

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



CAUSE NO: FSD0015 OF 2010 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)
AND IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED (IN
OFFICIAL LIQUIDATION)

IN CHAMBERS
BEFORE THE HON. MR. ANTHONY SMELLIE QC, CHIEF JUSTICE
HEARING ON THE 30TH DAY OF APRIL 2019; DECISION DELIVERED ON 1ST DAY
OF MAY 2019; REASONS DELIVERED ON 30TH SEPTEMBER 2019

Appearances: Ms. Colette Wilkins and Mr. Andrew Gibson of Walkers for the Joint
Official Liquidators of Saad Investments Company Limited (in official
liquidation)

Mr. Nicholas Fox of Mourant for Ahmad Hamad Algosaiibi and Brothers
Company

REASONS

Liquidators' proposal to compromise a debt by payment despite competing proprietary claims to all the assets of the company – whether debt crystallized when company, as guarantor, commenced winding up – application by liquidators for sanction of the Court to compromise the debt – basis upon which sanction might be given.

[This ruling was handed down in private on 1 May 2019 and has been signed and dated by the judge. The judge gives leave for it to be reported in anonymized form consistent with the order made by the Court dated 1 May 2019 for the summons and all evidence filed in support of it to be sealed and kept confidential pursuant to Order 24, Rule 6 of the Companies Winding Up Rules (2018)].

Introduction

1. This ruling relates to the application of the Joint Official Liquidators ("JOLs") of Saad Investments Company Limited (in official liquidation) ("**SICL**") for this Court's sanction that they should, notwithstanding (a) the orders of this Court dated 10 February 2010, 24 October 2013, and 20 July 2018; and (b) Ahmad Hamad Alghosaibi and Brothers Company's ("**AHAB's**") appeal of the rejection of its proprietary claims against SICL in CICA Civil Appeal No: 15 of 2018, be permitted to cause SICL to enter into a settlement agreement and mutual release between SICL, AB Ltd and XY Ltd (in voluntary liquidation). By this settlement and mutual release, AB Ltd would be paid dividends, in the amount of US\$17 million, in settlement of its claims proven in both of the liquidations of SICL and of XY Ltd.

Decision

2. I considered the evidence filed by the JOLs, the submissions of Walkers on their behalf, the submissions of Mourant on behalf of AHAB, and decided to grant sanction for the reasons set out following.

Background

3. SICL, together with XY Ltd (its wholly owned subsidiary), owes a contingent liability under a guarantee (the "**Guarantee**") provided by them both to AB Ltd for a primary liability due from Saad Trading, Contracting & Financial Services Company ("**STCC**") (a Saudi entity) to AB Ltd under a New York law governed promissory note (the "**Promissory Note**").



4. Under the terms of the Guarantee, SICL and XY Ltd guaranteed all past, present and future indebtedness under the Promissory Note. The guaranteed liability is for that reason to be regarded as a contingent liability. The quantum of the liability is for US\$12 million principal together with a 12% annual interest fee. As the underlying primary obligation was that of STCC and not of SICL, the interest component did not stop running by virtue of SICL's liquidation, and continued to run until STCC's own insolvency process began¹.
5. On 29 December 2009, AB Ltd (through its corporate successor in title) filed a proof of debt in SICL's liquidation for the US\$12 million principal together with a 12% annual default interest fee. Taking interest into account, the total debt would be US\$23 million.
6. On 20 September 2010, AB Ltd obtained a final and enforceable judgment from the Netherland Antilles Court against XY Ltd, as co-guarantor for payment of the sum of US\$12 million plus interest of 12% p.a. as of 14 June 2009, and costs.
7. That judgment having been obtained, an updated proof of debt was filed in the SICL liquidation by AB Ltd on 10 March 2017; SICL being the other co-guarantor.
8. On 26 April 2018, its corporate successor in title assigned and transferred to AB Ltd all of its rights, title and interest in and under the Promissory Note and Guarantee. Hence the claim being now pressed by AB Ltd itself.



¹ Assuming that under Saudi law, interest could no longer accrue against STCC once it went into liquidation, as would have been the case under Cayman law in respect of a debt which, although secured, must be proven and claimed in the liquidation: see *In re Humber Ironworks and Shipbuilding Co. (the Warrant Finance Company's case)* (1869) 4 Ch App 643 and *Re Contract Corp'n; Ebbw Vale Co's Case* (1869) 5 Ch App 112. This principle is not expressed in any statute. Its justification lies in the notion that upon a winding up of a company all rights of creditors are crystallized at that instant – “*the tree must lie where it falls*”. This judgment therefore proceeds on the basis that the debt arising under the Promissory Note and Guarantee did not crystallize until STCC entered into the insolvency process and this is as the JOLs contend.

Basis of AB Ltd's Claim against SICL

9. In order to determine the quantum of the liability of AB Ltd's claim against SICL, it is necessary to consider whether or not interest can be claimed against SICL as a company in liquidation under Cayman law.
10. Section 139(1) of the Companies Law (2018 Revision) (the "**Companies Law**") provides as follows with regard to provable debts in a liquidation:

"All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value."

11. The liability is a contingent debt and is admissible to proof under section 139(1). It is therefore a debt for which the JOLs must make provision.
12. The relevant guaranteed "*debt*" that is being proved against SICL as co-guarantor in the present case is "*principal plus interest*". As a result, this is not a case where there is a debt claimed upon which interest has been accruing after the liquidation of SICL. The interest is an integral part of the secured debt and so Order 16, Rule 11(2) of the CWR, which states in exclusionary terms as follows, has no application to the relevant debt:

"A creditor having a contractual right to interest as against an insolvent company shall not be entitled to prove for any interest accrued after the commencement of the liquidation."

13. As explained above, the relevant debt, including the right to interest (albeit not yet then embodied in a judgment), arose under contract prior to SICL going into liquidation.



14. And further as regards interest, the relevant right to interest which is also secured by the guarantee, arose under the Promissory Note between AB Ltd and STCC.
15. STCC was not in an insolvency process until very recently and therefore, as discussed above, interest continued to run as between STCC and AB Ltd until that event.
16. The secondary liability by way of guarantee between SICL and XY Ltd on the one hand and AB Ltd on the other, mirrors the primary obligation owed to AB Ltd (i.e. the debt of principal and interest secured under the Promissory Note issued by STCC) and therefore the value of the guaranteed claim increased as interest continued to run between STCC and AB Ltd.
17. This is the result when there is a secondary guaranteed liability of a company in liquidation because, as shown above, (i) the specific terms of Order 16, rule 11(2) of the CWR do not apply and (ii) there is coincidence between the primary and secondary liability. See *Re Ho Kok Cheong* [2000] SGHC 89, where it was held, among other things, that a guaranteed creditor is entitled to contractual interest up to the date of realization of his security and is entitled to prove in the liquidation of the guarantor company for any unrecovered deficit after the realization of the security; applying *Re Securitibank Ltd* [1980] 2 NZLR 714.
18. Based on the above, the claim against SICL arising from the Guarantee is for a contingent liability on which interest continued to accrue until STCC entered an insolvency process, making SICL as co-guarantor, liable for repayment of the principal and interest covered by the Promissory Note. Thus, as the JOLs admit, making the current total value of the liability at least US\$23 million.
19. This is all acknowledged by the JOLs to be the case, on the advice of their lawyers.



The Settlement Agreement

20. The principal terms of the Settlement Agreement are that:
- a. SICL will pay to AB Ltd the sum of US\$17 million to discharge the liability of both XY Ltd and SICL, which is admitted as being USD23 million.
 - b. AB Ltd will retain its right to pursue STCC for any sum above US\$17 million. (This would follow because STCC is not a party to the Settlement Agreement).
 - c. SICL (on behalf of itself and XY Ltd its wholly owned subsidiary) will retain the right to pursue STCC for US\$17 million by way of subrogation.
21. The Settlement Agreement will be governed by New York law, the same governing law as the Promissory Note and the Guarantee.

The Sanction Application

22. The application brought by the JOLs consists of a sanction application pursuant to Section 110 of the Companies Law and Order 11 of the CWR. The application is necessary for reasons to be explained below, notwithstanding the clear basis explained above, for the admission of the debt.

Section 110 of the Companies Law provides as follows:

"(1) It is the function of an official liquidator to -

- (a) collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and*
- (b) report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.*



- (2) *The official liquidator may -*
- (a) *with the sanction of the Court, exercise any of the powers specified in Part I of Schedule 3; and*
- (b) *with or without that sanction, exercise any of the general powers specified in Part II of Schedule 3."* [Emphases added.]

23. While the JOLs are required by section 110(1)(a) to distribute the assets to the creditors, this application is necessary because the powers conferred on the JOLs by this Court in the Winding Up Order dated 18 September 2009 made in respect of SICL, do not include the following power which is contained in Part 1 of Schedule 3 to the Companies Law, and therefore the power is exercisable only with the sanction of the Court in keeping with section 110(2):

"...power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the Company and a contributory or alleged contributory or other debtor or person apprehending liability to the Company."

24. Before sanction might be granted, there are, however, further obstacles faced by the JOLs which must be considered.

The Liquidation Orders

25. On 10 February 2010 this Court made an order (the "2010 Order") which contains, inter alia, certain provisions that are applicable to various Saad Group companies in liquidation (including SICL), for the preservation of the assets of those companies, taking into account AHAB's proprietary claims against them in Cause FSD 54 of 2009.



26. The 2010 Order sets out the limited basis upon which the assets may be applied, and this excludes the ability to settle any claims of the creditors of the defendant companies, prior to the determination of AHAB's proprietary claims.

27. In this regard, the 2010 Order further provides specifically as follows:

"9. Upon any sale of the assets (or any part of them) of any of the companies in liquidation, the liquidators of the company disposing of such assets shall retain the net proceeds of sale of such assets and shall not dispose of such net proceeds of sale other than in the payment of the liquidators' costs until the earliest of:

9.1 judgment in Cause No. FSD0054 of 2009;

9.2 an order of the Court in respect of the net proceeds of sale or any part of them; or

9.3 the consent of AHAB (any such consent to be provided in writing by or through its attorneys Messrs. Mourant du Feu & Jeune) and in the event of there being any third-party claim to beneficial ownership of the assets of the companies in liquidation so sold, the consent of such third party or parties."

28. The 2010 Order was varied pursuant to an order dated 24 October 2013 (the "2013 Order") so as to permit the liquidators of the companies in liquidation to pay the costs of defending AHAB's claims up to and including trial.

29. In light of AHAB's appeal of the judgment in FSD 54 of 2009, the 2013 Order was further varied by consent on 20 July 2018 so as to permit the liquidators of the companies in liquidation to pay the costs of defending AHAB's claims up to and including the conclusion of the appeal (the "2018 Order").

30. But neither the 2013 Order nor the 2018 Order varied the substance of the 2010 Order so as to permit the liquidators, including the JOLs on behalf of SICL, to settle any of



the claims of creditors pending delivery of the judgment in respect of AHAB's proprietary claims (or without further order of this Court or the consent of AHAB or any other proprietary claimant).

31. It must however be recognized that this application of the JOLs arises where there has been a very important change of circumstance, which is that AHAB's claim has been rejected at first instance ("the Judgment") and there is no stay of the Judgment.
32. AHAB has neither sought nor been granted a stay of the Judgment and it is settled principle that no stay of the operation of a judgment arises automatically because of an appeal².

The JOLs' reasoning

33. Payment of the settlement sum of US\$17 million to AB Ltd would result in significant savings to the SICL estate (and potentially to the XY Ltd estate as well) of some US\$6 million because AB Ltd's claim has been admitted to proof in the amount of US\$23 million.
34. The XY Ltd liquidation estate would be affected (although that factor is not central to my determination of the JOLs' application) because AB Ltd's claim arises from the Guarantee jointly issued by XY Ltd and SICL to AB Ltd. It is accepted that AB Ltd is entitled to claim on the Guarantee even while it might separately be able to sue STCC for any shortfall in recovery against the debt owed by STCC secured by the Promissory Note.



² See section 19(3) of the Court of Appeal Law (2011 Revision) and Rule 20(1) of the Court of Appeals Rules (2014 Revision).

35. The question is whether this Court has the power to sanction the JOLs entering into the Settlement Agreement and if so, whether it would be, in the circumstances of notice of AHAB's proprietary claim, a proper exercise of the power to do so.
36. By their application to this Court for *Berkley Applegate*³ relief in February 2010 to allow them to use the assets of the liquidation estate to defend AHAB's claim to a proprietary interest in all the assets (which resulted in the 2010 Order), it was implicitly accepted by the JOLs that they needed to make that application to this Court, having been put on notice of AHAB's proprietary claim.
37. That application was brought in acknowledgement of the principle settled by the Privy Council in the *Guardian Trust*⁴ case to the effect that, if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by a third party, he will be liable to the third party if he deals with the fund in disregard to that notice, should the third party's claim subsequently prove to be well founded. In those circumstances the fiduciary will be held to be constructive trustee for the third party and liable to account.
38. But in the circumstances now presented, I must recognize that being put on notice of AHAB's claim did not displace the JOLs' position and responsibilities as statutory trustees of the assets of SICL's liquidation estate for the benefit of SICL's proven creditors.⁵ That is the only established trust and the only established role of the JOLs



³ *Berkeley Applegate (Investment Consultants) Ltd, In re*, [1989] Ch 32, judgment on the application reported at 2010 (1) CILR 553.

⁴ *Guardian Trust and Executors of New Zealand v Public Trust of New Zealand* [1942] AC 115.

⁵ In the usual case, upon a winding up order being made, the assets of the company are impressed with a statutory trust in the sense that they constitute a fund to be administered by the liquidator as officer of the court and agent for all persons interested in the winding up. See, for instance, *AHAB v SICL et al* [2010](1) 553 citing *Oriental Inland Steam Co., In re, Exp. Scinde Ry Co.* (1874) L.R. 9 Ch App 557.

as trustees. Here AHAB remains at best a contingent proprietary claimant; no trust has been declared to exist in favour of AHAB.

39. Thus, AHAB's claim which is as yet unproven, may not be regarded as already imposing upon the JOLs fiduciary obligations owed to AHAB.
40. The JOLs must therefore seek, to the extent they might appropriately be allowed by this Court, to carry out their duties as liquidators for the benefit of the proven creditors of SICL's liquidation estate.
41. Moreover, this application arises in the context where, while AHAB exercises its automatic right of appeal, it has not sought or obtained a stay of SICL's liquidation proceedings. Nor, as already mentioned, has it sought a stay of the operation of the Judgment which rejects its claims.
42. Had it done so, the Court of Appeal would have considered the matter from the point of view of AHAB's likelihood of success and whether the refusal of a stay would have rendered AHAB's appeal nugatory.
43. Having not sought and obtained a stay, AHAB may not now ask this Court to deal with the JOLs' application as if a stay had been imposed.
44. Moreover, it must now be regarded as settled principle that the Court can sanction the payment out of funds which are the subject of a proprietary claim which claim, if eventually proven, would mean that the funds were held on trust for the claimant. Whether or not the Court should do so depends upon the particular requirements of justice in the circumstances of the case. See, for examples of the application of this principle, *Finers v Miro* [1991] 1 W.L.R. 35 (CA) and *In Re MF Global UK Ltd* [2013] 1 WLR 3874.



45. Apart from its impact upon AHAB's putative claim, the merits and bona fides of the commercial judgment of the JOLs in seeking to enter into the Settlement Agreement are not really in issue. AHAB would wish further explanations about the proposal but is not in a position to say that it is unreasonable. Their criticism is rather that the JOLs cannot enter into a settlement for which, according to AHAB, there is no legal foundation. This is on the further hypothesis that either the assets belong to SICL or they do not and if they do not, as AHAB contends, that there can be no legal or reasonable basis for the JOLs' action.

Analysis

46. Having read the evidence and heard from Counsel both for the JOLs and AHAB, I am satisfied first of all that the settlement is reasonable and that it would inure to the benefit of the proven creditors of SICL's liquidation estate.
47. Refusal of sanction would mean that SICL's liquidation estate would lose approximately US\$6 million (the difference between AB Ltd's admitted claim and the settlement sum) and potentially much more by way of further costs in having to unravelling AB Ltd's claim also in the context of the related XY Ltd liquidation. As mentioned above, XY Ltd is a 100% owned subsidiary of SICL and so any net returns from XY Ltd to be enhanced by entering into this compromise, would belong to SICL to meet the claims of creditors. There is as well to be considered, the ongoing SICL Swiss "mini-bankruptcy"⁶, where AB Ltd has also filed a claim, one which would also be compromised by the JOLs' settlement proposal, if sanctioned. Some US\$200 million worth of assets of SICL are held in the Swiss mini-bankruptcy and so its



⁶ Bankruptcy Proceedings in Switzerland against SICL in respect of assets held by SICL in that jurisdiction.

quickest and least expensive resolution to be promoted also by sanction of the settlement, is also clearly in the interests of SICL's liquidation estate. The overall savings to be realized as a result of the settlement would mean that the net diminution of the assets of the SICL estate would be significantly less than the diminution resulting from the settlement sum of USD17 million.

48. All of this against the background where AB Ltd claims on the basis of a co-guarantee of STCC's debt which was given jointly by XY Ltd and SICL and AB Ltd's claim has been admitted to proof, both in the liquidation of SICL and of XY Ltd. This is therefore not a case in which it can be said that the JOLs seek to prefer any particular creditor. While not having a lien against any particular asset of SICL⁷, AB Ltd is a secured creditor as already explained above.
49. On the other hand, if AHAB ultimately succeeds, the payment out by way of dividend in the amount of US\$17 million to AB Ltd would reduce AHAB's recoveries not by that amount but by the net amount after taking account of the savings of costs to redound from the settlement, which would be significant albeit unquantifiable at this point in time.
50. In my judgment, given the history of this matter, the change of circumstances since the 2010 Order (as amended pursuant to the 2013 Order and the 2018 Order) by way of AHAB's claim having been wholly rejected at first instance and the absence of any stay of the Judgment or upon the conduct of the liquidation, I consider that on balance, the JOLs' intention to preserve SICL's liquidation estate as much as possible for the benefit of the proven creditors, should be respected.



⁷ Unlike the case in both *Re Ho Kok Cheong* and *Re Securitibank Ltd* (both above) where there were mortgages or debentures over property backed by guarantees.

51. Their actions in this regard come well within the bounds of reasonableness required by the case law to warrant the sanction of the Court. See *In re DD Growth Premium 2X Fund*⁸.
52. Accordingly, I grant the orders the JOLs seek for sanction of the compromise and in terms such that it is clear that they are not to be exposed to any form of liability, personal or otherwise, to proprietary claimants (including AHAB) for having paid out the distribution of dividend to AB Ltd in giving effect to the compromise.
53. I also wish to emphasize that I regard this as an exceptional application justified by the clear interests of the SICL liquidation estate which are protected by the grant of sanction. I understand there are no further such applications for the compromise of claims intended to be brought by the JOLs and it should be understood that pending the outcome of AHAB's proprietary claim, it would be inappropriate for such applications to be routinely made.


Hon. Anthony Smellie
Chief Justice


September 30, 2019

⁸ 2013 (2) CILR 361.