CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL No. 7 OF 1983

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.

BETWEEN	CROWN TRUST COMPANY SEAWAY TRUST COMPANY AND GREYMAC TRUST COMPANY	PLAINTIFFS
AND	CANADIAN ARAB FINANCIAL CORP. (trading as Kilderkin Investments Grand Cayman)	FIRST DEFENDANT & APPELLANT
	KILDERKIN INVESTMENTS LIMITED	SECOND DEFENDANT & APPELLANT
	WILLIAM PLAYER	THIRD DEFENDANT & RESPONDENT
	PARKWAY FOREST APTS. I LTD. ET AL	FOURTH DEFENDANT

Mr. Jonathan Sumption for the appellant, instructed by W.S. Walker & Co.

Mr. Nicholas Patten for the respondent, instructed by C.S. Gill & Co.

November 15, 16, 17, 18, 21, 22, 1983
& May 14, 1984

PRESIDENT:

This is an appeal against a decision of the learned Chief Justice whereby he ordered:

> "(i) That the Order of this Court dated 18th April 1983 appointing the Clarkson Company Limited as the Interim Receiver and Manager of Kilderkin Investments Limited within the jurisdiction of this Court be discharged.

"(ii) .....

(iii) Further that pursuant to Section 59 (3) of the Rules of Court, Messrs. W.S. Walker & Co. be removed from the record as attorneys for the Second Defendant herein, and that Messrs. C.S. Gill & Co. may be placed on the record in their place."

The appellant, Clarkson Company Ltd., was appointed Receiver and Manager of Kilderkin Investments Limited, by an Order of the Supreme Court of Ontario dated 15th February, 1983.

Kilderkin Investments Limited is the second defendant in C.I. Cause 132 in which the plaintiffs are alleging a fraudulent conspiracy against all defendants. The third defendant William Player is the sole director of Kilderkin Investments Limited.

The application resulting in the Order of the Chief Justice was made by William Player, the third defendant in C.I. Cause 132.

The appellant contends that the interest of Kilderkin Investments Limited would be better served if they were to defend C.I. Cause 132 on behalf of Kilderkin as the third defendant William Player, its sole director, is alleged to be involved in a fraud on his company.

In an ex parte application on 15th February, 1983, the Supreme Court of Ontario made an Order whereby the appellant, the Clarkson Company Limited was appointed Interim Receiver and Manager of Kilderkin Investments Limited. The Order was made in the following terms:

"Upon motion duly made this day on behalf of the plaintiffs, in the presence of counsel for the plaintiffs and upon reading the Writ of Summons herein, the Affidavit of and the exhibits thereto, and the consent of The Clarkson Company Limited filed, and upon hearing what was alleged by counsel for the plaintiffs:

1. It is ordered that, until the trial of this action or until further order of this Court, The Clarkson Company Limited be and is hereby appointed Interim Receiver and Manager of all the undertaking, business, affairs,

"assets and property of the defendant Kilderkin Investments Ltd. (collectively referred to hereinafter as the "Undertaking and Assets"), with power to manage the Undertaking and Assets and to carry on the business of the defendant Kilderkin Investments Ltd.

2. And it is further ordered that the defendant Kilderkin Investments Ltd., its directors, officers, employees and agents and all other parties having notice of this Order deliver up to the Interim Receiver and Manager or to such agent or agents as it may appoint, the Undertaking and Assets of the defendant Kilderkin Investments Ltd. and all books, accounts, securities, documents, papers, deeds, leases and records of every nature and kind whatsoever relating thereto.

3. And it is further ordered that the tenants of any properties with respect to which Kilderkin Investments Ltd. as of the date of this order, is in receipt of or entitled to the receipt of rents do attorn and pay their rents to the Interim Receiver and Manager.

4. And it is further ordered that no party shall terminate or interfere with the right of the Receiver and Manager to manage and collect incomes and rents from properties which at the time of the making of this Order the defendant Kilderkin Investments Ltd. has an obligation or right to manage or in respect of which the defendant Kilderkin Investments Ltd. has an obligation or right to collect incomes or rents without leave of this Court first being obtained.

5. And it is further ordered that the Interim Receiver and Manager be and it is hereby authorised to borrow money from time to time as it may consider necessary not to exceed, in aggregate, a principal amount of five Million Dollars ($5,000.000), for the purpose of protecting and preserving the Undertaking and Assets and carrying on the business of the defendant, Kilderkin Investments Ltd., and that as security therefor, the assets of the defendant, Kilderkin Investments Ltd. of every nature and kind do stand charged with payments of the monies so borrowed by the Receiver and Manager, together with interest thereon in priority to the claims of the plaintiffs and, if any, to the claims of the defendants but subject to the right of the Interim Receiver and Manager to be indemnified as such Interim Receiver and Manager out of the Undertaking and Assets in respect of its remuneration to be allowed by the court and its costs and expenses properly incurred. "

"6. And it is further ordered that the monies authorized to be borrowed under this Order shall be in the nature of a revolving credit and the Interim Receiver may pay off and re-borrow within the limits of the authority hereby conferred so long as the maximum amount owing in respect of such borrowing at any one time does not exceed the amount hereby authorized with interest.

7. And it is further ordered that the Interim Receiver and Manager be and is hereby empowered to enter into new leases for apartment units contained in lands which at the time of the making of this Order, the defendant has an obligation or right to manage or in respect of which the defendant Kilderkin Investments Ltd. an obligation or right to collect rents and that the Interim Receiver and Manager is hereby appointed attorney in fact to negotiate all cheques, remittances and drafts relating to the rents of such lands.

8. And it is further ordered that the Interim Receiver and Manager shall be at liberty to appoint an agent or agents and such assistants from time to time as the Receiver and Manager may consider necessary for the purpose of performing its duties hereunder.

9. And it is further ordered that the Interim Receiver and Manager be at liberty, out of the monies coming into its hands available for that purpose, to pay all expenses relating to the management of the Undertaking and Assets.

10. And it is further ordered that the Interim Receiver and Manager shall be at liberty to pay itself out of monies coming into its hands, in respect of its services and disbursements in a reasonable amount either monthly or at such longer intervals as it deems appropriate, and each amount shall constitute an advance against its remuneration when fixed.

11. And it is further ordered that any expenditure which shall be properly made or incurred by the Interim Receiver and Manager shall be allowed it in passing its accounts and

"together with its remuneration shall form a charge on the Undertaking and Assets in priority to claims of the Plaintiffs and the claims, if any, of the Defendants.

12. And it is further ordered that the Interim Receiver and Manager do from time to time pass its accounts and pay the balance in its hands as the Master of this Court may direct and for this purpose the accounts of the Receiver and Manager are hereby referred to the said Master.

13. And it is further ordered that the Interim Receiver and Manager may from time to time apply to this Court for direction and guidance or additional powers in respect of the discharge of its duties as Interim Receiver and Manager.

14. And it is further ordered that the costs of the plaintiffs herein, including all proceedings under the reference herein be taxed and allowed by the Master and paid by the Defendants out of amounts received by the Receiver and Manager herein on a solicitor-and-client basis."

Further Orders dated 28th February, 1983; 29th March, 1983 and 13th April, 1983 were made by the Supreme Court of Ontario as it affected the appointment of the appellant as Interim Receiver and Manager. Paragraph 7 of the Order of 28th February, 1983, stated:

"(7) And it is further ordered that the Interim Receiver be and it is hereby authorized and directed to identify the assets of Kilderkin, and their location, to identify all persons having an interest in Kilderkin and its assets and entitled to receive notice of any proceedings affecting it."

The Order of the 13th April, 1983 was to the following effect:

"Upon motion made this day on behalf of The Clarkson Company Limited as Interim Receiver and Manager of the Defendant, Kilderkin Investments Ltd., for advice and direction of this Court in relation to its administration of the undertaking, business, affairs, assets and property of the said Defendant, upon reading the Affidavit of David I. Richardson, sworn the 13th day of April, 1983, and the Interim Report of the Interim Receiver dated the 29th day of March, 1983, upon hearing Counsel for the Interim Receiver and Manager:

"1. It is ordered that the Interim Receiver and Manager be and it is hereby authorized to commence proceedings in the Cayman Islands to preserve and recover any assets of Kilderkin Investments Ltd. situated in that jurisdiction, or for such other remedy as Counsel for the Interim Receiver and Manager may advise. "

Following upon these Applications and Orders of the Supreme Court of Ontario, the appellant made an ex parte Interlocutory Application in C.I. Cause No. 132. Arising out of this Application the learned Chief Justice on the 18th of April, 1983, made the following order:

"Upon hearing Counsel ex parte for The Clarkson Company Limited, Interim Receiver and Manager of Kilderkin Investments Limited pursuant to an Order of the Supreme Court of Ontario dated the 15th day of February 1983, and upon reading the Affidavit of James Alexander Cringan sworn the 13th day of April, 1983, and exhibits thereto, and the Affidavit of John L. Biddell sworn the 14th day of April, 1983, and exhibits thereto, and the Affidavit of John A.M. Judge sworn the 18th day of April 1983 and the exhibits thereto, it is hereby ordered that:

1. The Clarkson Company Limited as Interim Receiver and Manager of Kilderkin Investments Ltd. (hereinafter referred to as "Kilderkin") pursuant to the Orders of the Supreme Court of Ontario dated the 15th and 28th day of February, the 29th day of March and the 13th day of April 1983 is hereby authorized to act on behalf of Kilderkin within the jurisdiction of this Court.

2. The Clarkson Company Limited is authorized and permitted to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of this Court and to make inquiries and requests for information and documents, whether on paper, microfilm or tape or in any other form relating to any asset of Kilderkin which may be in the possession or control of any person, bank, or company within the jurisdiction of this Court, notwithstanding the Order of this Court dated the 16th day of April,1983.

Company
"3. The Clarkson/Limited may apply to this Court for further directions from time to time as the Interim Receiver and Manager of Kilderkin in relation to any matters arising from paragraphs 2 and 3 hereof upon proper notice to such of the parties as may be ordered by the Court. "

Prior to the Order of the 18th April, 1983 being made, an order of the Court made on 16th April, 1983, had the effect of freezing the assets of Kilderkin in the Cayman Islands.

In rescinding paragraphs 1 and 3 of the Order of the 18th April, 1983 the learned Chief Justice's decision was based on the following grounds:

"(1) That the Order of 18th April 1983 (the Order) had been obtained by a wrong and inappropriate process wholly unrelated to its purpose and, therefore, cannot be allowed to stand.

(2) The Receiver and Manager had apparently flouted the Confidential Relationships (Preservation) Law and, in the exercise of this Court's discretion, could not, until an acceptable explanation by way of Affidavit is placed before this court, be allowed continuing recognition as Receiver and Manager in this jurisdiction. "

The Order in terms of paragraph 3 was held to be a necessary consequence of the Order in terms of paragraph 1.

The learned Chief Justice also held that the appellant had no authority to defend an action brought against Kilderkin by virtue of the Orders of the Supreme Court of Ontario and that in order to do so, a direction to this appellant by the Court was necessary.

For the appellant it was submitted:

"(1) That the ex parte application made by the appellant was the proper procedural course to be adopted and that the learned Chief Justice erred in holding that a fresh Originating Summons was the only available course open to the appellant.

> "(2) That the appointment of the appellant as the Receiver and Manager for Kilderkin, displaced the powers and management of the Directors and the only person who could act on behalf of Kilderkin was the appellant. The powers of the appellant included commencing and defending actions.
>
> (3) The appellant was not in breach of The Confidential Relationships (Preservation) Law as the appellant was the only person authorised to act on behalf of Kilderkin. "

Counsel for the respondent in his submissions sought to support the decision on the reasons set out in the judgment of the learned Chief Justice.

It may be convenient to deal first with the question of the powers and authority of a Court appointed Receiver and Manager. Did the appellant have the authority to defend C.I. Cause 132 on behalf of Kilderkin?

In Kerr on Receivers, 1983, 16th Ed. at page 216, the Author states:

> "The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to the tenants annihilates the mortgagor. Both continue to exist, but the company is entirely superseded in the conduct of that business, and deprived of all power to enter into contracts in relation to that business, or to sell, pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. The powers of the directors in this respect are entirely in abeyance so far as that business of the company is concerned, and the relevant powers of the company are exercised by the receiver under the direction of the Court."

In Burt, Boulton, and Hayward v. Bull and Another, [1895] 1 Q.B. 276, a case in which the defendants were appointed Receivers and Managers of the business of a company by the court, the question arose as to whether the defendants were personally liable for goods which they had ordered for the business.

Lopes, L.J. at page 282 said:

> "It was argued that the defendants had only given the order as agents. But the company after their appointment had no control over the business: it could give no orders and make no contracts. The defendants could not be said to be agents for anybody. They had the sole control of the business, subject to the directions of the Court. They gave the order as receivers and managers appointed by the Court to the Plaintiffs, who knew the position of the company and that of the defendants. Under these circumstances in my opinion, the goods must be taken to have been supplied on the credit of the defendants."

In Moss Steamship Company Limited v. Whinney [1912] A.C. 254, a Receiver and Manager was appointed in a debenture-holders' action. In discussing the powers of a Receiver/Manager, Lord Loreburn, L.C. at pages 257 and 259 stated:

> "On January 5 an order was made in a debenture-holders' action that Mr. Whinney should be receiver and manager of Ind, Coope & Co. Nothing special is to be found in that order. Its effect in law was that the company still remained a living person, but was disabled from conducting its business, of which the entire conduct passed into the hands of Mr. Whinney.
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> " I agree with Fletcher Moulton, L.J. that the company was still alive and its business was being still carried on by Mr. Whinney, but he was not carrying on as the company's agent. He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions, upon which he was personally liable. "

The Earl of Halsbury at page 259 stated:

> "Another reason is that I think that, if the appellants' arguments should succeed, it would be a very serious blow to a system at present prevailing, by which an enormous quantity of business is being carried on. A great many joint stock companies obtain their capital, or a considerable part of it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well-known form of application to the Court, which practically removes the conduct and guidance of the undertaking from the directors appointed by the company and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets. "

At page 263 Lord Atkinson said:

> "This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to the tenants annihilates the mortgagor. Both continue to exist, but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance. "

In Del Zotto v. International Chemalloy Corporation [1976] 14 O.R. (2d.) 72, an application was made by the plaintiff to strike out a counterclaim. The question for the decision of the court was whether the defendant was precluded from delivering a counterclaim in its own name by reason of the appointment of a receiver and manager and whether leave of the court was necessary prior to such delivery.

On motion of the plaintiff, the Clarkson Company had been appointed receiver and manager of the property of the defendant until trial. In considering the question the court examined a number of authorities on the position and status of a corporation after the appointment of a receiver and manager. The case of Moss Steamship Co. Ltd. v. Whinney (supra) was considered. At page 75, Van Camp J. stated:

> "The question of whether the receiver or the parties shall institute proceedings or make applications before the court was also recently canvassed in the case of Wahl v. Wahl et al (No.2), [1972] 1 O.R. 879, 16 C.B.R. (N.S.) 272. There (at pp.891-2), the court referred to the case of Ireland v. Eade [1844], 7 Beav. 55, 49 E.R. 983, where it was said (at p. 56, per Lord Longdale, M.R.):
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> > 'A receiver ought not to present a petition or originate any proceedings in a cause; any necessary application should be made by the parties to the suit. That is the general rule; but there is some difficulty in

> 'adhering to it and many exceptions have been allowed.'
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> "It seems that exceptions to the general rule have been permitted in cases where the parties refuse or are unable to diligently prosecute the action. However, this would not apply, since the defendant itself desires to have carriage of the action. An exception might occur when the court permits the receiver to institute proceedings by making such provision in the order appointing them. However, the order of Mr. Justice Wright in the present case contains no such provision and, therefore, would not provide a ground for departing from the general rule. Therefore, based on the authorities cited, the defendant herein should be permitted to institute the counterclaim in its own name. "

The court then went on to consider the question of whether it was necessary for the defendant to obtain the leave of the court in order to commence proceedings. At page 76 Van Camp, J. stated:

> "Perhaps by considering some general principles relating to receiverships the issue can be determined. In Kerr on the Law and Practice as to Receivers, it is said,at p. 144:
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> > 'When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave (Angel v. Smith, 9 Ves. 335). If anyone, whoever he be, disturb the possession of the receiver, the court holds that person guilty of contempt.....'
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> "Similarly, in Law Relating to Receivers and Managers [1912], Riviere points out that (p. 162):
>
> > 'Interference with property over which a receiver has been appointed by a party to the action in which he has been appointed will be a contempt of court, whether the receiver has gone into possession or not.'
>
> "Although most of the cases relating to interference with property in the possession of the receiver relate to instances of physical interference, the principles enunciated in these cases should be equally applicable to instances of non-physical interference.

> "In this case the Clarkson Company Limited has been appointed receiver and manager of the property assets, business and undertaking of the defendant corporation. To the extent that corporate funds will be required to diligently pursue the conspiracy claim, the defendant corporation would be interfering with the possession of the receiver. Therefore, to avoid being held in contempt of Court, leave should be obtained in this case, particularly in view of the large sums of money involved. "

The Del Zotto case appears to have decided:

(1) Although the Clarkson Company was appointed receiver and manager of the defendant, the defendant was permitted to bring proceedings in its own name.

(2) Where there is interference with the possession of the receiver, leave of the court is necessary to institute proceedings in its own name.

(3) The general rule is that a receiver ought not to institute proceedings, but an exception might occur where the court permits the receiver to institute proceedings by making such provision in the order appointing him.

Both appellant and respondent rely on the Del Zotto case in support of their submissions. It was submitted on behalf of the respondent that the defendant Player, was not interfering with the possession of the receiver/manager as he had indicated that the costs for defending the action on behalf of Kilderkin was to be met out of his personal funds. In such circumstances Mr. Player would not require leave of the court to defend on behalf of Kilderkin as he was not interfering with the assets or possession of the receiver. It has been established that over One Hundred Million Dollars of Kilderkin funds are in the Cayman Islands. The plaintiffs in bringing their action, C.I. Cause 122, are seeking to hold on to those assets if they are successful in the action. If respondent Player is allowed to defend on behalf of Kilderkin and the plaintiffs succeed, then the assets of Kilderkin in the Cayman Islands, and which assets have been frozen by an order of the court, could be available to satisfy the judgment. Surely, this would be an interference with the

assets of Kilderkin. In such circumstances in my view it would be necessary for respondent to obtain an order of the court appointing the receiver granting him leave to defend the action on behalf of Kilderkin. Such leave of the court has not been granted to respondent and therefore he should not be allowed to act on behalf of Kilderkin in defending C.I. Cause 132.

What then is the position of the appellant? In my view the Del Zotto case is not authority for saying that a receiver cannot defend an action brought against a company for which he has been appointed receiver and manager.

The appointment of Clarkson Company as a receiver and manager had the effect of vesting in the receiver/manager complete control of the business of Kilderkin. The receiver/manager displaced the respondent Player its sole director. The respondent can no longer exercise any powers of control or management over Kilderkin. Under paragraph 2 of the Order of the Ontario Court dated 15th February, 1983, the respondent is directed to hand over to the receiver/manager all documents, assets, papers etc. of Kilderkin.

In my view, the appellant has the power to defend and authority to instruct solicitors to enter an appearance on behalf of Kilderkin. It was therefore appropriate for the appellant to make the application which they did on the 18th April, 1983, before the learned Chief Justice.

The question now arises as to whether the correct procedure was adopted by the appellant.

Could such an application be made ex parte and was it appropriate to make such an application arising out of C.I. Cause No. 132?

As previously stated on 15th February, 1983 the Supreme Court of Ontario made an order appointing the appellant as receiver and manager of Kilderkin. This application was made arising out

of an action in which Kilderkin and the respondent were named as defendants.

Does the Court in the Cayman Islands have the jurisdiction to recognize a foreign receiver? In Schemmer and Others v. Property Resources Ltd. [1975] Ch. 273, the court had to consider whether a receiver appointed in the United States would be recognized in England.

Goulding, J. at page 287 said:

> "I shall not attempt to define the cases where an English court will either recognise directly the title of a foreign receiver to assets located here or, by its own order, will set up an auxiliary receivership in England. To do either of those things the court must previously, in my judgment, be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order, on English conflict principles, as having effect outside such jurisdiction. Here I can find no sufficient connection. First, PRL was not made a defendant to the American proceedings, and there is no evidence that it has ever submitted to the federal jurisdiction. In that regard it is, in my judgment, not enough that certain subsidiary companies of PRL with assets in the United States of America have unsuccessfully contested the orders of the district court on the basis that it had no personal jurisdiction against them, and on other grounds. Secondly, PRL is not incorporated in the United States of America or any state or territory thereof, so that the principle tacitly applied in Macaulay's case, 44 T.L.R. 99, and more fully exemplified by North Australian Territory Co. Ltd. v. Goldsbrough, Mort & Co. Ltd. [1889] 61 L.T. 716 is of no direct relevance. Thirdly, there is no evidence that the courts of the Bahama Islands, where PRL is incorporated, would themselves recognise the American decree as affecting English assets. Fourthly, there is no evidence that PRL itself has ever carried on business in the United States of America or that the seat of its central management and control has been located there."

Applying the principles here suggested by Goulding, J. to the instant case: Firstly, Kilderkin was a defendant in the Ontario proceedings and had submitted to the jurisdiction of that court. Secondly, Kilderkin was incorporated in Canada. The third principle does not arise in this case. Fourthly, Kilderkin carried on business in Ontario and the management of the company was located in Canada.

In the Ontario case of C.A. Kennedy Company Ltd. v. Stibbe-Monk Limited and Dorothea Knitting Mills Limited [1976] 74 D.L.R. (3D) 87, the court there held that the courts in Ontario would recognise the appointment of a receiver in a foreign jurisdiction.

The Grand Court Law 8/75 s. 13 (1) states:

> "The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to the provisions of this and any other laws of the Islands, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by -
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> (a) Her Majesty's High Court of Justice; and
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> (b) The Divisional Courts of that Court
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> as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of Parliament of the United Kingdom amending or replacing that act."

In my view the court in the Cayman Islands has the jurisdiction to recognize a receiver appointed by the Supreme Court of Ontario.

The application made by the appellant was made ex parte in C.I. Cause 132. In effect it was an application for the recognition in the Cayman Islands of the order of the Ontario Court appointing the appellant as receiver and manager of Kilderkin.

Mr. Patten submitted if all that was being sought was recognition and leave to defend, then the procedure would have been correct. But he argued that paragraph 2 of the Order went far beyond the scope of C.I. Cause 132. The application could not therefore be made in C.I. Cause 132.

The U.K. Supreme Court Act, 1981, provides for the appointment of a receiver in s. 37 (1) which states:

> "The High 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. "

S. 37 (2) provides:

> "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

Order 30 Rule 1 of the Rules of the U.K. Supreme Court provides:

> "An application for the appointment of a receiver may be made by summons or motion. "

The Grand Court Law 8/1975 provides in s. 20 -

> "(1) Subject to the provisions of this or any other law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.
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> (2) In any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case. "

By reason of the provisions in the Grand Court Law the U.K. Supreme Court Act, 1981, and the U.K. Rules of the Supreme Court would be applicable to the Cayman Islands.

It is of interest to look at some of the Notes which appear in the White Book as applicable to Order 30 Rule 1.

Note 30/1/1 under the heading "Power to appoint Receiver" states:

> "There is no limit to the power of the Court under this section to appoint a receiver on motion, except that it is only to be exercised when it appears just or convenient ....."

Note 30/1/5 states:

> "Under the old practice an ex parte application would be granted only in exceptional circumstances. Sub-rules (3) and (4) now allow ex parte applications and give the Court power to put any terms that may be appropriate to the appointment. The application can be made even before service of the writ in exceptional cases, but usually short notice of motion should be served with the writ.
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> "An application by a defendant or any party other than the plaintiff can only be made after appearance has been entered, although it would seem by analogy that an application might be heard upon an undertaking to appear. "

In his submissions Mr. Patten stated that he would not support the finding that a defendant could not apply for the appointment of a receiver.

Halsbury's Laws of England 4th Edition V.39 "Application for appointment of a Receiver" at paragraph 815 "Application by party to an action" states:

> "An application for the appointment of a receiver under the Supreme Court Act 1981 must, in general, be made in a properly constituted action. The application may be made by any party to the action, or, it would seem, by any person served with notice of, or attending any proceeding in, the action. "

And at paragraph 822 "Application by Defendant" it is stated:

> "Although a plaintiff may be able in an urgent case to obtain the appointment of a receiver even before service of the writ or summons, a defendant may only apply after he has acknowledged service, and then only on notice to the plaintiff; nor may he apply without first filing a counterclaim or a writ in a cross-action, unless his claim to relief arises out of the plaintiff's cause of action or is incidental to it."

In the case of Chief Constable of Kent v. V. and Another [1982] 3 All E.R. 36 (C.A.), Lord Denning at page 40 in discussing s. 37 of the Supreme Court Act 1981 had this to say:

> "But I am glad to say that the reasoning of those cases has now been circumvented by statute. They were based on the wording of s. 25 (8) of the Supreme Court of Judicature Act 1873, which said that -
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> > '.....an injunction may be granted ..... by an interlocutory order of the court in all cases in which it shall appear to be just or convenient that such order should be made.....'
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> "That was re-enacted in s.45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925 in these words:
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> > 'The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.'
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> "I have emphasised the word 'interlocutory' because it was the basis of the decision in the North London Rly Co. case and the following cases. That was pointed out by Lord Diplock in The Siskina [1977] 3 All E.R. 803 at 823, [1979] A.C. 210 at 254 when he said:
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> > 'That subsection, speaking as it does of interlocutory orders, pre-supposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. '
>
> "Now that reasoning has been circumvented by s.37 (1) of the Supreme Court Act 1981, which came into force on 1 January 1982. It says that:
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> > 'The High 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. '
>
> "The emphasised words in brackets show that Parliament did not like the limitation to 'interlocutory'. It is no longer necessary

> "that the injunction should be ancillary to an action claiming a legal or equitable right. It can stand on its own. The section as it now stands plainly confers a new and extensive jurisdiction on the High Court to grant an injunction. It is far wider than anything that had been known in our courts before. There is no reason whatever why the courts should cut down this jurisdiction by reference to previous technical distinctions. Thus Parliament has restored the law to what my great predecessor Jessel M.R. said it was in Beddow v. Beddow [1878] 9 Ch. D 89 at 93 and which I applied in the first Mareva injunction case, Mareva Compania Naviera SA v. International Bulk-carriers SA (1975) [1980] 1 All E.R. 213 at 214: 'I have unlimited power to grant an injunction in any case where it would be right or just to do so ....' Subject, however, to this qualification: I would not say the power was 'unlimited'. I think that the applicant for an injunction must have a sufficient interest in a matter to warrant his asking for an injunction. Whereas previously it was said that he had to have a 'legal or equitable right' in himself, now he has to have a locus standi to apply. He must have a sufficient interest. This is a good and sensible test ..... Next, it must be just and convenient that an injunction should be granted at his instance as, for example, so as to preserve the assets or property which might otherwise be lost or dissipated. "

In what circumstances can a defendant apply for the appointment of a receiver and can it be an ex parte application? The order of the Supreme Court of Ontario was made on an ex parte application. Kerr on Receivers, 16th Edition, at page 105 states:

> "An application for a receiver may be made by any party. It is provided by R.S.C., Ord. 30, r.1, that the application may be made either ex parte or on notice. It is conceived that, in a very urgent case, a defendant may obtain the appointment of a receiver on such an application. Under the old practice a defendant could not apply before decree, but he may now apply at any stage, even if the plaintiff has applied. In such a case one order is made on both motions, the conduct being usually given to the plaintiff. The relief sought by the defendant must be incidental to, or arise out of, the relief claimed by the plaintiff, or the defendant must counter-claim or issue a writ before he can obtain a receiver. "

And at page 106 the learned Author states:

> "The appointment may be made at any stage of an action according as the urgency of the case may require without formal application if necessary. A receiver may be appointed ex parte even after judgment where there is risk of the defendant making away with the property: but an injunction is preferred in such cases if it will be effective. "

In Carter v. Fey, [1894] 2 Ch. 541 it was held that a defendant could apply for an injunction against the plaintiff without filing a counter-claim or issuing a writ in a cross-action, but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action, or is incidental to it.

I have no doubt that it is open to a defendant to apply to the court for the appointment of a receiver and manager.

It will be necessary to look at the findings of the learned Chief Justice on the question of Procedure. At page 5 of his judgment it is stated:

> "Kilderkin, as such, and its sole director could not have been aware of the original application. As will be considered later, Clarkson, as interim Receiver and Manager, did not assume the personality of Kilderkin."

The appellant having the control and management of Kilderkin, and having displaced the sole director, it cannot be said that Kilderkin would not have been aware of the application made by the appellant. As far as the respondent is concerned, if the application could be made ex parte then it would not be necessary for notice to be served on the respondent who was a defendant in C.I. Cause 132.

The learned Chief Justice held that O 30 R. 1 is not applicable, and at page 7 of his judgment states:

"The original application was not an application for the appointment of a receiver as contemplated by that provision. It was an application by the Receiver and Manager appointed by the Ontario Court for the recognition of that Receiver and Manager and for authority for that Receiver and Manager to perform certain functions within this jurisdiction. Furthermore, O 30 r 1 provides machinery for a plaintiff to have a receiver appointed to take possession of and preserve the assets of a defendant for the purpose of satisfying a judgment in the plaintiff's favour. That is not what the original application was about. It was an application by a Receiver and Manager of a defendant in relation to the assets and operations of that defendant. Clarkson was already the Receiver and Manager of Kilderkin. O. 30 r 1 is not designed to give to such a Receiver and Manager authority over that company for the purpose of the suit (Cause number 132). Its control over the assets of Kilderkin had no connection with the suit against Kilderkin. Clarkson's preservation of the assets of Kilderkin in this jurisdiction in its capacity as Receiver and Manager of Kilderkin had no relevance to the suit (No. 132) in this jurisdiction. The original application was not at the instance of the plaintiffs in the suit in this jurisdiction to have Clarkson or some other fit and proper person appointed receiver. It would have been an altogether different matter had it been. What Clarkson was seeking to do was to locate assets of Kilderkin for the benefit of and at the instance of the plaintiffs in the Ontario action, albeit the same plaintiffs, for the purpose of the action. Hence Clarkson's report to the Ontario Court dated 15th June 1983. No report to this Court was contemplated or made. The Order had no relation to the suit (Cause number 132] in this jurisdiction. Its only possible connection with the local suit would have been to authorise Clarkson to defend that suit, an aspect dealt with elsewhere, and an aspect not adverted to at all in the ex parte summons. "

And at page 8 the learned Chief Justice states:

""The terms of the Order have no connection with cause number 132 or the subject matter of it save in one very limited respect and that is that the words 'is hereby authorised to act on behalf of Kilderkin within the jurisdiction of this Court' could be construed as authorising Clarkson to

> "defend suits against Kilderkin in that jurisdiction, assuming it to have power to do so. It did not have that power. Hence the observation that the resulting Order (and application) bore no relationship to cause number 132 and could not properly be an interlocutory application in that cause. Clarkson did not need the powers set out in paragraph 2 of the Order for the purposes of cause number 132. "

The appellant in attempting to locate the assets of Kilderkin in the Cayman Islands cannot be said to be locating it for the benefit of the plaintiffs. It is true that it was on the plaintiffs' application that the appellant was appointed receiver and manager in Canada. However, once appointed the receiver is an officer of the court and if he has full control and management over the affairs of Kilderkin then once appointed he is acting in the interest of Kilderkin. He is, therefore, entitled to seek out and establish the whereabouts of assets belonging to Kilderkin.

The plaintiffs having sued Kilderkin (C.I. Cause 132) if successful the assets of Kilderkin would be in jeopardy. It cannot therefore be said that the application has no connection with C.I. Cause 132. One of the reasons for the learned Chief Justice holding that the Order (and Application) bore no relationship to C.I. Cause 132, and that it could not be an interlocutory application was because he held that the appellant had no power to defend.

In my view, the application made by the appellant had a real connection with the suit (C.I. Cause No. 132). An application to appoint a receiver can in a proper case be made ex parte.

There is no reason, therefore, why an application to recognize a receiver cannot be made ex parte since the Cayman Islands Courts could recognize the appointment of a receiver

in Canada. Having regard to the circumstances of the instant case, it would be prudent for the appellant to be recognized in the Cayman Islands.

In holding that the procedure was irregular the learned Chief Justice at page 10 of his judgment said:

> "An important consequence of the procedural irregularity is that it has led to a denial of natural justice. With the benefit of hindsight one can see that the Order was more than a formality. The company, Kilderkin, should have been made a party to the originating process - perhaps the sole director as well - and any such party should have been entitled to oppose the making of the Order. The company would have been exercising its residual powers in opposing the original application. The right to do so was denied to the company. "

If the appellant has the power to defend on behalf of Kilderkin, then it follows that no right has been denied Kilderkin If the sole director has been displaced, then it is unnecessary to make him a party to the proceedings. There would be no denial of natural justice.

I hold that the appellant as manager and receiver has the power to defend on behalf of Kilderkin. The application was properly made as an ex parte application arising out of C.I. Cause Number 132 as there was a connection with that case and it arises out of the relief claimed by the plaintiffs.

Although I hold that there was no irregularity in the proceedings, if it became necessary, Order 2 Rule 1 of the Supreme Court Rules could be invoked in order to preserve the Order made on the 18th April, 1983.

The irregularity of the procedure was only one ground on which it was held that the Order of the 18th April, 1983, should be discharged. It was also held that the appellant had disregarded the provisions of the Confidential Relationships (Preservation) Law. The learned Chief Justice in his judgment at page 12 said:

> "There is no doubt in my mind that Clarkson acted in breach of the Confidential Relationships (Preservation) Law. In the absence of an acceptable explanation, that breach appears to have been deliberate.
>
> "That in itself disentitles Clarkson to continue to be recognised as Receiver and Manager of Kilderkin in this jurisdiction and justifies the exercise of this Court's discretion to discharge the Order. "

In a report by the appellant, dated 15th June, 1983 addressed to the Chief Justice of the Ontario Supreme Court, confidential information relating to transactions in the Cayman Islands' Banks, concerning Kilderkin was disclosed. The contents of the report apparently received wide publicity in the press in Canada.

This report followed upon the Order of the 18th April where in paragraph 2 of the Order the appellant was authorised and permitted to identify and locate all assets belonging to Kilderkin in the Cayman Islands. The report of the 15th June, 1983 although marked "Strictly Confidential" and sent to the Chief Justice of the Ontario Court, became public property.

There is no evidence to suggest that the appellant intended the contents of the report to be made public. As an officer of the court he made his report. Assuming a breach of the Confidential Relationships (Preservation) Law, there is no evidence to suggest that the breach was a deliberate act. The appellant has not been charged with a breach of the law but

it became necessary to consider the breach because the learned Chief Justice relied on it as a ground for discharging the 18th April, 1983, order.

In my view, even assuming a breach of the Confidential Relationships (Preservation) Law, having regard to the circumstances under which the breach was committed, I would hold that this should not be a ground for not recognizing the receiver and manager appointed by the Ontario Court.

I will now consider whether in fact there was a breach of the law.

The Confidential Relationships (Preservation) Law 16 of 1976, s. 3 (1) states:

> "Subject to subsection (2) this Law has application to all confidential information with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout. "

S. 3 (2) states:

> "This Law has no application to the seeking, divulging, or obtaining, of confidential information -
>
> (a) in compliance with the directions of the Grand Court pursuant to section 3A;
>
> (b) by or to -
>
> (i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal."

S. 3A (1) states:

> "Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted. "

No application was made by the appellant under s.3(a) (1). This section applies to a person who intends to divulge confidential information in evidence contrary to s. 4 (1) of the Law. S. 4 (1) states:

> "Subject to the provisions of subsection (2) of section 3, whoever -
>
> (a) being in possession of confidential information however obtained;
>
> (i) divulges it; ....."

The question now arises as to whether the appellant falls within s. 3 (2) (B). If so, then there would be no breach of the Law.

S. 2 defines "confidential information", principal", and "professional person."

> "Confidential information" includes information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge;
>
> "Principal" means a person who has imparted to another confidential information in the course of the transaction of business of a professional nature;
>
> "Professional person" includes a public or government official, a bank, trust company, an attorney-at-law, an accountant, an estate agent, an insurer, a broker and every kind of commercial agent and adviser whether or not answering to the above descriptions and whether or not licensed or authorized to act in that capacity and every person subordinate to or in the employ or control of such person for the purpose of his professional activities."

The learned Chief Justice at page 12 of his judgment said:

> "There can be no doubt that Clarkson, as Receiver and Manager, never became the principal in relation to the confidential information for the purposes of the Confidential Relationships (Preservation) Law. The Receiver and Manager is not the agent of the company. The Receiver and Manager does not merge its identity with that of the company. The case law cited points clearly to the Receiver and Manager being a principal in his own right in relation to the control of the assets of the company and managing its business affairs. .....
>
> "The company, Kilderkin, (and the fourth defendants in relation to their affairs) remained the principal for the purposes of the Confidential Relationships (Preservation) Law and continue to be the principals in relation to the confidential information relating to the company - in particular all the confidential information in relation to which the company was the principal before the Receiver and Manager was appointed."

It may be that the company Kilderkin is a principal for the purposes of the Confidential Relationships (Preservation) Law. But someone has to act on behalf of the company. Surely if the sole director of the company is in the control and management could it be said that he had breached the law if he had divulged confidential information. If therefore, as I hold, the receiver and manager had displaced the sole director and is in the control and management of the company then can it be said that he has breached the law if he divulged confidential information. In effect the appellant would be acting as a principal under the law and could not be in breach of the Confidential Relationships (Preservation) Law.

In my view it would be in the interest of Kilderkin for the appellant to continue to be recognized in the Cayman Islands as manager and receiver for Kilderkin.

For the reasons stated I would allow the appeal and vacate the Order of the Chief Justice made on 20th July, 1983.

I would in the circumstances restore the order of the Chief Justice made on 18th April, 1983.

The appellant is to have the costs of the appeal and the costs of the application below.

CARBERRY, J.A.:

I have had the opportunity of reading the Judgments of Zacca P. and Carey J. A. herein, and I agree with the conclusions to which they have come, and the reasons that have led them to those conclusions. In doing so I have borne in mind, as I am sure that they have also, the views expressed by Lord Diplock in his speech in Hadmor Production Ltd. et al v. Hamilton et al (1982) 1 All E. R. 1042 (H. L.) as to the relatively limited function of a court of appeal asked to review the exercise of discretion by a trial judge as to whether or not to grant an interlocutory injunction. We are not to proceed as if we were exercising an independent discretion of our own, and must not interfere merely on the ground that we would have exercised that discretion differently. Our function is one of review only: we may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law, or the evidence before him, or possibly on the ground of a change of circumstances since the order was granted. I think that the two judgments of Zacca P. and Carey J. A. have demonstrated that at least the two first mentioned grounds for intervention exist. In as much as the appellants have now themselves initiated an independent action against their adversaries it may be that the third ground for intervention also exists, but that has not been actively canvassed before us.

This was a complicated case, and a complicated situation, and reading the two judgment of my brothers carefully, and more than once, I will try to avoid any unnecessary repetition of either the arguments they have discussed, or the conclusions to which they have come. It may however be useful to attempt to set out the general situation out of which litigation has arisen, without of course attempting to reach any conclusion as to its merits, which fortunately is not before us.

It appears that the starting point of the ligigation was the series of dealings that took place with regard to some twenty six large blocks of apartment buildings in Toronto. These were owned by the

Cadillac Fairview Corporation Limited and were sold to the Greymac Corporation for some $270 million Canadian dollars. Leaving out the details of the intermediate dealings, a series of resales and other dealings, it appears that the ultimate resale price to the fourth defendants was somewhere in the region of $500 million Canadian dollars. It appears that the basic foundation for this speculation lay in the hope and intention of the ultimate purchasers to increase very substantially the rentals that would be paid by the actual apartment dwellers for the privilege of living therein. This despite the Rent Control Acts of Toronto. Along the way, it is alleged that the three plaintiffs, trust companies deriving their assets from the investments of possibly thousands of small investors (and larger ones), were persuaded to use their assests to finance these dealings. It seems to be alleged that the trust companies may find their investments illusory, and that the only substantial beneficiaries, (if there prove to be any such), are the defendants in the present proceedings. As to these we have been principally concerned with the second and third defendants: Kilderkin Investments Limited and Mr. William Player.

The transactions mentioned seem to have caused the greatest concern in Toronto, the city and Ontario, the province in which all of the parties concerned (save the first named defendant, a Cayman registered Company) have their roots, and in which they are incorporated.

Receiver-managers have been appointed to run the three trust companies, the plaintiffs, and to attempt to see what can be salvaged. While as to the second defendant Kilderkin Investments Limited the Clarkson Company Limited was appointed receiver-manager of this company, at the instance of the plaintiffs in the first place, but having been appointed by the Supreme Court of Ontario on the 15th February, 1983, they are so to speak officers of the Court, beholden to no one, but under a duty to that Court, to supervise manage and take control of the second defendants in the interest of that company, which has facing it, claims from the trust companies, from its own creditors, and also from

its own shareholders, or as we understood it, shareholder, for the third named defendant. Mr. William Player was Kilderkin's sole director and the person principally interested in its funds.

This highly complicated piece of litigation extended itself to the Cayman Islands because it is alleged that Kilderkin Investments Limited has deposited in the banks of these islands a substantial sum of money said to amount to over $100 million dollars, and this money, alleged to be derived from what is called the "Cadillac" transaction, and possibly other legitimate dealings by that company, represents what the plaintiffs see as their only hope of salvaging something for their investors. It should of course be pointed out that Mr. Player defends or will defend all of the transactions as legitimate exercises in the business world. He denies both personally and on behalf of Kilderkin Investments Limited the charges of conspiracy, deceit et cetera that have been levelled against these dealings. As I understood it, he suggests that all would have been well but for the extension of Rent Control Laws of Toronto or Ontario to the actual apartments.

The struggles that have taken place in that part of the litigation that has come before us relate to the efforts of the plaintiffs (the trust companies) to secure that the "Cadillac Funds" now said to be in the hands of Kilderkin Investments stay "frozen" and available within the Cayman Islands to await the outcome of the litigation, whether it takes place in Canada or these islands. More particularly the present appeal involves the efforts of the Clarkson Company, the receiver-managers of Kilderkin Investments Limited, to secure not only the "Cadillac funds" but any other funds that that company may be entitled to and which are presently within the jurisdiction. Clarkson Company Limited have also been concerned to establish, as part of thir duty, their own control of the litigation that has been brought against Kilderkin Investments Limited. They wish to appear for it and to defend and be involved in that litigation and they contend that Kilderkin Investments Company Limited may have claims of its own against its director Mr. Player, which they wish to pursue, and so they may wish to join him as a third party, responsible to indemnify them against claims made by the plaintiff trust companies.

Mr. Player, while through his counsel eschewing any allegations aginst the integrity of the Clarkson Company, has contended that as the sole director of Kilderkin Investments Limited (and the person principally interested in its funds), whatever may have happened in Ontario he is, in the Cayman Islands, the person entitled to conduct its litigation and to defend its assets. He suggests that as receiver-managers originally appointed by the Supreme Court of Ontario on the application of the plaintiffs, Clarksons is so to speak likely to be prejudiced aginst his claims and less likely to defend Kilderkin with the same vigour that he would.

One other background factor that may be mentioned in this brief note is that the Cayman Islands have with skill and management created an offshore banking industry; they are anxious to secure foreign investment and as part of their services to such investors passed a law, The Confidential Relationships (Preservation) Law (Law 16 Of 1976), amended by Law 26 of 1979), the object of which is to preserve the confidence of those who invest in Cayman Banks by punishing unauthorised disclosures of their investor's affairs.

After the preliminaries begun in the jurisdiction of the Ontario Supreme Court with the appointment of Clarksons as receiver-manager to Kilderkin, (and prior to that with the appointment of receiver-managers to the trust companies, who initiated the main Canadian litigation,) the scene of the litigation shifted to the Cayman Islands, where the Kilderkin monies now lie.

The plaintiffs on the 16th April, 1983 obtained an order from the Chief Justice which in effect appointed a Caymanian citizen, Mr. C. D. Johnson, receiver of the "Cadillac assets", and gave an interlocutory injunction aginst the first, second and fourth defendants transferring any assets out of the jurisdiction, or dealing with them save to transfer them to Mr. Johnson, and requiring all the defendants to refrain from parting with the relevant documents relating to the transactions referred to earlier.

On the 18th April, 1983, Clarksons obtained from the Chief Justice, an ex parte Order that recognized them as receiver and manager of Kilderkin,

and gave them authority to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of the Court.

Clarksons acted in pursuance of this order, and in course of their duty to report back to the Ontario Court, reported to that Court the result of their investigations. It appears that such reports are from time to time the subject of mention in open court on the occasion of applications by receiver-managers for further directions from the Ontario Court. That happened in this case, and in view of the public interest which already existed for the reasons mentioned earlier, their interim report received wide publicity in the ordinary press in Toronto. Though apparently aware of the (C. I.) Confidential Relationships (Preservation) Law, it had not occurred to Clarksons that they could or should (?) have got permission under that law from the Court in Cayman to report to the Ontario Court on their investigations.

In the meantime the litigation in Cayman was proceeding; claims were filed and appearances and defences were due to be put in. Mr. Player for his part moved before the Chief Justice for the exparte Order given to Clarksons on the 18th April, 1983, to be set aside. It was set aside on the 20th July, 1983, by the Chief Justice for the reasons set out in his written Judgment of the 12th October, 1983. The new Order of the 20th July, 1983, purported to revoke the order of the "18th April, 1983, appointing The Clarkson Company Limited as the interim Receiver and Manager of Kilderkin Investments Limited within the jurisdiction of this Court", and it went on to remove from the record as Attorneys for Kilderkin the Attorneys appointed by Clarksons, and to substitute therefor the Attorneys appointed by Mr. Player.

It may be said that three reasons seems to have induced the learned Chief Justice to reverse the previous Order of the 18th April, 1983: (a) his view of the authority vested in Clarksons by the various orders made by the Supreme Court of Ontario from time to time --- he held that those orders did not give them any authority to defend the litigation now coming to a head in Cayman between the trust companies and the defendants; (b) secondly he held that the procedure adopted by Clarksons in seeking their order in the suit already begun by the trust

companies was wrong --- they should have initiated a seperate and independent application; and (c) disturbed by the publicity given to their interim report to the Ontario Supreme Court in the newspapers in Toronto, he decided that Clarksons had broken the (C. I.) Confidential Relationships (Preservation) Law, and in effect that in the absence of explanation or apology were not entitled to enjoy the powers previously given to them.

For the reasons given by both Zacca P. and Carey J. A. I am of the view that the learned Chief Justice was wrong on all three reasons. And apropos of the advice given by Lord Diplock , and referred to earlier above, it should be noted that this appeal from the decision of the 20th July, 1983, treating it as a refusal of something in the nature of an interlocutory injunction, followed on an earlier ex parte grant.

As to (a) it appears to me that the learned Chief Justice misapprehended the effect of the orders made in the Ontario Supreme Court (the Court of the country in which Kilderkin was incorporated) in two respects: (i) those orders suspended completely the management powers and authority of Mr. Player as director of Kilderkin ; (ii) they vested the powers he previously enjoyed in the Clarkson company, the receiver-managers appointed by the Court, and whether expressly mentioned or not (and in my view they were sufficiently mentioned) those orders gave Clarksons the right and duty to defend the Kilderkin company in any action taken against it by the trust companies or otherwise. With great respect, I think that the position set out in The Conflict of Laws, by Dicey and Morris, 10th Edition (1980) in Rules 139 and 143 is correct. As they have not been otherwise cited I set out the rules here:

> Rule 139: (1) The capacity of a corporation to enter into any legal transaction is governed by the constitution of the corporation and by the law of the country which governs the transaction in question.
>
> (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation.
>
> " The effect of a foreign winding up order"
> Rule 143: The authority of a liquidator appointed under the law of the place of incorporation is recognized in England".

For "liquidator " I would substitute " receiver-manager".

Counsel for the respondent, Mr. Player, pressed on us the case of Newhart Developments Limited v. Co-operative Commercial Bank (1978) 2 All A. R. 896 (C. A.)

In that case developers had enlisted the aid of a bank to provide financial backing, under a debenture that granted the bank the power to send in a receiver. The Bank did so. This had the effect of suspending the powers of the directors. However they wished to sue the bank for the breach of contract, and did so. The Bank moved to strike out their claim on the ground that the directors no longer had the power to do anything like bring an action on behalf of the company, seeing that a receiver had been appointed. The bank failed. The court held that the directors could bring such an action; provided it did not touch the assets of the company it could if successful only go to swell those assets. The case did not deal with the status of a receiver appointed by the court, owing a duty to the court, not to a mere creditor. Further, if by chance a director were to find that a receiver appointed by the court was to be put in a similiar position of conflict as in the Newhart case, I would think his proper course would be to apply to the court, in much the same way as cestui que trust would in the case of a trustee wasting the assets. This would not involve the survival of any powers in the director as such, but merely his right as an interested person to complain of the conduct of an officer appointed by the court.

For the rest I adopt without reiterating the conclusions arrived at by Zacca P. and Carey J. A. as to the law relating to the recognition of a foreign receiver-manager appointed by the court of the country in which the subject corporation is incorporated.

As to (b), the procedural point: here again I would express agreement with the conclusions reached by Zacca P. and Carey J. A. and agree that the learned Chief Justice misapplied the effect of the U. K. Supreme Court Act, 1981, s 37, and also the effect of the Rules of the U. K. Supreme Court 0.30 r 1 relating to such applications for interlocutory orders, both of which are incorporated into Cayman Law , the former by virtue of S 13 of The Grand Court Law, (law 8 of 1975), and the later

by s 20 of the same law.

As to (c) the question of whether or not a breach took place of the (C. I.) Confidential Relationships (Preservation) Law, I agree for the reasons expressed by Zacca P. and Carey J.A. that in fact no breach of that law took place. It is proper and understandable that those who administer the laws of Cayman should be anxious to see that those laws are given the respect which is their due, and judging by hindsight it would have been better for all concerned if Clarksons, who by virtue of their recognition in that jurisdiction had become officers of the Cayman Court also, had made application under Section 3A of that law to the Grand Court for directions, but they did owe a duty to the Supreme Court of Ontario by whom they were originally appointed, and I suppose that the investigative capacity of the members of the press in the western world is something which from time to time appears both unpredictable and startling.

Overall, it sometimes happens that first impressions prove better than second thoughts, and with respect, this seems to have happened here. It would I think seem a little odd that a director who had been relieved of his corporate powers in the country in which the company was incorporated, should nevertheless be held to be still in control of the company in the friendly foreign country in which it seems the litigation arising out of his and the company's transactions is destined to be fought out.

I would close by thanking the several counsel and attorneys involved for the great assistance provided to us by their arguments, and by the careful preparation of the documents, and the photocopies of the authorities and cases which they wished to place before us. They did much to lighten a difficult task.

CAREY, J.A.:

A remarkable feature of this appeal is that the Caymanian connection is altogether tenuous; only one of the several companies involved is incorporated in the Cayman Island and even so, its solitary Caymanian shareholder owns a mere 2% of the issued share capital. Be that as it may, the matters arising on this interlocutory appeal concern firstly, a procedural point, and secondly, the construction of the Confidential Relationships (Preservation) Law 26 of 1979. The resolution of these questions will determine which of the two parties, the protagonists in this appeal, viz., William Player, the sole director of Kilderkin Investments Limited, or Clarkson & Company, appointed by the Ontario Supreme Court as Receiver and Manager of the company will have the right to act on behalf of the company in defending the suit (Cause 132/83) filed in this jurisdiction against that company and other defendants.

Both points arise from an order of the Chief Justice dated 20th July, 1983, discharging his earlier ex parte order made on 18th April, 1983. This latter order (the first in point of time) was in the following terms:

> "UPON HEARING counsel ex parte for The Clarkson Company Limited Interim Receiver and Manager of Kilderkin Investments Limited pursuant to an Order of the Supreme Court of Ontario dated the 15th day of February 1983, and UPON READING the Affidavit of James Alexander Cringan sworn the 13th day of April 1983, and exhibits thereto, and the Affidavit of John L Biddel sworn the 14th day of April 1983, and exhibits thereto and the Affidavit of John A.M. Judge sworn the 18th day of April 1983 and the exhibits thereto, IT IS HEREBY ORDERED that:
>
> 1. The Clarkson Company Limited as Interim Receiver and Manager of Kilderkin Investments Ltd. (hereinafter referred as "Kilderkin") pursuant to the Orders of the Supreme Court of Ontario dated the 15th and 28th of February, the 29th day of March and the 13th day of April 1983, is hereby authorized to act on behalf of Kilderkin within the jurisdiction of this Court.
>
> 2. The Clarkson Company Limited is authorized and permitted to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of this Court and to make inquiries and requests for information and documents, whether on paper, microfilm or tape or in any other form relating to any assets of Kilderkin which may be in the possession or control of any person, bank, or company within the juris-

> " diction of this Court, notwithstanding the Order of this Court dated the 16th day of April 1983.
>
> 3. The Clarkson Company Limited may apply to this Court for further directions from time to time as the Interim Receiver and Manager of Kilderkin in relation to any matters arising from paragraphs 2 and 3 hereof upon proper notice to such of the parties as may be ordered by the Court."

The learned Chief Justice in discharging this ex parte order, and thereby removing the appellants as interim Receiver and Manager of Kilderkin Investments Limited, made the following order as well:

> "3. Further that pursuant to Section 59 (3) of the Rules of Court, Messrs. W. S. Walker & Co. be removed from the record as attorneys for the Second Defendant herein, and that Messrs. C. S. Gill & Co. may be placed on the record in their place."

In a considered judgment, the learned Chief Justice rested his decision on two bases. One, the interlocutory application made by the appellants for recognition as receiver and manager of Kilderkin Investments Limited was a wholly inappropriate procedure. Two, the conduct of the appellants in breaching provisions of the Confidential Relationships (Preservation) Law disentitled them to hold the position of interim Receiver and Manager within this jurisdiction.

Before I make my own observations on the questions which arise for considerations, I desire to pay tribute to the lucidity of the submissions of counsel who appeared before us and, for my part, I wish to express my appreciation for their helpfulness and refreshing candour.

It now becomes necessary to examine the reasons of the Chief Justice stated in his judgment in order to deal with the grounds of appeal which challenged both bases of his decision. The ex parte order originally made by him did not appoint the appellants receiver and manager of Kilderkin Investments Limited; it was an order recognizing them as such. This is plain from the nature and terms of the order which he made:

> "The Clarkson Company Limited as interim Receiver and Manager of Kilderkin Investments Limited pursuant to the orders of the Supreme Court of Ontario dated the 15th and 28th February, the 29th day of March and the 13th day of April 1983, is hereby authorised to act on behalf of Kilderkin within the jurisdiction."
> [Emphasis supplied]

The appellants having been previously appointed as receiver and manager by the Ontario Court now received the "imprimatur" of the competent court within this jurisdiction i.e. the Grand Court. The basis of the jurisdiction then being exercised, is, it is accepted, derivative. Sec. 13 (1) (a) of the Grand Court Law - 8 of 1975 - provides as follows:

> "13. (1) The Court shall be a superior court of record and in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to the provisions of this and any other laws of the Island, the like jurisdiction within the Island which is vested in or capable of being exercised in England by -
>
> (a) Her Majesty's High Court of Justice; and
>
> (b) the Divisional Courts of that Court, as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of Parliament of the United Kingdom amending or replacing that Act."

Section 20 (2) of the same Act is also relevant. It recites:

> "(2) In any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case."

For completion, it should be noted that since no Rules of Court exist in the Grand Court in relation to the appointment or recognition of a Receiver and Manager, it is the appropriate Rules of the Supreme Court in England, if such there are, to which reference must be made. There are, however, no specific rules of the Supreme Court in the United Kingdom either, dealing with the recognition of a foreign appointed Receiver and Manager, and in his observation to that effect, Mr. Patten for the respondent, was undoubtedly correct. But that the High Court in England exercises an undoubted jurisdiction to recognize a foreign appointed Receiver and Manager, is no less true and he was not so bold as to suggest otherwise. He

was careful to say no more than that the submissions of Mr. Sumption were mainly concerned with the appointment of a receiver and manager by the High Court in England.

I do not put forward any heretical view if I venture to suggest that the Grand Court, as does the High Court in England, has an inherent power to recognise foreign appointed Receivers and Managers over assets within the jurisdiction based on well recognised conflict of laws principles. Illustrative of the exercise of this jurisdiction, is Schemmer and ors. v. Property Resources Ltd. & ors. [1975] 1 Ch. 273 where one of the points raised before Goulding, J., was that the plaintiff a foreign appointed receiver had no "locus standi." The plaintiff had been appointed a receiver by a district court judge in the United States of America and had issued a writ in England seeking to have himself appointed receiver and manager of the assets of a company and its subsidiaries in England. The learned judge in a considered judgment held, rightly as I think, that before the English Courts would recognise the title of a foreign receiver to assets located in the United Kingdom or direct the setting up of an auxilliary receivership, the court had "to be satisfied of a "sufficient connection between the defendant and the jurisdiction in "which the receiver was appointed."

There can be little doubt that Kilderkin Investments Limited has a real connection with the jurisdiction in which Clarkson and Company were appointed. Kilderkin Investments Limited is a limited company incorporated under the Laws of Ontario, while Clarkson & Company, the Receiver and Manager, has been appointed by the Ontario Supreme Court. Goulding, J., in Schemmer v. Property Resources Ltd. (supra), at p. 287 suggested four tests to determine whether that connection existed or not:

1. Has the company in respect of whose assets, the Receiver and Manager has been appointed, been made a defendant in the action in the foreign court?

The answer to this is yes. Kilderkin Investments is a defendant in the suit.

2. Has the company in respect of whose assets the Receiver and Manager has been appointed, been incorporated in the country who appointed the Receiver and Manager?

Again the answer is, yes.

3. Would the courts of the country of incorporation recognize a foreign appointed receiver?

Answer - The Ontario Supreme Court would recognize the appointment of a receiver of a foreign jurisdiction. See C. A. Kennedy Ltd.v. Stibbe-Mark Ltd. & anor. 23 CBR. 81 [1976] 74 DCR. (3d) 87.

4. Has the company carried on business in Canada or is the seat of its central management and control been located there?

Answer - Yes. Kilderkin Investments carries on business in Ontario, Canada. It is as a result of their business operations in Canada that an action has been launched against them by the plaintiffs.

The result of this excursus is that the Grand Court has an undoubted power to make orders recognizing a foreign appointed Receiver and Manager, and accordingly, had the power to recognize these appellants.

The Chief Justice in discharging his ex parte order was of the view, not that he did not have a jurisdiction to recognize a foreign appointed Receiver and Manager but that the procedure adopted by the appellants, viz., an application ex parte in the suit then pending before his court, was inappropriate. Perhaps, it would be helpful if the 'ipsissima verba' of the Chief Justice on this aspect were recited:

> "The original application was not an application for the appointment of a receiver as contemplated by that provision. It was an application by the Receiver and Manager appointed by the Ontario Court for the recognition of that Receiver and Manager and for authority for that Receiver and Manager to perform certain functions within this jurisdiction. Furthermore, O 30 r 1 provides machinery for a plaintiff to have a receiver appointed to take possession of and preserve the assets of a defendant for the purpose of satisfying a judgment in the plaintiff's favour. That is not what the original application was about. It was an application by a Receiver and Manager of a defendant in relation to the assets and operations of that defendant. Clarkson was already the Receiver and Manager of Kilderkin. O 30 r 1 is not designed to give to such a Receiver and Manager Authority over that company for

"the purpose of the suit (cause number 132)."

I understood the learned judge to be saying as well that the procedure was inappropriate because the Ontario Supreme Court did not by any order authorise Clarkson and Company to enter an appearance on behalf of Kilderkin Investments and defend any proceedings brought against that company. The purpose of the application made by Clarkson and Company was to locate assets of Kilderkin for the benefit of and at the instance of the plaintiff in the Ontario action. The terms of the order were far wider than was necessary for the purpose of the suit.

The ex parte order of the Chief Justice was made pursuant to several orders of the Ontario Supreme Court, the entirety of these it would be really unnecessary to rehearse, but I propose to set out the salient segments of the relevant orders, the better to appreciate the reasoning of the Chief Justice. The first order appointing Clarkson and Company Receiver and Manager was dated 15th February, 1983, and provided:

> "1. IT IS ORDERED that, until the trial of this action or until further order of this Court, The Clarkson Company Limited be and is hereby appointed Interim Receiver and Manager of all the undertaking, business, affairs, assets and property of the defendant Kilderkin Investments Ltd. (collectively referred to hereinafter as the 'Undertaking and Assets'), with power to manage the Undertaking and Assets and to carry on the business of the defendant Kilderkin Investments Ltd."
>
> "2. AND IT IS FURTHER ORDERED that the defendant Kilderkin Investments Ltd., its directors, officers, employees and agents and all other parties having notice of this Order deliver up to the Interim Receiver and Manager or to such agent or agents as it may appoint, the Undertaking and Assets of the defendant Kilderkin Investments Ltd. and all books, accounts, securities, documents, papers, deeds, leases and record of every nature and kind whatsoever relating thereto."
>
> "13. AND IT IS FURTHER ORDERED that the Interim Receiver and Manager may from time to time apply to this Court for direction and guidance or additional powers in respect of the discharge of its duties as Interim Receiver and Manager."

The second was dated 28th February, 1983:

> "7. AND IT IS FURTHER ORDERED that the Interim Receiver be and it is hereby authorized and directed to identify the assets of Kilderkin and their location, to identify all persons having an interest in Kilderkin and its

> "assets and entitled to receive notice of any proceedings affecting it."

The third was dated 13th April, 1983:

> "1. IT IS ORDERED that the Interim Receiver and Manager be and it is hereby authorized to commence proceedings in the Cayman Islands to preserve and recover any assets of Kilderkin Investments Ltd. situated in that jurisdiction, or for such other remedy as Counsel for the Interim Receiver and Manager may advise."

My first concern is to consider what these orders empowered Clarkson and Company to do as respects Kilderkin Investments. It is, I think, well established that the scope and nature of the functions of a receiver and manager is governed by the law of the place of incorporation, in this case, Ontario Law. The Chief Justice so stated and in that view, both Mr. Sumpton and Mr. Patten are agreed. There were two affidavits of law, one each on behalf of the respective parties in this appeal. The learned judge dealt with these offerings in this way:

> "While there is very little difference of opinion between them in the sphere covered by both, one goes very much further than the other in setting out the scope of a Receiver and Manager's powers. As each, presumably, purports to be exhaustive in setting out the opinion of the respective deponent as to the extent of the powers of a Receiver and Manager under the law of Ontario this difference in the bounds amounts to a discrepancy or conflict of fact. I cannot choose between the two on affidavit evidence only. I could only accept the common ground in the opinions put forward by two deponents. Further assistance was to be found in Del Zotto et al v. International Chemalloy Corp 1976 14 Ontario Reports 72."

Seeing that the judge said he was unable to choose between the two, this court is entitled to consider this question of fact and make up its own mind as to the true view it should form. Mr. Lederman's affidavit which was filed on behalf of the appellants was full and if I may say so, appears the more helpful. The two most important pieces of information he vouchsafed are to be found in paragraphs 5 and 6 of his affidavit:

> "5. It is a general rule of receivership law in Ontario that a receiver and manager of a corporation appointed by the Court is an officer of the Court and not an agent of the corporation. Upon appointment, the receiver and manager takes possession of the corporation's property which is the subject of the appointment. He also takes control of the conduct of the business of the corporation, exercising the powers of the company as an officer of the Court

"and as principal. The receiver and manager acts for the benefit of all parties in accordance with the directions of the Court.

Del Zotto et al v. International Chemalloy Corp. (1976), 14 O.R. (2d) 72 at pp. 74-75;

Kerr on Receivers, (15th Edition, 1978) at pp. 145, 165 and 232.

6. While the corporation against whom an Order is made appointing a receiver and manager is not dissolved, the receiver-manager displaces the Board of Directors in exercising control over the assets and affairs of the corporation. The officers and directors of the corporation may not interfere with the property over which the receiver has been appointed without first obtaining leave of the Court. Any party who interferes with the possession of the receiver without first obtaining leave may be in contempt of Court.

Del Zotto et al v. International Chemalloy Corp., supra, at pp. 73, 74, 76, 77 ;

Federal Business Development Bank v. Shearwater Marine Limited (1979), 102 D.L.R. (3d) at p. 303."

The other affidavit of law was that of Donald J. Brown. I give an extract below of the three important paragraphs of this affidavit, viz., paragraphs 7, 8, 9:

"7. The general rule in Ontario is that the Company against whom a receiving order has been made pursuant to Section 19 has the status to commence proceedings and has an independent status.

DelZotto et al vs. International Chemalloy Corp., 1976, 14 O.R. (2nd) 72

Clarkson Company Limited v. Canadian Acceptance Corporation et al, (1977), 24 C.B.R. 197.

8. In fact, Kilderkin Investments Limited has commenced proceedings in the Province of Ontario in connection with a libel and slander action. These proceedings were expressly authorized by the Honourable Mr. Justice Galligan as appears by the true copy of his Order annexed hereto and marked as Exhibit 'DJB 1'.

9. As can be seen from the letter dated June 20th, 1983 annexed hereto and marked as Exhibit 'DJB 2', Ontario counsel for the Clarkson Company Limited expressly recognize that there is a separate existence or residuary power in the company notwithstanding the appointment of the receiver."

It is of interest that both learned and distinguished members of the Ontario Bar referred to and relied on Del Zotto et al v. International Chemalloy Corp., [1976] 14 O.R. (2nd) 72, a decision of the Ontario Supreme Court per Van Camp, J. And this court is entitled to look at this case and consider it to confirm or reject the validity of the opinions proffered. Mr. Brown suggested that a company in respect

of which a Receiver and Manager is appointed has the power to commence proceedings if leave of the court is obtained. I am not at all certain what the deponent means when he says that "the company "has an independent status." Doubtless this opinion should be understood as meaning no more than that the original directors have some residual powers, even where the company is in receivership. Mr. Lederman made the point quite clearly that the receiver and manager when appointed becomes an officer of the court and not an agent of the company. He takes the place of the Board of Directors and exercises control as an officer of the court and as principal. The Directors who have been superceded are, nonetheless, entitled to bring an action or defend proceedings with respect to the corporation only where leave of the court has first been obtained. Understood in this light, I for one, do not see any divergence of view. Where Mr. Lederman was explicit, Mr. Brown was less than direct, but what was implied is I think, plain. Paragraph 8 of his affidavit, I suggest, purports to explain paragraph 7 which otherwise would convey the impression that the directors of the company in respect of which a receiver has been appointed could act at their own discretion in initiating proceedings. But paragraph 8 derogates from that expansive view and indicates quite plainly that such a director requires the leave of the court. This must mean therefore that since the company does not cease to exist, its management is in the hands not of the directors but of the Receiver and Manager who on appointment by the court, assumes responsibility for the company's assets and undertakings.

I can now turn to Del Zotto et al v. International Chemalloy Corp. (supra), in which two questions arose for consideration by the learned judge, Van Camp., J., but only one of these is material for our purposes, namely, whether a company in respect of which a Receiver and Manager is appointed, is able to prosecute a counter-claim, which requires corporate funds. In other words, can the directors interfere with the company's assets, control of which, the Receiver and Manager has been given? The learned judge came to the conclusion that in pursuing a claim in damages, the company would be interfering with the possession of the assets which would constitute

a contempt of court. In those circumstances, leave would be required. As to the status of a corporation after appointment of a Receiver and Manager, Van Camp, J., relied strongly on Moss Steamship Co. Ltd. v. Whinney [1912] A.C. 254, the locus classicus on this point. It seems to me to follow ineluctably that the legal position with respect to a Receiver and Manager is the same in Canada as it is in England and by derivation in the Cayman Islands. The result of all this, in my view, is that there does not appear to be any divergence of view between the two affidavits of law put forward by each of the parties to this appeal. The one was explicit, the other impliedly made the same point. It is essential to understand this, as the status of Mr. Player, the director, who has been superseded by the appointment is plainly at issue. Has he a 'locus standi' to apply to the Grand Court to remove the receiver and manager without first obtaining leave of the Ontario Court? This question must in my view underlie any proper consideration of the issues involved in this appeal.

Seeing then that the law of England in regard to receivers and as a consequence, the law of Cayman and the law of Canada more particularly the law of the province of Ontario, are similar, it is right to set out that law. In Moss Steamship Co. Ltd. v. Whinney (supra), Lord Atkinson provided the most definitive formulation as to the effect of the appointment of a receiver and manager in these words at page 263:

> "This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of the land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."

To the like effect, was the Earl of Halsbury in his speech at p. 260, who stated that the effect of the appointment was that it -

> "removes the conduct and guidance of the undertaking from the directors appointed by the company and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets."

These authoritative statements which so far as I know, have never been doubted, make it abundantly clear that the powers of the directors of a company are suspended during the tenure in office of the Receiver and Manager. The receiver is an officer of the court in the performance of his functions and has for that purpose all the powers of the company. He is not an agent of the company but a principal and as such is personally liable on contracts made by them. This aspect of the legal position of receivers and managers is exemplified in Burt, Boulton & Hayward v. Bull (1894) 1 Q.B. 276. At page 282 Lopes, L.J., observed:

> "But the company after their appointment had no control over the business: it could give no orders and make no contracts. The receivers and managers could not be said to be agents for anybody. They had the sole control of the business, subject to the directions of the Court."

And Rigby, L.J., as to personal liability said:

> "The rule has always been that such persons are prima facie themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors or trustees."

In so far as this case is concerned, Clarkson & Co. were specifically given the control and management of all the assets and undertaking of Kilderkin Investments Limited and notice was given to the directors to deliver up the assets of the company to the appellants. It appears to me that Clarkson & Co. had completely ousted the director William Player. In so far as the control and management of the company was concerned, William Player, in my view, had no "locus standi." When the Ontario Supreme Court by its order of 28th February, 1983, directed (see para. 7) Clarkson & Co. to identify and locate the assets of Kilderkin, it was not enlarging the powers of the Receiver and Manager; it was giving specific authorisation as opposed to the comprehensive powers conferred upon the appointment of Clarkson & Co. as a Receiver and Manager. This specific authority could not be exercised by William Player, the sole director of Kilderkin. Further, by parity of reasoning, when by its order dated 13th April, 1983, the Ontario Supreme Court, gave the appellants authority "to commence proceedings in the "Cayman Islands to preserve and recover any assets of Kilderkin "Investments Ltd." it effectively and expressly confirmed removal

of such a power from the hands of its sole director, William Player.

The reason for subsequent applications seeking, for example, authority to institute or defend proceedings is not far to seek. The receiver and manager who institutes or defends proceedings without the prior approval of the court, runs the risk of having his costs disallowed, if subsequently his action is not sanctioned. Seeing that the receiver and manager is personally liable, ordinary prudence would seem to dictate self-preservation by a recourse to prior judicial sanction. It is to be noted that in paragraph 13 of the first order of the Ontario Supreme Court, the appellants were given liberty to apply "for directions and guidance or additional "powers in respect of the discharge of its duties as interim receiver "and manager." They did take advantage of this provision in order to make applications to the court "for the advice and direction of "this court i.e. the Ontario Supreme Court," firstly on 28th February, 1983 when an order was made authorizing the receiver and manager to receive and account for rental payments accruing from the undertaking (para. 2) and further by paragraph 7 - authorized Clarkson & Co. "to identify the assets of Kilderkin and their "location, to identify all persons having an interest in Kilderkin "and its assets." Secondly, by an order dated 29th March, 1983, authorisation was sought to scale down the organisation of Kilderkin. Thirdly, by the order dated 13th April, 1983, authority was given to the receiver and manager "to commence proceedings in the Cayman "Islands to preserve and recover any assets of Kilderkin Investments "Ltd. situated in that jurisdiction or for such other remedy as "counsel for the interim Receiver and Manager may advise."

In my view, there was no necessity in point of law for any application for the powers set out in these subsequent orders. The purpose of the applications was to prevent claims being successfully made against the receiver and manager who as is well-known, is liable personally for his acts. But they demonstrated another important factor. Where the receiver and manager was specifically authorised to act, it was notice to William Player that he had no power to act in those respects. He had been dispossessed of those powers which as a director he would undoubtedly have been able to exercise.

I should at this point say something about a point raised by Mr. Patten for the respondent, William Player. It was submitted that the court should never lose sight of the fact that the appellants were appointed at the instance of the plaintiffs who are common to the actions filed in both jurisdictions. Clarkson were fulfilling functions brought into being, he said, at the suit of the plaintiffs.

The law is that once a receiver and manager is appointed by the court, he becomes an officer of the court and is required to act fairly, and not take sides. In the absence of evidence to the contrary, he is presumed to be acting fairly in the interests of the company to preserve the assets for the benefit of all parties. Mr. Patten as I recall, expressly disclaimed any suggestion that Clarkson and Company were acting other than with perfect propriety. He said there was no basis for alleging any conspiracy between the plaintiffs and the receiver and manager. In the light of that concession, whatever Player might have been entitled to think, and it was mooted that he believed that there had been an element of co-operation between plaintiffs and Clarkson and Company, plainly, the point really is without substance.

I can therefore return to matters of substance. Were Clarkson entitled to make the particular application which was in fact made and granted? Was there the necessity for an ex parte application? The question which is prompted by this mode of application must then be - in what circumstances, is it appropriate to apply ex parte for the recognition of the appointment of a receiver and manager, and then to go on to consider whether these circumstances obtained in the present case. It was Mr. Patten's submission that the circumstances did not warrant such an application

Earlier in this judgment, I concluded that the Grand Court had an inherent jurisdiction to recognise a foreign appointed receiver and manager. It is as well to observe that there are no specific rules either for making such an application. But as I can see no juridical difference between a power to appoint a receiver and the power to recognise a receiver and manager, I can see no serious objection to a resort to the procedure for the appointment of receivers within the jurisdiction. By sec. 37 (1) of the Supreme

Court Act 1981 (U.K.) -

> "The High 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."

The procedure for such appointment is to be found in Order 30 R. 1 of R. S. C. (U.K.). As long ago as Gawthorpe v. Gawthorpe (1878) W.N. 91, Jessell, M.R., wisely observed that there was no limit to the power of the court except that it appears just and convenient. In so far as ex parte applications go, it is trite that such applications are made only in urgent cases. The circumstances which, it was urged, warranted an urgent application was the need for prompt recognition of the appointment of Clarkson & Co. by the court below. The claim made against Kilderkin Investments Ltd. was singularly large, in excess of $109M (Can.) and this obliged the receiver and manager in preserving the company's assets first to prevent any defence open to the company from going by default and secondly, to take prompt action in the light of the mandatory orders against the company, which required timely compliance.

The response made to these submissions by Mr. Patten was that there was a coincidence of interests as between the company and its sole director and shareholder, Player, who all along intended to protect the company's interest. As to the mandatory orders made, there could be no cause for concern since the Clerk of the Grand Court under powers of the Grand Court Act, would have signed the orders as had occurred in the case of the fourth defendants.

I must confess that I remain wholly unconvinced by these arguments of learned counsel for the respondent, attractive though they appear to be. In the first place, even if there is a coincidence of interest, the receiver and manager is obliged by the nature of his responsibility to act at his discretion for it is on him the mantle of management of the company has fallen. But this coincidence of interest has certainly not been demonstrated in any shape or form. Indeed, far from that being the case, we were advised that the company has launched its own action against the sole director, William Player (being cause 183). As respects timely compliance with the mandatory orders in favour of the

plaintiffs and against all the defendants, the receiver and manager who has the control and management of the company, in carrying out his functions, has the responsibility of seeing that so far as the orders touch and concern the company, no contempt of court was committed. I think this was a positive duty and part of what Mr. Sumption categorised as managerial functions of a director. In endeavouring to see whether the ex parte application was justified, it is the circumstances at the time of the application that should be looked at and these have been indicated earlier. Fo r with the benefit of hindsight, it might well be thought that there was scarcely any need for precipitate action. In my view, having regard to those circumstances, the appellants were entitled to make an application ex parte.

One of the arguments mounted in support of the Chief Justice's order discharging the ex parte order, was that the appellants, as defendants in an action were not entitled to make the application largely because the Ontario Supreme Court orders did not authorise the appellants to defend any action but "to commence "proceedings ... to preserve and recover any assets of Kilderkin "Investments Ltd. situated in that jurisdiction." The learned Chief Justice was clearly of opinion that "Clarkson, as manager and "receiver, had no authority under the orders of the Supreme Court of "Ontario to defend on behalf of Kilderkin in cause 132."

In my view the phrase "commence proceedings" is not a term of art. It is plain English and means, in my view, no more than to begin a step in legal proceedings. To ascribe any other meaning would lead to a clear absurdity, for it would mean that while Clarkson and Company would be acting perfectly legitimately in filing an action on behalf of the company to preserve or recover the company's assets, they would, on the other hand, be acting illegitimately if they entered an appearance on behalf of the same company and filed a counter-claim, for example, to preserve or recover the same assets. I would reject a construction which leads to such a patent absurdity. I must therefore record my dissent to the contrary view expressed by the learned Chief Justice. In my respectful view, he was patently in error.

Further, it should be said that there is no question but that such an application can be made either by the plaintiff or a defendant in the action. Where the relief is sought by the defendant, however, there is authority for saying that it must arise out of the relief claimed by the plaintiff or the defendant must counter-claim or issue a writ before he can obtain a receiver. Carter v. Fey (1894) 2 Ch. 541. The learned Chief Justice was plainly in error when he observed at page 7 of his judgment -

> "Furthermore, O 30 r 1 provides machinery for a plaintiff to have a receiver appointed ....."

Mr. Patten candidly acknowledged that the view here expressed was erroneous and nothing further need be said about it.

Another of the reasons put forward by the Chief Justice for discharging his order was that the order sought on the ex parte application, and in the result granted, was wider than was necessary for the purposes of recognition of a receiver and manager within the jurisdiction. The particular wider order was numbered 2 and recited as follows:

> "2. The Clarkson Company Limited is authorised and permitted to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of this Court and to make inquiries and requests for information and documents, whether on paper, microfilm or tape or in any other form relating to any assets of Kilderkin which may be in the possession or control of any person, bank, or company within the jurisdiction of this Court, notwithstanding the Order of this Court dated the 16th day of April, 1983."

The view of the Chief Justice was "that Clarkson did not need the "power (as set out above) for the purposes of cause 132," and "the "resulting order went far beyond what was necessary for the "purposes of cause number 132." The action against Kilderkin and the other defendants sought (inter alia) -

> "1. Damages for fraudulent or illegal conspiracy to apply in breach of trust the monies of the Plaintiffs or one or more of them."
>
> "3. An enquiry as to what monies investments and securities now represent or, but for the wilful default of the Defendants, would represent the said profits and an Order that the Defendants and each of them pay to the Plaintiffs what may be found due upon taking such an enquiry."

> "5. An Order that the Defendants and each of them to the extent of any estate or interest respectively vested in them in the said monies, securities and investments or any of them or any part or parts thereof, and in respect of the said profits, investments and dividends or any of them or any part or parts thereof, pay or transfer the same to the Plaintiffs or as they direct."
>
> "7. Insofar as necessary, an enquriy and/or account of all dealings with the said monies, securities and investments and the said profits, interests and dividends, an Order that payment of any sum found due to the Plaintiffs and the taking of such enquiry and/or account."

Plainly, all the assets of Kilderkin Investments would be at risk in the event that this action was successfully concluded in the plaintiffs' favour. Moreover, during the hearing of the present appeal, the appellants on behalf of Kilderkin filed an action against William Player to protect the assets and undertaking of Kilderkin. A responsible receiver and manager would enquire where his company's assets are so that they may be protected. It is difficult to conceive how the receiver and manager could properly function in accord with his prime duty, if he was quite unaware where the assets of the company were located. The claims against the company sought to trace funds which the plaintiffs were alleging were theirs, while the company would be asserting its own entitlement to those funds. Indeed, it is right to say that in locating funds of the company, the appellants were doing no more than was essential or prudent for the proper discharge of their duties. They would be acting consistent with their duties and in my view, need not have sought the order in terms of paragraph (2) of the application, which have earlier been set out. In these circumstances, I cannot regard the view of the learned Chief Justice that "Clarkson's preservation "of the assets of Kilderkin in this jurisdiction in its capacity "as Receiver and Manager of Kilderkin had no relevance to the "suit (No. 132) in this jurisdiction," as correct.

The assets of Kilderkin had to be protected and preserved not only by reason of the plaintiffs' claim but also (and this is a mere allegation) by reason of the illegal activity of William Player, the sole director, and himself a defendant in the action (cause 132/83). There was some suggestion that the assets of Kilderkin were no longer at risk by reason of the Maraeva injunction

obtained by the plaintiffs and further an undertaking in costs. As to the first suggestion, relief sought and obtained by the plaintiffs, cannot in my view relieve the receiver and manager of his responsibilities in respect of the company. As to the second, I am content to say that the same reasoning applies. At all events, I ca mot see how these considerations have any bearing on whether the procedure adopted was appropriate or not.

But even if contrary to the conclusion at which I have arrived, the procedure adopted by the appellants was inappropriate and an original application would have been proper, I would have been prepared to hold nonetheless that the order should not have been discharged for in my judgment no prejudice has resulted to the respondent. He was heard by the Chief Justice and by this court and was afforded every opportunity to represent his cause. There is moreover power in the court (see Order 2 R. 1) to treat non-compliance with the rules as an irregularity and not as nullity. I did not understand the Chief Justice's judgment as deciding that the procedure was a nullity for he did not appear to think that Clarkson were not entitled to be recognised as receiver and manager within the jurisdiction, but that the procedure was not the correct method. In fact he himself identified the non-compliance as a "procedural irregularity." That being so, unless some injustice could be shown and none has been, although the Chief Justice thought that it led to a breach of the "audi alteram partem" rule, the irregularity should not be allowed to affect the matter. I have dealt with the fact of prejudice previously. It is enough to repeat that the circumstances in my view warranted an ex parte order and at all events, the other side has now been heard. I think Mr. Sumption was eminently right when he observed that the point of procedure was the purest technicality, which might well suggest that it did not merit as exhaustive a consideration as it in fact received. But the matter is of some interest in this jurisdiction; the careful research and arguments of counsel were deserving of serious consideration and treatment and out of deference to the judgment of the Chief Justice.

I pass now to the question of construction mentioned

earlier. The learned Chief Justice discharged his ex parte order by reason of their conduct in flouting, as he found, the provisions of the Confidential Relationships (Preservation) Law (Law 16/1976). He found that:

> "Clarkson has been responsible for the disclosure of confidential information within the meaning of that Law in the report of 15th June 1983 addressed to the Chief Justice of the Ontario Supreme Court."

And that :

> "... no application was made under sec. 3A. The confidential information was divulged without authority."

He concluded that the breach appeared to be deliberate.

We must now examine the relevant provisions of the Act. Section 4 (1) (a) (i) creates the offence of divulging confidential information. It states as follows:

> "4.(1) Subject to the provisions of sub-section (2) of section 3, whoever -
>
> (a) being in possession of confidential information however obtained;
>
> (i) divulges it;"

is guilty of an offence. This provision plainly all embracing in scope, is limited however by Section 3 (2) (as amended) which recites as follows:

> "(2) This law has no application to the seeking, divulging, or obtaining of confidential information -
>
> (a) in compliance with the directions of the Grand Court pursuant to section 3A;
>
> (b) by or to -
>
> (i) any professional person acting in the normal course of business with the consent, express or implied, of the relevant principal."

For completeness, the provisions of section 3A (1) should be recited. These provisions are in the following form:

> "3A. (1) Whenever a person intends or is required to give in evidence in or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted."

The Chief Justice by his findings came to the conclusion that the appellants had acted contrary to section 4 (1) (a) (i) of the Act.

There was no question but that the appellants had submitted a report dated 15th June, 1983, to the Ontario Supreme Court concerning the affairs of Kilderkin which they had doubtless obtained from banks in these Islands.

Mr. Sumption submitted that in order to invoke the provisions of the Act, two conditions must be satisfied, viz.:

(i) there must be a communication of information in confidence by a principal to someone else i.e. Clarkson, and

(ii) it must be shown that Clarkson divulged that information without consent of Kilderkin;

and these had not been met. Mr. Patten contended that it was an offence to divulge information "however obtained." / This would be so even if Clarkson obtained information from a bank notwithstanding that the information was originally given to the bank by Kilderkin and by the bank to Clarkson. / So the offence was committed not only by the person to whom the information is communicated but anybody else who subsequently receives it and divulges it.

Under the Act, the information which it is forbidden to divulge is "confidential information." which is defined by the Act as including -

> "information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge."

In the present appeal, it is accepted that the "principal" is Kilderkin Investments. "Principal" means under the Act -

> "a person who has imparted to another confidential information in the course of the transaction of business of a professional nature."

So that we are concerned with confidential information, which Kilderkin did not authorize to be divulged. Mr. Patten urged that Clarkson in order to obtain consent of Kilderkin had to ask for it. In my view, this cannot be right. The consent of Kilderkin if no receiver and manager had been appointed would have been given by its director, William Player. But in the circumstances of this case, the managerial functions of Player were in abeyance, and management of the assets and undertaking of the company had been entrusted to the receiver and manager. The Ontario Supreme Court's orders made

that abundantly clear and in point of law, the managerial functions of Player, were ousted. It would be no more than solemn farce for Clarkson to obtain consent from themselves, to divulge information in the normal course of business. "Normal course of business" is defined in the Act as meaning -

> "the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees."

Clarkson did not therefore require any consent. The information which was disclosed to them and which they divulged to the Ontario Court, was received in virtue of their position as replacing the director of the company. Sec. 3 (2) (b) (i) exempts from the operation of the Act - the divulging of information by any professional person acting in the normal course of business or with the consent of the principal, express or implied. The combined effect of section 4 (1) (a) (i) and section 3 (2) (b) (i) is not to forbid absolutely the divulging of confidential information but prevents a finding of guilt where the communication occurs in the normal course of business or where the principal consents to the dissemination.

In the result, there is merit in the submission of Mr. Sumption as to the conditions which must be satisfied in order to invoke the provisions of the Act. I entirely agree that the conditions have not been satisfied and accordingly there has been no breach of the Act by the appellants.

Having regard to the approach which the Chief Justice took in relation to the position of a receiver and manager vis-a-vis the company in respect of which they have been appointed, it followed logically that he would conclude, as indeed he did, that -

> "The company Kilderkin (and the fourth defendants in relation to their affairs) remained the principal for the purposes of the Confidential Relationships (Preservation) Law and continue to be the principals in relation to the confidential information relating to the company - in particular all the confidential information in relation to which the company was the principal before the Receiver and Manager was appointed."

He was right in holding that the company was "principal" for the purpose of the Act, but fell into error in thinking that the

receiver and manager had not replaced the company's director in respect to its management. I do not think there would be any doubt that if Kilderkin through its director had divulged confidential information prior to the appointment of the receiver and manager, that anyone would successfully assert they had breached the Act. Seeing then that Clarkson have stepped into the shoes of Player, they are in the same position as the erstwhile director and equally exempt from liability under the Act. Mr. Sumption pointed out, as I think, correctly that the information belongs to the company. He regarded this information as an asset. Mr. Patten disagreed as to the information being an asset, but he did not dissent to the view that as business information, the company retained the privilege of non-disclosure. It is the director who has the right to this information and who exercises a managerial function in respect of it. In the present case, it is the appellants who exercise that power; they have the control and management of the assets and undertaking of the company.

If what has been said is correct, it is really unnecessary to consider whether the receiver and manager was required to comply with the provisions of section 3A (1), viz., obtain directions from the court. The fact of the matter was that no such application was made. A factor which I think should be kept in mind is that Clarkson as receiver is an officer of the court and a report to the court by its officer, cannot surely qualify as conduct which should disentitle the receiver and manager to continue to act. In my view, these appellants in reporting to the Ontario Supreme Court with respect to their stewardship, could scarcely be categorised as busybodies interfering in the affairs of strangers; they would be acting in consonance with their obligations to the court as officers of the court and in accord with their responsibilities as managers of the company. I am therefore constrained with respect to disagree with the conclusion of the learned Chief Justice that -

> "that justifies the exercise of this Court's discretion to discharge the order."

It only remains to consider that part of the order whereby the attorneys acting for the receiver and manager were

removed from the record and the attorneys for Player placed thereon. The Chief Justice acted pursuant to Rule 59 (3) of the Grand Court (Civil Procedure) Rules 1976 which decrees:

> "If a dispute or difficulty arises as to the representation of any party to a suit or any person claiming to be the attorney-at-law of any party to that suit or to have acted in that suit may make application by summons to the judge in chambers who may make such order in that behalf as appears just and expedient."

There was not a deal of argument in relation to this rule but I would be inclined to think that it is based on Order 67 R.S.C. (U.K.) There is however no rule in that order in similar terms. I am not at all clear what was the intention of the draughtsman in the use of the words "dispute or difficulty." Order 67 R. 5 (U.K.) appears to be the only rule where a party other than a party to the cause or action is entitled to apply, in effect for a declaration that the solicitor has ceased to be the solicitor acting for the party. Rule 5 provides:

> (1) Where -
>
> (a) a solicitor who has acted for a party in a cause or matter has died or become bankrupt or cannot be found or has failed to take out a practising certificate or has been struck off the roll of solicitors or has been suspended from practising or has for any other reason ceased to practise, and
>
> (b) the party has not given notice of change of solicitor or notice of intention to act in person in accordance with the foregoing provisions of this Order,
>
> any other party to the cause or matter may apply to the Court or, if an appeal to the Court of Appeal is pending in the cause or matter, to the Court of Appeal for an order declaring that the solicitor has ceased to be the solicitor acting for the first-mentioned party in the cause or matter, and the Court or the Court of Appeal, as the case may be, may make an order accordingly."

The occasions in which a situation such as occurred in this case came about are so rare that it is unlikely that the rule could have been devised for such an unusual eventuality. But even if I am wrong in this view, it is difficult to regard the application by the respondent as "a dispute or difficulty arising as to representation." Having removed the attorneys on the record for Kilderkin, some other attorney was required on the record as acting for the company. I

do not think that the rule could be prayed in aid in these circumstances.

Perhaps of more fundamental importance, is the fact that by that order, Player the director of Kilderkin who had been required to hand over all the assets and undertaking of the company under orders of the Ontario Supreme Court, was being placed once more in a position where the assets and undertaking of the company would be at risk. For it is evident that while Player considered his interests and those of the company to coincide, that was a picture the duly appointed receiver and manager did not share. We understood during these hearings that Kilderkin had filed an action against Player and others in relation to the assets of Kilderkin within the jurisdiction. So startling a result is not, in my respectful opinion, in keeping with the principle of comity. I am not to be taken as suggesting for one moment that the court has not the power to refuse to confirm or recognise the appointment of a foreign receiver, but there must exist strong and compelling constraints against such recognition. None in my view has been shown. For these reasons I am led to conclude that that portion of the order was also erroneously made.

Accordingly, I would set aside the order of the Chief Justice which discharged his ex parte order and removed the appellants' attorneys from the record. The appeal should be allowed with costs both here and below.