In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2017 No: 90

IN THE MATTER OF SAAB FINANCIAL (BERMUDA) LTD.
AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

ASEDOR FINANCE LIMITED

Appellant

-and-

(1) MATHEW C. CLINGERMAN
(2) KENNETH KRYS
(acting as the Joint Liquidators of Saab Financial (Bermuda) Limited (In Liquidation))

Respondents

RULING

Date of Hearing:	Friday 17 January 2020
Date of Judgment:	Wednesday 18 March 2020
Appellant (Putative Creditor):	Mr. Jonathan O'Mahony (Conyers Dill & Pearman Limited)
Joint Provisional Liquidators:	Mr. Sam Stevens (Carey Olsen Bermuda Limited)

Appeal against Joint Provisional Liquidators' Rejection of Proof of debt
Rule 75 of the Companies (Winding-Up) Rules 1982
Whether Appellant had a right to rescind contract made under Mauritian Law

RULING of Shade Subair Williams J

Introduction

1. This is an appeal under Rule 75 of the Companies (Winding-Up) Rules 1982 ("the Winding-Up Rules") against the rejection of a proof of debt in the liquidation of Saab Financial (Bermuda) Limited ("Saab" / "the Company"). The Appellant, Asedor Finance Limited ("Asedor" / "the Appellant") is a BVI incorporated company which holds itself out to be an aggrieved unsecured creditor whose proofs of debt were wrongly rejected by the Respondent Court-appointed joint liquidators, Mr. Mathew Clingerman and Mr. Kenneth Krys ("the Respondents" / "the JLs").

2. On an *ex parte* summons application, dated 26 July 2019, the Respondents obtained the sanction of this Court to, *inter alia*, give their notice of intention to declare a final dividend pursuant to Rule 150 of the Winding-Up Rules and to distribute a final *in specie* dividend "*comprised of all assignable property of the Company by taking all reasonable steps to assign such property to the creditors of the Company, subject to the creditors of the Company meeting the costs and expenses associated with such assignment*…". In the same Court Order which was made on 16 August 2019 by the learned Chief Justice, Mr. Narinder Hargun, the Court sanctioned the Respondents' making of an application for their release and the dissolution of the Company under section 178 of the Companies Act 1982.

3. By Notice of Motion, dated 27 September 2019, the Appellant seeks the reversal or variation of the Respondents' Notices of Rejection of Proof of Debts, dated 6 September 2019 ("the 1st Rejection") and 9 September 2019 ("the 2nd Rejection"). The evidence of the Proofs of Debt relate to the sum of US$170,114,618.

4. The Appellant is also in pursuit of an order of costs in their favour to be paid out of the assets of the Company "*as a super-priority under Rule 140(3) of the Rules*". The Appellant further prays under the Notice of Motion for a stay of the Respondents' application for their release and for the dissolution of the Company. However, on 10 October 2019 Mr. Stevens, appearing on behalf of the JLs, confirmed that there was no prospect of the Respondents pursuing the dissolution of the Company or otherwise furthering the steps sanctioned by the Chief Justice under the 16 August Order pending the determination of this appeal.

5. Of note, the Respondents remained neutral in their overall stance on the appeal. Notwithstanding, the JLs refuted any hint of criticism that their deliberations on the proofs of debt were insufficient or improper.

The Facts

6. The evidence before the Court comprised of the affidavit evidence of the First Respondent, Mr. Mathew Clingerman and that of Ms. Elvira Castaneda, a director of Compass Directors Limited ("Compass"), which is a corporate director of the Appellant. Additionally, the relevant facts were informed by the expert evidence of Mr. Yahia Nazroo, a barrister and partner at Appleby, Mauritius Office.

7. The debts claimed arise out of three five-year term placement agreements between Asedor and the Company, the first of which was made on 16 November 2012 at an annual interest rate of 5.5% on the principal sum of US$50,000,000 ("the first placement agreement"). The second placement agreement was made on 16 July 2013 in the amount of EUR€38,000,000 at an annual interest rate of 3.75% ("the second placement agreement"). The final of the three was also made on 16 July but for the sum of US$50,000,000 at an annual interest rate of 4. 5%[1] ("the third placement agreement"). Collectively, I shall refer to all three of these three placement agreements as "the placement agreements". The placement agreements are governed by English law.

8. The Company's non-payment of the loans made under the placement agreements is undisputed. On 11 January 2017 Asedor served a statutory demand on the Company and thereafter petitioned for its winding up. On 21 April 2017 the learned Chief Justice, Mr. Ian Kawaley (as he then was), ordered the winding up the Company pursuant to the provisions under Part XIII the Companies Act 1981 and the Respondents were appointed as joint provisional liquidators before they were confirmed as joint liquidators.

9. The first proof of debt submitted by Asedor was for the sums of US$103,706,589.00 (representing a combined outstanding sum in principal and interest owed under the first and third placement agreements) and EUR€40,510,342.47. This was submitted to the JLs on 27 July 2017 ("the First Proof").

10. On 16 July 2018 Asedor entered into a written agreement with First Company of the Atlantic (II) Ltd ("FCA II") and FCA II's parent company, Weston Capital Partners Limited ("WCPL").

[1] In the 8th affidavit of Mr. Matthew Clingerman, the interest rate is stated to be 4.5% [para 9] whereas in Ms. Castaneda's affidavit the interest rate is stated to be 4.75% [para 5iii]. This discrepancy may be resolved by reference to Placement Agreement Reference SFPA 48/13 and the Term Sheet which both state the agreed interest rate to be at 4.5%.

Both FCA II and WCPL are companies incorporated in the Republic of Mauritius ("Mauritius"). Under this written agreement ("the Assignment Agreement") Asedor agreed to assign to FCA II its claim to the debts owed by Saab, including unpaid interest ("the assignment"). In consideration for the assignment of these rights, it was agreed that Asedor would receive FCA II Recovery Notes ("the Recovery Notes") to the same value as the debts owed by Saab under the placement agreements.

11. Also on 16 July 2018 a written agreement entitled "Term Sheet for Purchase and Sale of Saab Financial (Bermuda) Limited- Private Placement Notes" ("the Term Sheet") was made between the same parties as those signatory to the Assignment Agreement. It is clear on a review of both documents that the execution of the Term Sheet preceded the execution of the Assignment Agreement, notwithstanding the same date mark affixed to both agreements.

12. The Assignment Agreement is governed by the domestic laws of Mauritius pursuant to an exclusive jurisdiction clause and the Term Sheet contains a provision which states that all documentation shall be subject to Mauritian law with provisions thereunder for arbitration.

13. The Term Sheet refers not only to the private placement notes issued by Saab to Asedor under the placement agreements ("the Asedor Notes"), but also refers to unrelated Notes issued by Saab and owned or controlled by two other corporations. In the context of these proceedings, the Term Sheet is a broad outline or memorandum of the agreed terms for the sale and transfer of the Asedor Notes to FCA II for incorporation into a legally binding contract.

14. The Term Sheet expressly states on its face that it is '*not legally binding and is subject to contract*'. However, at paragraph 8 of Ms. Castaneda's affidavit she states:

"*Furthermore all of the parties acted on the understanding that the Term Sheet created a binding contractual agreement; this is evidenced by an email dated 23 July 2018 from Jabir Udhin, a director of both FCA II and WCPL, to LCP and John Liegey a director of WCPL, in which Mr. Udhin's understanding of how the termination provision in the term Sheet operated was set out*…"

15. In the 23 July email from Mr. Jabir Udhin, he stated:

"… *To be perfectly clear, this clause in the Term Sheet ranks priority as it forms part of the heads of terms for the loan. What this clause states is that if Asedor reclaims the Saab PPNs after the assignment:*

1. *Asedor forfeits its option on acquiring the shares of FCA II;*
2. *Asedor walks away with the Saab PPN and only one claim on the debt default of the Saab PPN returned to it.*

If there are any other claims in the legal proceedings initiated, these other claims will not be returned to Asedor nor will Asedor have any participation thereof, and these claims will remain for FCA II.

For avoidance of doubt, if FCA II is required to return back the other claims, then we will not file the claims in the first place and Asedor will be required to warrant and represent for costs, damages, claims, counterclaims, compensation and indemnification filed against us by the Saabs…"

16. The above email message from Mr. Udhin came in reply to the expressed concerns of Mr. Robert Hebble who was negotiating the terms of the Assignment Agreement on behalf of Asedor. Mr. Hebble had written to Mr. John Liegey, the Chief Executive Office of WCPL, stating on 17 July 2018:

"*John, can we reference the walk away language in the docs* […]. *The issue about being able to quit and walk away whenever* [the client (Asedor)] *wants is important*."

17. An affidavit sworn by Mr. Hebble was produced as an exhibit under the expert opinion evidence of Mr. Nazroo which is addressed further below. Mr. Hebble deposed that in an email sent on 23 July 2018 he made an additional inquiry to Mr. Udhin for the inclusion of the termination clause in the Assignment Agreement. Less than two hours thereafter came the response from Mr. Udhin as recited further above.

18. The termination provision referred to in the Term Sheet provides as follows [6j]:

"*The transaction may be cancelled only if they so agree previously and in writing. Asedor may terminate the transaction before the expiration of the term, with written communication to FCA (II) and WCPL with ninety (90) days in advance. However, if said termination takes place at any time after the date of execution of the closing agreements, Asedor, (1) shall have no rights to participate in any claims other than the claim specific to the defaulted Private Placement Notes issued by Saab Bermuda and (2) must indemnify FCA II as to costs, damages and disbursements incurred or to be incurred, in pursuing the recovery of the defaulted Private Placement Notes issued by Saab Bermuda, whether litigated or not. For avoidance of doubt, each and every claim, other than the claim specific to the defaulted Private Placement Notes issued by Saab Bermuda, shall remain claims attributable to FCA II only and Asedor shall have no recourse to such claims*."

19. No such termination clause appears in the Assignment Agreement. In fact, the Assignment Agreement contains the following clauses of interest:

[5(d)]

"*Representations and Warranties of Asedor. Asedor hereby represents and warrants to WCPL and FCA II as follows:*

(a)-(c)…

(d) No Reliance. Asedor acknowledges and agrees that it is not relying on any representations and warranties other than those expressly set forth in this Agreement.

…

[6a]

Amendments & Waivers. No purported amendments to any provision of this Agreement shall be binding on the parties unless each party has duly executed and delivered to the other party a written instrument that states that it constitutes an amendment to this Agreement and specifies the provision(s) hereof that are being amended. No purported waiver of any provision of this Agreement shall be binding on any party unless it has duly executed and delivered to the other party a written instrument which states that it constitutes a waiver of one or more provisions of this Agreement and specifies the provision(s) hereof that are being waived. Any such waiver shall be effective only to the extent specifically set forth in such written instrument. No waiver of any right, power or remedy of a party shall be deemed to be a waiver of any other right, power or remedy of such party or shall, except to the extent so waived, impair limit or restrict the exercise of such right, power or remedy.

[6b]

Entire Agreement. This Agreement constitutes the entire agreement among the parties with respect to the subject matter hereof and supersedes all previous and contemporaneous contracts, representations, warranties and understandings (whether oral or written) by or among the parties with respect to the subject matter hereof including any term sheet, letter of intent or similar document."

20. In Ms. Elvira Castaneda's affidavit evidence, she states that a notice of the assignment was given to the Company on the same date, 16 July 2018, as the making of the Assignment Agreement. (Mr. Clingerman deposed that the JLs received of a copy of the notice of assignment on 18 September 2018).

21. Ms. Castaneda further deposed that on 21 August 2019 Asedor gave written notice of its termination of the assignment to FCA II and to WCPL, via email and courier mail. Copies of those termination notices were produced as an exhibit. Ms. Castaneda asserts that Asedor effectively exercised the termination provision under clause 6(j) of the Term Sheet thereby making Asedor a creditor or contingent creditor of Saab. She explained [para 10] that the contingency "*might be said to arise on the basis of the operation of the 90-day notice period under clause 6(g).*"

22. Since which, FCA II has commenced proceedings against the Company in the Supreme Court of Mauritius for the sums owed under the placement agreements. However, the JLs have not partaken in those proceedings for a lack of available sufficient funds and because they consider such proceedings to have been improperly launched without the leave of the Bermuda Court.

23. On 21 August 2019, Asedor through its Bermuda attorneys at Conyers Dill & Pearman Limited ("Conyers") presented itself as a creditor or contingent creditor of the Company on the basis that Asedor had given notice of termination of its assignment of the placement agreements to FCA II. However, on 27 August 2019 the JLs responded in writing;

"*As you will be aware, the Joint Liquidators are in receipt of a claim for the same placement from FCA II. It is not for the Joint Liquidators to determine if the termination was valid, and the Joint Liquidators therefore request that Asedor asks FCA II to confirm directly with the Joint Liquidators that FCA II no longer has an interest in the placement Asedor is claiming*".

24. Mr. Clingerman in his affidavit points out that the FCA II informed the JLs that they did not accept the notice of termination to be valid. He included in his affidavit evidence an extract from correspondence between Asedor and FCA II where FCA II stated in a 1 September 2019 letter:

"*Asedor and its lawyers, Conyers are hereby ordered to immediately withdraw, retract and cancel all communications concerning Termination of a Closing Contract and Forbearance Agreement to WIARCO, FCA(III), FGFL and their lawyers and provide an immediate written retraction to WIARCO of the above recorded Forbearance Agreement forgery. WIARCO will not accept a termination of existing executed Closing Documents (Appendix C) and states categorically* ***that there will be no return of the Saab Financial (Bermuda) Limited Private Placement Notes*** *in the nominal aggregate amount of USD 93,000,000 and Euro 38,000,000 (represented by SFPA 65/12, SFPA 46/13 and SFPA 48/13)…*"

25. At paragraph 28 Mr. Clingerman explained the JLs reasoning for having rejected the first proof:

"*The Joint Liquidators considered that Asedor's and FCA II's competing claims for the Asedor Placements under the First Proof filed on 27 July 2017 were duplicative. On 6 September 2019 the Joint Liquidators rejected both Asedor's and FCA II's claims in respect of the First Proof.*"

26. It should be noted that Mr. Clingerman clarified at paragraph 45 of his affidavit that FCA II never submitted a separate (or its own) proof of debt in the liquidation of the Company. The JLs would argue that this defeats the Appellant's criticism that they duplicitously rejected FCA II's claim for the same sum. The Appellant contends in its written submissions [paras 17-18]:

"*Even if it is right that FCA II did not formally submit a proof in the liquidation in relation to the Asedor claims (and the position here must be open to some doubt), it appears to be uncontested that FCA II submitted in relation to other debts assigned to it.*

By submitting a proof in the liquidation of Saab FCA II has submitted to the jurisdiction of this Court…"

27. On 6 September 2019 Asedor submitted a renewed proof of debt supported by the affidavit evidence of Ms. Elvira Castaneda ("the Second Proof"). The JLs considered the grounds underlying the Second Proof to be substantially the same as those in support of the First Proof. Accordingly, the JLs rejected the Second Proof.

The Jurisdiction Issue

28. There is no dispute before this Court challenging the governance of Mauritian law over the question as to whether Asedor's termination of the assignment triggered an automatic right of rescission of the Assignment Agreement. Mr. Clingerman, however, cautioned this Court against engaging the merits of the purported termination notice given that proceedings to resolve this point have been commenced in the Supreme Court of Mauritius.

29. Highlighting the order made by the Chief Justice on 16 August 2019 under which a final *in specie* dividend was distributed, Mr. Clingerman deposed [para 50]:

"*Further, up until the correspondence from Asedor on 14 August 2019, the joint liquidators were not (in) possession of any information to suggest that there was any other creditor of the Company other than FCAII. For avoidance of doubt, I am informed by my legal Counsel, Carey Olsen, that during the hearing on 16 August 2019 that they brought to the Court's attention the correspondence from Conyers' (sic) on 14 August 2019 in which they claimed Asedor was a contingent creditor. Notwithstanding that correspondence, the Court proceeded to make the Distribution Order*."

30. Mr. O'Mahony, however, submitted that the Appellant is entitled to prove its contractual rights as a matter of Mauritian law.

The Termination of the Assignment Agreement Issue

31. Mr. O'Mahony described the expert opinion of Mr. Yahia Yusuf Nazroo of Appleby Mauritius to be clear. Mr. Nazroo, a practicing barrister admitted before the Supreme Court of Mauritius since 2 February 2005, provided a comprehensive legal opinion which, *inter alia*, addressed the laws of Mauritius relating to non-execution of contractual obligations.

32. Mr. Nazroo commented on clause 6(j) in the Term Sheet but noted [para 19]; "*However, the Termsheet is subject to contract and is not legally binding*". He also observed that the Assignment Agreement does not contain an early termination clause [para 20].

33. Mr. Nazroo also referred to the following clauses in the Assignment Agreement:

"*Purchase and Sale of the Transfer Saab PPNs. Simultaneously with the execution and delivery of this Agreement, FCA II shall purchase from Asedor, and Asedor shall sell, transfer and assign to FCA II, all of Asedor's rights and interest in the Transfer Saab PPNs, in exchange for the Recovery Notes to be issued by FCA II to Asedor upon the sale, transfer and assignment of the Transfer Saab PPNs by FCA II. Completion ("Completion") of the sale, transfer and assignment of the Transfer Saab PPNs under this Agreement shall take place on July 24, 2018.*

Purchase Price. FCA II shall pay to Asedor the aggregate purchase price representing 11% of the Transfer Saab PPNs by way of an exchange for the Recovery Notes, which shall constitute payment consideration in full satisfaction of the purchase price of the Transfer Saab PPNs."

34. Mr. Nazroo pointed out that FCA II did not honour its contractual obligation to assign its rights in the FCA Recovery Notes to Asedor. Instead, as he noted; "(WCPL) *sent Asedor a draft Recovery Sharing Agreement which was supposed to replace the exchange of the Recovery Notes*." What followed thereafter was Asedor's termination notice of the Assignment Agreement to FCA II.

35. Mr. Nazroo considered, amongst other things, the following passage from the Notice of Termination sent by email on 21 August 2019:

" …

2. The FCA II notes were never delivered to Asedor. Instead on or about 3 June 2019 Weston (WCPL) sent Asedor a draft Recovery Sharing Agreement ("the RSA") which was supposed to replace the issuance of the FCA II Notes. It was Weston's view that: "[the FCA Notes] require a registration and approval of the Mauritius Financial Services

Commission. We consider that the RSA be a simpler and cleaner way to deal with this. It is still in draft form as we are awaiting comments from your end, then we will issue and (sic) execution copy". No execution copy was issued.

3. *Please thereby accept this notice as giving 90 days' notice by Asedor of termination of the transaction pursuant to clause 6(j) of the Termsheet as set out above. The end of the ninety (90) days' notice for these purposes shall be known as "the Date".*

4. *By no later than the Date FCA II will transfer the Asedor Notes to Asedor with full legal and beneficial title to the Asedor Notes being transferred thereby, including all claims arising thereunder as referred to in clause 6(j) of the Termsheet.*

5. *By no later than the Date FCA II shall notify Asedor of any costs, damages and disbursements, incurred or to be incurred, in pursuing the recovery of the defaulted Private placement Notes issued by Saab whether litigated or not ("the CDD"). Payment by Asedor of the CCD to FCA II shall occur within a reasonable time after the Date*."

36. The hybrid legal system which governs Mauritius law is explained in Mr. Nazroo's opinion. In summary, French intrusion imposed le Code Pénale; le Code Civil; le Code de Commerce and le Code de Procédure Civile. The impact of English invasion is also visible in commercial law enactments passed by the Mauritian National Assembly which correspond with English statutes. The examples provided were bankruptcy law and company law.

37. Mr. Nazroo further explained the general sources of Mauritius law, being the Constitution (which is expectedly supreme) and Mauritian case law which follows the same kind of hierarchical Court structure as applied under Bermuda law. Of course, English case law from the United Kingdom Supreme Court and decisions handed down from La Cour de Cassation are highly persuasive under Mauritius law.

38. On the subject of contract law, Mr. Nazroo stated that the French Civil Code governs in Mauritius. Offering an English translation of the Articles of the Civil Code (as provided by Monsieur Georges Rouhette, Professor of Law, with the assistance of Dr. Anne Rouhette-Berton, Assistant Professor of English [paras 25-29]:

"…

25. A contract of sale is qualified as special contract under the Civil Code and a contract of sale lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law (Article 1134).

26. *The Civil Code stipulates as a general principle that all contracts must be performed in good faith and lawfully entered into agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature* (Article 1135).

27. *The Civil Code further stipulates that in any synallagmatic contract (that is an agreement between two parties whereby each party has undertaken to do a specific act towards each other), there is always an implied condition subsequent, for the case where one of the two parties does not carry out his undertaking. In that case, the contract is not avoided as of right. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfill the agreement when it is possible, or to request its avoidance with damages. Avoidance must be applied for in court, and the defendant may be granted time according to circumstances* (Article 1184)

28. *The Civil Code defines a condition subsequent as one which, when it is fulfilled, brings about the revocation of the obligation, and which puts things back in the same condition as if the obligation has not existed* (Article 1183)

29. *The Civil Code also stipulates that where the seller fails to make delivery within the time agreed upon between the parties, the purchaser may, at his choice, apply for avoidance of the sale, or for his being vested with possession, if the delay results only from the act of the seller* (Article 1610)…"

39. In the analysis portion of his opinion, Mr. Nazroo states his view that the Notice of Termination sent by Asedor amounts to a *mise en demeure* which entitles Asedor to benefit from the provisions under Article 1610 and 1184.

40. The Appellant leans heavily on the following paragraphs from Mr. Nazroo's opinion [35-36]:

" ...

35. *Even though the Notice of Termination as served by Asedor makes reference to the Termsheet, it is clear and unambiguous that Asedor is referring to the same contractual obligations as mentioned in the Purchase, Assignment and Exchange Agreement. In any event, the Termsheet and the Purchase, Assignment and Exchange Agreement refer to the same transaction and should be read in conjunction. Furthermore, through the Notice of Termination, Asedor has exercised its rights to claim rescission as opposed to specific performance. As Asedor is not claiming damages from FCA II, the Notice of Termination need not warn FCA II of the consequences for its default.*

36. I am therefore of the considered view that the Notice of Termination emailed on the 21st August 2019 to FCA II amounts to a "mise en demeure" for the purposes of Articles 1184 and 1610 of the Civil Code. However, it would not amount to a "mise en demeure" if, additionally, damages were claimed by Asedor. Additionally, I am of the opinion that service of the "mise en demeure" qualifies Asedor (as) a contingent creditor. However, such a scenario has not been tested before a Mauritius court".

41. Addressing the clause in the Term Sheet, Mr. Nazroo states [38-40]:

38. The existence of an intention to terminate and by extension the existence of a binding agreement to terminate seems unchallengeable in the teeth of the exchanges between the parties.

39. The intentions of the parties are clear and unambiguous from the affidavit dated the 25th November 2019 sworn by Mr. Robert Hebble on behalf of LCP. I am, however, of the view that a Mauritius court may rule that it is not binding in view of the specific clause contained in the Termsheet that it is not legally binding and is subject to contract. I am of the view that a Mauritius court will give a strict interpretation to this clause the moreso (sic) *as Article 1134 of the Civil Code stipulates that agreements lawfully entered into take the place of the law for those who have made them.*

40. I am of the view that the Notice of Termination served on the 21st August 2019 amounts to a valid exercise of rights in terms of Articles 1184 and 1610 of the Civil Code entitling Asedor to claim the rescission of the Purchase, Assignment and Exchange Agreement before a court of law in Mauritius.

Relevant Statutory Framework and Legal Principles

42. The procedure for the submission and examination of a proof of debt in liquidation is governed by the Companies (Winding-Up) Rules 1982. Rule 74 provides:

"*The liquidator shall examine every proof of debt lodged with him, and the grounds of debt and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing [Form 56] to the creditor the grounds of the rejection*."

43. The Court's general statutory powers to review a position taken by a liquidator in a winding-up of a company is sourced from section 176(5) of the Companies Act 1981:

"*If any person is dissatisfied by any act, omission or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and may give such directions and make such order in the premises as it thinks just*."

44. Rule 75 creates a specific pathway for a creditor's appeal to the Court against the decision of a liquidator in respect of the proof of debt:

"*If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but, subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding-up by the Court rejecting a proof sent to him by a creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of the service of the notice of rejection."*

45. In England and Wales an appeal against a liquidator's decision on a proof of debt is procedurally governed by Rule 4.83 of the Insolvency Rules 1986. There is no real significant or substantive difference between Rule 4.83 and our Rule 75.

46. Mr. Andrew Kay, the scholarly author of McPherson's Law of Company Liquidation (Second Edition) ("McPherson's") offers a helpful procedural overview on the role of a liquidator in assessing a proof of debt [12.036]:

"*… It is the liquidator who, in the first place, determines whether a proof should be admitted or rejected, and in performing this function the liquidator acts in a quasi-judicial capacity. The liquidator's role here is to ensure that the assets of the company are distributed amongst those who are justly and properly the creditors of that company, and so the liquidator is to satisfy himself or herself that there is adequate evidence that the debt on which the proof is based exists. Hence, the liquidator is bound to examine every proof lodged, both from the point of view of the grounds of the debt and of any possible right of set-off, and the fact that proof is based on a judgment does not prevent or relieve the liquidator from performing this duty. If a liquidator is not happy with a proof he or she is to reject it, rather than seeking to examine the relevant creditor. The liquidator may admit a proof for dividend in whole or in part. A liquidator may, after examining the proof, call for documents or further evidence in order to allow a decision to be made concerning the proof.*

If the liquidator decides to reject a proof in whole or in part, he or she shall prepare a written statement containing the reasons for the decision and this is to be sent forthwith to the creditor.

It is submitted that the statement should advise the creditor that he or she may appeal against the decision of the liquidator…"

47. An appeal to the Court in challenge of a liquidator's decision is heard *de novo*. McPherson's offers some general commentary on the appeal process as follows [para 12.037]:

"*The proper course for a creditor who is dissatisfied with the liquidator's decision in respect of a proof is to appeal to the court to reverse or vary that decision. An appeal against a rejection of a proof must be instituted within 21 days of the creditor receiving the notice (under r.4.82(2)) setting out the reasons for rejection of the proof…*

…

An appeal to (the) court against the liquidator's rejection of a proof is, it appears, a rehearing de novo (citing *Kentwood Constructions Ltd,* Re [1960] 1 W.L.R. 646; *Trepca Mines Ltd, Re* [1960] 1 W.L.R. 1273; *Westpac Banking Corp v Totterdell* (1997) 25 A.C.S.R. 769)) *and either party is therefore entitled to adduce fresh evidence in support of his or her contention…The court's task in hearing an appeal is to examine the evidence placed before it and come to a view whether on balance, and taking into account the merits of the claims of the creditor whose proof is being considered, the claim was established, and, if so, in what amount. It is permissible, where it is necessary to dispose of a matter, for the court to allow the cross-examination of a claimant on his or her affidavit evidence in support of a claim against the company…Whether cross-examination is necessary will depend on the circumstances in each case…*

The function of the liquidator changes in circumstances where a creditor appeals against the liquidator's decision and he or she defends the decision made earlier. This is explained by Brennan and Dawson JJ. Of Australian High Court in their joint judgment in <u>Tanning Research Laboratories Inc v O'Brien</u> (1990) 169 C.L.R. 332:

"In such a proceeding [an appeal under the equivalent of r.4.83] a liquidator who defends his decision to reject a proof of debt is no longer acting in a quasi-judicial capacity; he is cast in the role of an adversary, defending the assets available for distribution against a liability which, according to the view he formed when acting quasi-judicially, is not legally enforceable. The liquidator may defend those assets against the creditor's claim on any ground on which the company might have defended the claim had it been sued by the creditor. If the liquidator relies on those special defences which allow him to go behind a judgment, an account stated, a covenant or an estoppel in order to ascertain the true liability of the company, he is none the less in the role of an adversary. The issue in the proceeding is whether the liability referred to in the proof of debt is a true liability of the company enforceable against it. The issue is contested by the putative creditor on the one hand and the liquidator on the other; the liquidator is a party litigant."

So, on an appeal the liquidator stands in the shoes of the company and may raise defences that would have been available to the company had not liquidation intervened..."

Analysis and Decision

48. While the JLs were unusually neutral on how the Court should ultimately determine this appeal, they warned against this Court's interference with questions of Mauritian law which are currently before the Supreme Court of Mauritius. However, whether or not FCA II has submitted to the jurisdiction, this Court has a statutory duty to examine and review the JLs' decision to reject Asedor's proofs of debt by determining whether the debt s in fact owed and payable by the Company. If in doing so questions of foreign law arise, I am bound to make a finding on those foreign law points to the extent that it is necessary to do so in order to decide on the merits of the appeal. So, here the doctrine of comity is not compromised. (See ***Stitching Shell Pensioenfonds v Krys (PC)*** [2015] AC 616.)

49. For this reason, I agree that this Court must determine, as a matter of Mauritian law, whether the debt claimed under the Proofs of Debt qualifies Asedor as an unpaid creditor in the liquidation of Saab.

50. The First Proof was submitted by the Appellant prior to the execution of the Assignment Agreement and the Second Proof was submitted thereafter. However, in my judgment it matters not whether the Appellant was entitled to payment of the First Proof on the date on which it was first submitted. As this is a hearing *de novo*, I am primarily concerned with current legal position of the claim for the debt.

51. Putting aside the Term Sheet and the Notice of Termination, the effect of the Assignment Agreement itself was a conveyance to FCA II of Asedor's right to claim for the debts accrued under the placement agreements. No analytical complexity arises on this point.

52. The phase of my scrutiny is the provision of a draft Recovery Sharing Agreement which was intended by WCPL to qualify as a substitute for the exchange of the Recovery Notes as consideration. On Asedor's case, it is implicit that the non-exchange of the Recovery Notes was akin to a repudiatory breach of the Assignment Agreement which gave rise to an automatic rescission of the contract once the Notice of Termination was served.

53. However, Asedor's Notice of Termination generated a legal quandary which can only be resolved between Asedor and FCA II / WCPL. As these parties are not agreed on the proprietary of the claims under the placement agreements, an *inter partes* hearing between those same parties is plainly the next step.

54. I do not see how it could have been open to the JLs then, or to this Court now, to determine the legal controversy of the Notice of Termination and the Term Sheet in the absence of representations by FCA II / WCPL. At the very least, FCA II / WCPL should be given the opportunity to be heard before the Court as fully as Asedor has been.
55. This may very well entail competing expert opinion evidence on Mauritius law and any further factual evidence which may be relevant. It is too early to envisage the likelihood of any need for cross-examination. Of course, if FCA II / WCPL choose not to appear or partake in these proceedings, it seems that this Court would be left to determine the merits of Asedor's appeal in their absence. Either way, the appeal of the liquidators' decision must be decided by this Court.

56. This Court has an obligation to adjudicate any debt claims in these proceedings for the winding-up of a Bermuda company. In this case, the Court must first determine whether Asedor has a right of rescission under Mauritius law and whether the service of termination notice amounts to a *mise en demeure* qualifying Asedor as a contingent creditor.

57. Article 1184 of the Civil Code provides guidance on the proper approach to a 'synallagmatic contract' which arises where each party has undertaken to perform a specific act for the benefit of the other. Article 1184 clearly states that the contract is not avoided as of right. The aggrieved party who has not received the benefit of the agreed consideration has the option of either compelling the other to fulfill the agreement if reasonably possible or the option of requesting its avoidance with damages.

58. It would seem that the Notice of Termination was a request for an avoidance, an application which must now be made to this Court.

59. For these reasons, I will adjourn this appeal pending the determination of an *inter partes* hearing between Asedor on the one part and FCA II / WCPL on the other.

Conclusion

60. The Appellant's Notice of Motion, dated 27 September 2019, is adjourned.

61. FCA II / WCPL are to be served with a copy of this Ruling within 7 days.

62. This matter is to be listed before the Court on a date mutually convenient to the legal representatives of Asedor and FCA II / WCPL and subject to the availability of the Court calendar.

Dated this 18th day of March 2020

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HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT