, 2020 made between Sun Island Transfers Ltd. as Borrower and Investar Securities Ltd. as Lender...
2. An Order that the Receiver-Manager be added as signatory to each of the bank accounts of the Defendant, until such time as the Receiver-Manager is able to open and maintain bank accounts in his name as Receiver-Manager of the Defendant Company.
3. Payment of all moneys secured by the Debenture Convertible into Common Shares and the Supplemental Debenture;
4. Further or in the alternative that the said First Debenture and said Supplemental Debenture may both be enforced by sale of the premises and property secured by the said First Debenture and said Supplemental Debenture.
5. Order for delivery by the Defendant to the Receiver-Manager of possession of the secured assets.'

[2.] Investar has applied for the appointment of Philip Galanis, chartered accountant of HLB Galanis & Co (Galanis), as Interim Receiver and Manager of Sun Island. Investar relies on the affidavits of Ansel Watson, Galanis and Marion Bethel. Sun Island opposes Investar's application

to have Galanis appointed as Receiver-Manager. Their position is supported by the affidavit and supplemental affidavit of Barry Malcolm (Malcolm).

[3.] Sun Island, which trades as SunCash, was incorporated in 2013 and licensed by the Central Bank to conduct a money transmission business 'within and from within The Bahamas'. Sun Island is also licensed by the Securities Commission as a Financial and Corporate Services Provider. SunCash's services to the public include domestic money transfers between the islands of The Bahamas, particularly the remoter islands without a bank presence, international cross-border money transfers, and digital currency e-wallets.

[4.] Sun Island issued a Debenture and Supplemental debenture on 11 May 2020 and 21 May 2020 respectively, over its assets, in favor of Investar to secure advances made to Sun Island. The debentures are in fairly identical terms. Clauses 4, 5, 6, 16 and 17 of the Debentures provide:

"4. For the purposes of these presents an act of default shall include the passing of a resolution for or the making of an order for the winding-up of the Borrower and/or its operations whether voluntary (except for the purposes of reconstruction or amalgamation) or compulsory or the making of any composition or arrangement with or assignment for the benefit of the creditors of the Borrower or for the liquidation of the debts of the Borrower by composition or otherwise or the suffering of any execution or distress levied upon the goods of the Borrower or the failure or neglect of the Borrower to satisfy and discharge any final judgment against the Borrower recorded in a court of competent jurisdiction in the said Commonwealth for a period of Four (4) weeks after the filing of such judgment (subject to awaiting the result of any appeal against the same) if the Borrower ceases or threatens to cease to carry on its business operations or an act of bankruptcy on the part of the Borrower or the making of a receiving order against the Borrower.

5. Notwithstanding anything hereinbefore contained the Secured Sums Advances moneys sums and liabilities hereby secured shall become immediately due and payable and the security hereby created shall become enforceable if:

- (i) the Borrower fails to pay any money or to discharge any obligation or liability to the Lender on the due date;
- (ii) any petition is presented, or application made in respect of, or Order is made or any resolution passed, the liquidation, winding or dissolution of the Borrower, or for the appointment of a manager or receiver in respect of the Borrower other than for the purpose of solvent reconstruction or amalgamation first approved by the Lender provided that the Borrower shall have reasonable opportunity to have any such petition, application, Order or appointment of a manger or receiver is discharged;
- (iii) if the Borrower ceases or threatens to cease to carry on its business and/or operations or the major part thereof or (other than for the purpose of

solvent construction or amalgamation first approved by the Lender) sells or transfers the whole or major part (considered in relation to the Borrower as a whole) of its undertaking or property (except in the ordinary course of its business) assets whether by a single or series of transactions related or not; and (iv) if the Borrower does not duly and punctually comply with observe and perform or shall commit any breach of any of the provisions of this Debenture.

(v) Control of the Borrower is acquired by any person, company or group of connected persons not having control of the Borrower at the date of this Debenture (unless with the prior consent in writing of the Lender).”

6. The Lender may, in its discretion and with or without the consent of the Borrower or any guarantor or surety, in respect of the liabilities hereby secured or any part thereof give an extension of time, take the covenant of any purchaser of the equity of redemption of the said Property or any part thereof, or any security whatsoever from them or from any other person, for the assumption and payment of the whole or any part of the liabilities and sums hereby secured or for the due performance of any of the provisions hereof and any such action on the part of the Lender shall not release the Borrower from payment of the liabilities hereby secured or any part thereof or the performance of the said provisions or any of them; and the Lender may also, in its discretion, compound with or release the Borrower or any one claiming under it, or any other person liable for payment of the liabilities hereby secured, or surrender, release or abandon or omit to perfect or enforce any securities, remedies or proceedings which the Lender may now or hereafter hold, take or acquire, and may pay all monies received from the Borrower or others, or from securities upon such part of the liabilities hereby secured as the Lender may think best without prejudice to or in any way limiting or lessening the liability of the said Property or any other property hereby charged or of any surety or obligor or any other person liable for payment of the liabilities hereby secured; and the Lender shall incur no liability to any person by reason of anything aforesaid; any provision or liability aforesaid shall continue in full force as long as any such liabilities remain unpaid, but the Lender shall not be bound to exhaust its recourse or remedies against the said Property or any other property hereby charged or the Borrower or other parties or the securities it may hold before being entitled to payment from any guarantor or surety of the liabilities and sums hereby secured.

...

16. IT IS HEREBY EXPRESSLY AGREED AND DECLARED as follows:-

(1) Section 22 of The Conveyancing Law of Property Act shall not apply to this security but the statutory power of sale shall as between the Lender and a purchaser from the Lender shall be exercisable at any time after the execution of this security provided that the Lender shall not exercise the said power of sale until payment of the moneys liabilities and sums hereby secured have been demanded and the Borrower has made default for Twenty-one (21) days in paying the same but this proviso is for the protection of the Borrower only and shall not affect a purchaser or put him upon inquiry whether such default has been made.

17. At any time upon Thirty (30) days advance written notice (pursuant to the Notice of Intention to Convert Form attached herewith as Exhibit 2) to the Borrower (unless a lesser notice period is agreed otherwise in writing between the Parties), the Lender at

its sole discretion may exercise its option, subject to the written approvals of the Central Bank of the Bahamas and the Securities Commission of the Bahamas (hereinafter referred to as the "Regulators") to require the Borrower to convert the Advances and accrued interest or any part thereof under this Debenture into fully paid common shares in the Borrower at the conversion rate of B\$446.43 for One (1) common share up to a maximum of 3,290 (49%) of common shares and the proportionate indebtedness under the Debenture shall be satisfied and cancelled upon such conversion into common share.

...

[5.] On May 20, 2020, Investar exercised its options under Clause 17 of the Debenture to convert SunCash's indebtedness under the Debenture into 49% equity of SunCash. Investar's ability to convert the indebtedness under the Debenture into equity was subject to the approval of both the Central Bank and the Securities Commission.

[6.] Sun Island made the appropriate application to the Central Bank for Investar to become a shareholder. They say that notwithstanding earlier informal verbal indication from the Central Bank that Investar would be suitable, Central Bank subsequently, on August 7, 2020, denied the application on policy grounds. Central Bank not only denied the application for Investar's equity conversion, but imposed a deadline by which Sun Island must secure a new shareholding or face the cessation of its business. In its email of 25 January 2012, advising of the denial, Charles Littrell Inspector of the Central Bank, stated:

'We are however prepared to operate on the following basis:

- a) [Sun Island] provides the Central Bank with an executed contract for sale, with an acceptable purchaser, by 30 April; and
- b) The sale closes 30 June/1 July.
- c) Should [Sun Island] not be able to deliver on part (a) above, the Central Bank proposes to commence a transfer of [Sun Island]'s obligations to other licensed entities, with a close by 30 June.'

[7.] On 24 February 2021 Investar served a Crystallization Notice on Sun Island in relation to the Debenture and Supplemental Debenture giving notice of the grounds of default and converting the floating charge to a fixed charge over the property, premises and business assets of Sun Island. On 26 February 2021, Investar purported to appoint Galanis as their Receiver-Manager pursuant to the terms of the debentures. Notice of the appointment was not served on Sun Island but Investar sought to obtain an appointment by the Court.

[8.] Malcolm, in his affidavit of 16 April 2021, says that:

...

16. SunCash is not insolvent and is meeting all its payment obligations as they become due.

...

25. Investar purports to have appointed Mr. Galanis as Receiver on 26 February, 2021 by Appointment of Receiver... The alleged Appointment of Receiver purports to invoke Clauses 5, 6, and 16 of the Debenture or Supplemental Debenture give Investar the power to appoint a Receiver.

26. Neither SunCash, its Directors or Registered Office was ever provided notice of or served with the Appointment of Receiver dated February 26, 2021. SunCash's attorneys, Callenders & Co. further advise that as of their searches of the Companies Registry on March 23, 2021, there was no evidence of Notice of Appointment of a Receiver lodged with the Registrar of Companies on the files for Sun Island Transfers Limited maintained at the Companies Registry.

[9.] Notwithstanding their opposition to Galanis' appointment Sun Island says that they are willing to cooperate with him in providing information and documentation to assess the value of the business of Sun Island, as a going concern. This they say, would be done in an effort to find a purchaser for the shares.

[10.] The Central Bank has, in the interim, granted Sun Island an extension of time until 30 June 2021 to find and identify a new investor.

Summons for Joinder

[11.] The Central Bank has also applied to be joined as a party. The application, by summons, filed on 8 April 2021 seeks an Order:

'...pursuant to Order 15, rule 6 (2) (b) of the Rule of the Supreme Court, 1978 ("RSC") and/or the inherent jurisdiction of the Court for the following relief:

1. an Order directing that the Central Bank of The Bahamas (the "Applicant") be added as the Second Defendant to these proceedings and the record be amended accordingly on the following grounds:
 - a. the Applicant is an entity whose presence before the Court is necessary to ensure that certain of the matters in dispute in this cause or matter may be effectually and completely determined and adjudicated upon; and/or
 - b. the Applicant is an entity between whom and both the Plaintiff and the Defendant (together the "Parties") there exists a question or issues arising out of or relating to or connected with the relief or remedy claimed or which may be claimed by the Plaintiff which is just and convenient to be determined by this Honourable Court as between the Applicant and the Parties;...

The joinder application is supported by the affidavit of Rochelle Deleveaux-McKinney, filed on 20 April 2021.

[12.] The nub of the Central Bank's complaint is found at paragraph 5 of Mrs. Deleveaux-McKinney's affidavit which states:

5. I have read and considered the Originating Summons and I am of the view that the relief sought by the Plaintiff materially impacts and/or has the potential to materially impact the ability of [the Central Bank] to properly conduct its oversight responsibilities. Upon this reason, I verily believe that [the Central Bank] should be joined to the instant action as a necessary party who may be in a position to assist the Court in arriving at a determination of the Plaintiff's claims which are able to be given true effect.

Law and Analysis

[13.] Investar submitted and presented oral arguments that it was entitled to appoint Galanis as Receiver-Manager under clauses 5, 6 and 16 of the Debentures if Sun Island defaults. The acts of default they say are contained in clauses 4 and 5 of the Debentures. Investar also relied on Section 21(1)(c) and 26 of the Conveyancing and Law of Property Act and Sections 21 of the Supreme Court Act in support of their claim to an entitlement to appoint Galanis. They say that it is 'just and convenient' in the circumstances to do so. Sections 21(1)(c) and 26 of the CLPA provides:

21. (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) —

(a)...

(b)...

(c) a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof;

(d)...

...

26. (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver. ...

Section 21(1) of the Supreme Court Act provides:

- (1) The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.

Section 139 of the Companies Act which provides as follows:

139.(1) Where any person —

- (a) obtains an order for the appointment of a receiver of any of the property of a company;
- (b) who as a debenture holder becomes entitled to realise his security interest and appoints a receiver of any assets of a company pursuant to the instrument creating the debenture; or
- (c) appoints a receiver, pursuant to any Act, instrument or rule of law, of any of the property of a company or enters possession of any property of a company under the powers contained in any charge, he shall give, within ten days from the date of the order, appointment or entry into possession, notice thereof to the Registrar, who shall cause the same to be filed in the company's file at the Registry."

[14.] The learned authors of *Law of Insolvency*, 4th Edition, Sweet & Maxwell, London 2009, pages 422-423 state as follows:

"This jurisdiction must only be exercised in aid of some legal or equitable right but an order appointing a receiver in respect of a fixed or floating charge clearly falls within its ambit. The Court will not appoint a receiver if it would secure no legitimate advantage to the applicant, it would unfairly prefer one creditor to another or if the property is incapable of beneficial realization.

[O]rders have been made where there are arrears of principal or interest or the security is in jeopardy. A receiver may be appointed merely on the basis of arrears of interest, the principal not being due. A receiver may be appointed even if there has been no default in the payment of the principal or interest, and no other breach of contract by the company, if the security is seen to be in jeopardy. This was the situation in *London Pressed Hinge Co Ltd* where a receiver was appointed to protect the assets from execution by a judgment creditor. The jeopardy principle can also be seen operating in cases where companies, having granted a floating charge over their business and undertakings, then propose to dispose of the business and/or wind up. In either case the company will cease to carry on the business thus jeopardizing the security. Thus a receiver can be appointed under a floating charge on the undertaking, prior to a fixed repayment date, if the resolution is passed winding-up the company and its assets are transferred to a company formed to take them over"

[15.] In the celebrated case of *Aslatt v Corporation of Southampton (1880) 16 Ch D 143*, *Jessel MR* provides an old but nonetheless useful discussion on how the *just and convenient test* should be considered. He stated:

"...the words "just and convenient" did not mean that the Court was to grant an injunction simply because the Court thought it convenient: it meant that **the Court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles**; but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere. Now it has been said – and I think truly said – that, as a general rule, the Court only interferes

where there is a question as to property, I do not think that the interference of the Court is absolutely confined to that now; there may be cases on which the Court would interfere even when personal status is the only thing in question; but it is not necessary for me to decide that question at the present moment.” [emphasis added]

[16.] Investar contends that Sun Island is in default under the Debentures. They say that:

[1.]The Central Bank directive to secure a purchaser by 30 June 2021 is akin to the presentation of a winding up petition and ought to amount to a default under clause 5 of the Debentures thereby accelerating the payments due under facility;

[2.]Sun Island is in default under the terms of the Debenture as they have consistently, contrary to clause 5 of the Principal Debenture, always paid the amounts due under the facility in arrears; and,

[3.]Contrary to Clause 10(2) and 11(g) Sun Island has failed to provide Investar with inter alia requested business plans and management accounts. Further, contrary to clause 2(c)(xiii) Sun Island failed to advance the appointment of two directors nominated by Investar.

[17.] Counsel for Sun Island argued that there was no power under either of the Debentures to appoint Galanis. They also argue that it was not just and convenient to do so in the circumstances.

[18.] In response to Investar’s submissions as to their entitlement to appoint a receiver pursuant to clauses 5, 6 and 16 of the Debentures, Sun Island says that no such entitlement exists within any of the clauses. They say that nowhere in the Debentures does Investar ‘reserve the right to appoint a receiver or receiver-manager, or even an attorney, in the event of a default or otherwise, or for any reason whatsoever’. At the hearing, Counsel for Investar conceded that there was no power in the Debentures to appoint Galanis and relied on the provision of the law. It is therefore accepted that Investar must satisfy the Court in accordance with Section 21(1) of the Supreme Court Act, that it would be just and convenient in the circumstances for the appointment of Galanis.

[19.] Sun Island says that Investar has not satisfied this test for just and convenience and further they have not satisfied the evidentiary bar to have Galanis appointed. Sun Island asserts that the appointment of Galanis as Receiver-Manager would actually be a ‘detriment to [Sun Island’s] security and seriously endanger’ its value. They say that contrary to Investar’s assertions Section

139 of the Companies Act does not empower the Court or anyone to appoint a receiver. In fact, they say, it only identifies the obligations that Investar must comply with in the appointment of a receiver. Section 139 Companies Act is inapplicable in the circumstances, as Investar is not a debenture holder who is entitled to the realization of its security interests.

[20.] Sun Island denies that they are behind in their payments and says that no monies have become due. They say that where Sun Island was late in making payments, Investar would have extended the time for payment under the terms of the Debenture. Further, they say that at the date of the application Sun Island was in compliance with its obligations under the Debenture.

[21.] I accept Sun Island's submission.

[22.] The terms of the Debenture instrument clearly does not provide an agreed mechanism for the appointment of a Receiver by Investar over the assets of Sun Island. Mr Sears QC, for Investar, in accepting this fact during the course of his presentation, proposed in the alternative, an amendment of the Summons. The amendment would seek to have the Court make the appointment of Mr. Galanis. Whilst I would be prepared to grant Investar's amendment of the Summons to reflect an application to the Court for an appointment, I am not satisfied that such an appointment would be just and convenient, on an interlocutory basis, in the circumstances of this case, at this time.

[23.] Whilst it seems that some payments under the loan, in the past, were late in coming there was some forbearance on the part of Investar in those instances. It is accepted that the payments are up to date and, but for, the Central Bank's directive the issue would not have arisen. No formal demand had ever been levied for the payment of any outstanding sums under the Debenture.

[24.] The Central Bank directed Sun Island to find an acceptable replacement shareholder by 30 June 2021, under the threat of the cessation of Sun Island's business. Severe as the directive of the Central Bank may be, I am not satisfied that it represents an act of default under clause 4 of the Debentures. Sun Island has not ceased its business and whilst the Central Bank has threatened the cessation of Sun Island's business, it is not Sun Island which issued the threat.

[25.] The Central Bank has an issue with Investar as the proposed shareholder of Sun Island, and not Sun Island's business. The Central Bank says that Investar's involvement as a shareholder infringes their policy of excluding gaming related entities from the money transmission business. Contrary to Investar's suggestion, there is no allegation of any regulatory offence committed by Sun Island.

[26.] I am also not persuaded that there has been a failure to comply with the terms of the loan for provision of information to Investar by Sun Island. I accept Sun Island's responses to these complaints which could not, in my view, warrant the drastic remedy of the appointment of a receiver.

[27.] Likewise, I do not accept that, for the purposes of this interlocutory application, there has been an act of default to warrant the acceleration of the loan payments of Sun Island under clause 5 of the Debenture. On the evidence, there are fixed assets listed under the debenture which, albeit book values, nonetheless exceed the value of the outstanding debt. Whilst there is the possibility that Sun Island may no longer be a going concern, if they are unable to locate a shareholder prior to 30 June 2021, there is no evidence that these fixed assets will lose their value in that event.

[28.] In all the circumstances it is not just and convenient for the appointment of a receiver over the assets of Sun Island.

[29.] In respect of the Central Bank's application for joinder, I am not satisfied, having refused the interlocutory application for the appointment of a receiver, that there is any merit in its involvement in this action, at this stage. If the shares are acquired, or not, in advance of the deadline imposed, the concerns of the Central Bank that it may be unable to supervise Sun Island, falls away. The action will largely become an issue as between Sun Island and its Debenture Holder.

[30.] I will adjourn the substantive application for hearing on 5th July 2020 at 9:30am. It is hoped of course that Galanis and the other agents for the parties will be able to secure a new shareholder and the need for such a hearing will become unnecessary.

[31.] The Central Bank as well as the Securities Commission are welcome to attend and watch any further proceedings in the action, in the event it becomes necessary.

[32.] I will hear the parties as to costs by written submissions within 21 days.

Dated this 30th day of June, 2021

A handwritten signature in black ink, appearing to read 'I-R' with a stylized flourish.

Ian R. Winder
Justice