

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 908

XP 27/2008

IN THE MATTER OF AILEE DEVELOPMENT CORPORATION (in liquidation)

AND

IN THE MATTER OF THE COMPANIES ORDINANCE 1972

AND

**IN THE MATTER OF AN APPLICATION TO RELEASE THE LIQUIDATOR AND
WIND UP THE COMPANY**

Gerard Lincoln

(Rep. by Francis Chang-Sam and Olivier Chang Leng)

AND

EODC

(Rep. by Frank Elizabeth)

Neutral Citation: *Lincoln v EODC* (CP 27/2008) [2019] SCSC 908

Before: Twomey CJ

Summary: Company law – Companies Ordinance 1972 and Regulations of 1975 – winding up of company on order of the court – proper winding up procedure required in the Regulations prior to release of liquidator – liquidator may only be released by Official Receiver, courts’ powers restrained – court empowered to make appropriate orders to ensure proper finalisation of liquidation.

Heard: 14 January 2019- 20 March 2019, submission 15 May 2019

Delivered: 16 October 2019

ORDER

- (a) The Liquidator’s application to be released and for Ailee Development Corporation Limited to be wound up is refused.*
- (b) The Liquidator is to furnish particulars of the outstanding matters relating to the winding up of Ailee Development Corporation Ltd (in liquidation) to the satisfaction of the Official Receiver.*
- (c) That after taxation and/or confirmation of payable fees any excess thereof shall be paid into this court and distributed to the creditors*

- (d) That the bond of SR 1 million in respect of the present winding-up by the Liquidator be forfeited and surrendered to the Court from which the fees of the Official Receiver shall be paid pursuant to the Regulations.
- (e) EODC's costs in these proceedings are allowed and to be defrayed from the Liquidator's fees.
- (f) A copy of this decision is to be served on the President of Seychelles with the recommendation of the Court that a Commission of Inquiry be set up to inquire into the matters as outlined in this decision.
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RULING

TWOMEY CJ

Background

[1] I make it clear at the outset what this case is not about. It is not about this Court sitting on appeal against the decision of Acting Chief Justice Perera made on 23 June 2008 ordering the winding up of Ailee Development Company (*In re Ailee Development Corporation Ltd* (CS 27/2008) [2008] SCSC 9 (23 June 2008)). It is not about this Court sitting on appeal against the Court of Appeal's decision of 10 December 2010 upholding the Supreme Court decision (*In Re [Winding-up] Ailee Development Corporation (in liquidation) and the Companies Act 1972* SCA 13/2008) [2010] SCCA 1 (07 May 2010 (2010) SLR 18 to wind up Ailee Development Company. It is not about the previous matters arising which resulted in several orders of the Supreme Court including the approval of a previous distribution of payments to creditors of Ailee Development Company in 2011.

[2] Before I state what the present case is about, I have to rehearse the main facts and findings to contextualise the present applications before the court. In this regard, I rely on the uncontested documentary evidence adduced to set out the material facts in chronological order. In this decision, I do not use the words Applicant or Respondent as the longevity of the case and the numerous applications by both parties have rendered the

terms meaningless and would lead to confusion. I therefore simply refer to the parties by the terms the Liquidator and EODC.

- [3] Ailee Development Company (Ailee) was incorporated on 13 March 1976 for the purposes of operating a hotel, The Plantation Club. In September 1988 it opened a bank account with Standard Chartered Bank Inc. At the time, Dr. George Davidson was the Managing Director of Ailee which ran the Plantation Club. I take judicial knowledge of the fact that Nouvobanq was founded in 1991, out of a joint venture between the Government of Seychelles and Standard Chartered Bank. Ailee continued to hold an account (the Nouvobanq account) with the successor of Standard Chartered Bank, namely Nouvobanq.
- [4] On 4 February 2008, the Government of Seychelles as an 8.4037 % shareholder of Ailee, sought a winding up of Ailee under section 205(f) of the Companies Ordinance 1972 (the Ordinance) on the grounds that the substratum of Ailee had disappeared as its ability to operate as a hotel resort had ceased with the Seychelles Licensing Authority refusing a renewal of its licence. In brief, it was averred that Ailee had been operating the hotel resort which had been allowed to fall into disrepair and had resulted in the cancellation of its licence. Section 205(f) of the Ordinance empowered the Court to wind up a company when it “[was] of the opinion that it [was] just and equitable” to do so.
- [5] On 8 February 2008, before the petition for winding up was heard, the Court (Perera ACJ), pursuant to section 211 (1) and (2) of the Ordinance appointed Ernst and Young (Mauritius) represented by its Chief Executive Officer Gerard Lincoln as the Provisional Liquidator of Ailee. The provisional order limited the Liquidator’s powers to “taking possession of, collecting and protecting the assets of “the Plantation Club Hotel” and all its annexes and appurtenances” but not to distribute or part with them until further order of the court. The appointment of a firm as opposed to a natural person as liquidator was unusual and corrected by further order of the court as will become apparent later in this judgement.
- [6] On 13 February 2008, an amount of SCR 5 400 000 was advanced to Ailee by the Government of Seychelles through the Nouvobanq account. Further, on 29 February

2008, the Government of Seychelles made out a payment voucher for SCR 1 000 000 to Ailee through the Nouvobanq account. The amounts were stated as an advance granted to the Plantation Club.

[7] On 27 March 2008, the Government of Seychelles again made out a payment voucher for SCR 1 041 000 to Ailee as another advance to the Plantation Club through the Nouvobanq account. It is worth mentioning, at this stage, that the above payments have never been fully explained until the hearing of the present matters.

[8] In his decision of 23 June 2008, allowing the winding up of Ailee, Perera ACJ found that the “just and equitable” ground in the statutory provision could be given a wide interpretation to include the public interest element relied on by the Government namely, that in allowing a prime tourist property to be abandoned and fall into disrepair in a country whose economy was based mainly on tourism not only affected the rights of all shareholders, but the economy of Seychelles as well. Ultimately, the Court found that although other legal remedies were considered in this instance (inter alia the protection of minority shareholders), the only remedy available to the Government was the filing of the winding up petition and made an order accordingly.

[9] The Court of Appeal upheld Perera ACJ’s decision finding that the trial judge had more than enough solid material before him to come to the conclusion that the substratum of Ailee had failed and that it should be wound up. In this regard they found, inter alia, that at the time of the application for winding up, Ailee had twenty-nine mortgages and floating charges totalling in debt of at least \$130 million and total liabilities of at least another \$200 million. They stated that although the business projected “the image of a thriving hotel whose special guests included kings, presidents and the Miss World pageant, behind that image, the books showed that it was a pauper paper hotel, whose coffers emptied and dwindled as soon as it filled up for the money to go to some place unknown.” The Coram found bad faith and devious motives on the part of the Managing Director of Ailee who was simultaneously the Managing Director of EODC, Ailee’s major shareholder and a party in the present proceedings.

[10] It is important to note for the purposes of the present case that on 23 June 2008, the Provisional Liquidator, Mr. Gerald Lincoln, the Chief Executive Officer of Ernest & Young - Mauritius, was confirmed as Liquidator of Ailee pursuant to section 217(2) of the Ordinance and was conferred with full powers of a Liquidator under sections 221 and 222 of the Ordinance.

[11] It must also be noted that the provisions of the Ordinance under which Ailee was wound up have since been repealed and replaced by the application of the Insolvency Act 2013. However, section 202 (2) of the Ordinance provides that:

Application of Insolvency Act 2013

202. (1) The Insolvency Act 2013 shall apply to winding up of companies registered under this Act.

(2) Any submission or registration of documents, fees or penalty payable or any action or proceedings taken against any person under Part VI of the Companies Act 1972, prior to the commencement of the Insolvency Act 2013, shall continue as if Part VI of the Companies Act 1972 had not been repealed. (Own emphasis.)

(3) Any regulations made under part VI of the Companies Act 1972 shall continue to have effect until they are repealed or amended under the provisions of the Insolvency Act 2013.

[12] On 28 August 2008, on an application by the Liquidator for directions on matters that had arisen during the liquidation process, the Court, without objection of the other parties to the suit, sanctioned the appointment by the Liquidator of a legal advisor, namely Mr. Francis Chang-Sam. The Court inter alia also permitted the Liquidator to sell the assets of Ailee, i.e. the Plantation Club, to European Resorts Limited for the sum of SCR 480 million on an undertaking that it would invest in the redevelopment of the property in a sum up to USD 309 million. European Resorts Limited paid a sum of USD60 0000 000 into the Central Bank account in respect of the purchase price. However, only SCR 439 839 106 appeared in the Central Bank entry. The liquidator used this to purchase treasury bills, which later acquired interest. Different creditors, in their order of priority, submitted claims. Several statutory payments like tax and employee claims also arose.

[13] In June 2011, following an application for directions dated March 2009 by the Liquidator, Egonda-Ntende CJ made an order (the June Order) authorising the distribution of the available funds in the hands of the Liquidator in final settlement of the priority payments and the claims of the secured creditors. The amount available in the hands of the Liquidator was stated as being SCR 608 760 093 (equivalent then to USD 50 730 008).

[14] In July 2011, the Liquidator applied to the Court for an order correcting mistakes he made in the calculations he had submitted in its application to the Court for the amount in the Liquidator's hands to now read SCR 562 103 283 made up of USD 12 380 359 and SCR 413 538 975. This mistake was in respect of a sum of USD 12 380 359 which, in the Liquidator's view, had been double counted in a deposit held in one of the banks in Mauritius. There were no objections from the other parties to this amendment and consequently the June Order was amended on 27 July 2011 (the July Order) to reflect this change, and further to read:

“... EODC Operations Limited has agreed to forgo certain claims and to receive the sums of ... SCR 125 818 169 plus... USD 1 million as its share of the proceeds available for distribution to the Seychellois Creditors and that the remaining sum of ...SCR 287 720 806 and ...USD 11 380 359 be paid to the Bank of Baroda Consortium in settlement of their claim.”

[15] It must be noted that a dispute then took place over who should receive payments of money to be disbursed by the Liquidator to EODC as the latter had changed counsel from Mr. Bernard Georges to Mr. Frank Elizabeth. Meanwhile, a contempt of court application had been made by EODC against the Liquidator for the release of funds as per the July Order. On 5 March 2012, Renaud J ordered that the Liquidator pay the sum of SCR 125 818 169 and USD 1 000 000 (as had been set out in the July Order) to Victoria Law Firm (Mr. Elizabeth's firm) on behalf of EODC together with all interest accrued from the date of receipt of the proceeds of liquidation by the Liquidator and that the Liquidator be released from all liabilities arising from the making of the payment. Renaud J further

stated that he was satisfied that the Liquidator had reasonable cause to withhold the payments and that this was not in contempt of the July Order.

[16] Further, on 13 July 2012, Renaud J at the request of the parties ordered that all restrictions over accounts held in the name of the Liquidator of Ailee be lifted and permitted him to operate and draw from all accounts for the purposes of the liquidation. As will be seen later in this decision, matters more or less stood there without any further resolution until I took over the matter in 2017.

What the present case is about

The Liquidator's Application

[17] On 12 November 2012, the Liquidator applied to the Court for a further Order confirming the final distribution of all the assets of Ailee, releasing him and dissolving Ailee. The notice of motion intimated that there were no assets left, and the liquidation had been concluded. Attached to this application was the final account which had ten exhibits (A to J).

[18] These exhibits included: a statement with a summary of all income as well as all distributions made by the Liquidator; the amount received for proceeds of the sale of the land; all other income received including interest and debt collections; the Liquidator's fees; legal fees; expenses incurred in the liquidation and details of payments made; payments to the Revenue Commission; advance payments from the Government of Seychelles and refunds to it; payments related to employees' claims; and the main secured creditors and payments made to them.

[19] The total income received was shown as SCR 594 168.051. This included the proceeds from the sale of assets at SCR 480 000 000; debtors' collections at SCR 3 092 982; advances from the Government at SCR 1 million; and sale of miscellaneous items at SCR 223 000 and the interest accruing on placement by the Liquidator at SCR 109 852 069.

[20] The total outflow included Liquidator's fees at SCR 14 420 500; legal fees at SCR 637 725; liquidation running expenses at SCR 4 682 864. The sum total for outflow was SCR 19 741 089.

[21] The Priority Payments, per court order of 27 July 2011, included the Liquidator's fees on distribution of proceeds at SCR 6 846 542, the Pension Fund at SCR 24 225, the Seychelles Revenue Commission at SCR 1 932 714, the Refund to the government at SCR 1 million and the Employee claims at SCR 88 469.

[22] The amounts for the Secured Creditors were payments to Bank of Baroda at SCR 424 285 113 and to EODC at SCR 140 249,899. These totalled to SCR 574 426.942. The amount for distribution after these payments was stated as SCR 0.

The (counter) application by the EODC

[23] EODC opposed the application to release the Liquidator. Its objections, made in an affidavit dated 3 September 2012 deposed to by Mr Davidson, stipulated the following:

- (a) That in the sanction letter from the Government, dated 29 August 2008, the purchase price for the Plantation Club was to be converted to Seychelles Rupees, and the Shareholders and Creditors needed to see evidence of how much was paid out to the Liquidator and when it was paid to the Liquidator by the Central Bank.*
- (b) That exhibit C, the income received and interest income and debtors' collection, does not make sense and cannot give a true picture of the management of the proceeds of liquidation. Particularly, this exhibit claims that although the Liquidator had significantly more capital on deposit in the banks (SCR 540 919 048) than the entire proceeds of the liquidation (SCR 480 000 000) it earned an interest of just SCR 13 588 585. The Liquidator further claims that SCR 96 263 484 was earned in interest from placement in treasury bills, without providing any information about where the capital came from.*
- (c) The Liquidator erroneously paid himself fees amounting to SCR 21 267 042 contrary to the law by wrongly basing his fees on Regulation 2, Head IV of the Companies (Winding Up) Regulation 1975, which applies to the Official Receiver. He should have relied on Head I. Further, he paid himself in advance of the events prescribed in Head I, which states that the Liquidator shall only be paid 'on the audit of the Liquidator's accounts by the Official Receiver' and not on disposal of assets. In paying himself in advance, he contravened section 225(2) of the Companies Act.*
- (d) There may be assets left and the liquidation not concluded properly. In the Liquidator's affidavit dated 27 June 2012, he swore that EODC*

Operations Ltd would receive a final payment of some SCR 1 500 000. No such sum is mentioned in the Final Accounts.

(e) The Liquidator failed to provide the Official Receiver with a statement of the company's affairs as required by sections 215 of the Companies Act 1972 and as a result, creditors and shareholder had no possibility of assessing the company's true position. Without this, it is not possible to assess the true position of the company's progress of the liquidation.

[24] The orders that the EOCD has asked the court to give are to:

(a) Order the Liquidator to provide the Official Receiver a statement of the company's affairs, as envisaged in section 215 of the Companies Act 1972;

(b) Order the Liquidator to present the accounts to the Official Receiver as prescribed by section 226 of the Companies Act 1972 for the years that he has failed to do so, in order for the Final Account to be audited as required by section 226(3) of the Companies Act 1972;

(c) An order declaring that the Liquidator has contravened section 225(2) of the Companies Ordinance, 1972;

(d) Order the Liquidator to explain to the satisfaction of the court the reason for the unlawful retention of SCR 21 267 042 in his private bank account pursuant to section 225 of the Ordinance and if for any reason the Liquidator refuses, or cannot provide a satisfactory answer, ordering the application of penalties provided for by section 225(2) of the Companies Ordinance;

(e) Costs of the action; and

(f) Any other order the court deems fit.

[25] Before the Liquidator opposed this application on 19 March 2014, a further application was made by EODC for an order confirming Mr Bernard Pool as Official Receiver. It was also prayed that the Liquidator provide the Official Receiver with a statement of the company's affairs. Forming part of this application was a gazette dated 19 November 1989 which gave notice for the Final General Meeting of the company and its creditors. There, Bernard Pool was the Official Receiver and Liquidator.

[26] This application resulted in protracted proceedings relating to whether or not there was an Official Receiver appointed. The matter stagnated between Renaud J and Egonda-Ntende

CJ and was adjourned on many occasions. The reasons for the adjournments are not altogether clear. A recusal of Renaud J was then sought by EODC.

- [27] The matter was not resolved and on 17 March 2014, EODC again applied to the Court for an order confirming Bernard Pool as Official Receiver pursuant to section 214 of the Ordinance and for an order that the Liquidator provide the Official Receiver with a statement of Ailee's affairs as required by section 215 of the Ordinance. No conclusive response was obtained from the court. The issue of confirmation of the Official Receiver was relevant as without an Official Receiver a liquidation cannot be completed. It appears that the issue was subsequently dealt with in proceedings in the Supreme Court. On 1 April 2014, Mr. Bernard Pool was appointed by Chief Justice Egonda-Ntende as the Official Receiver. I shall return to this vexing issue later in my judgment.
- [28] On 14 November 2014, the Liquidator again applied to the court with his accounts and prayed for an order confirming the final distribution of all the assets of Ailee, releasing him from his duties and dissolving Ailee.
- [29] With the receiver issue apparently dealt with, the motion for the Liquidator to submit his final account continued several years later in 2017. This time, before me.
- [30] During the proceedings on 25 October 2017, it was discussed that the only missing aspect in finalising the liquidation was the statement of account by the Liquidator. In the subsequent proceedings on 22 November 2017, I made an order that the Official Receiver, Mr Pool, submit a report to the Court to indicate whether the account submitted was in order and what his recommendations were. Following this, in a letter dated 11 December 2017, the Court requested the Receiver to submit the report.
- [31] The Official Receiver received various documents from the Liquidator in completing the report. This included a copy of the Cash Book and minutes of meetings including the first creditor's meeting.

The Official Receiver's Report

- [32] On 19 March 2018, the Receiver lodged the report with the court, which was then sent to the parties. In terms of this report, there were 'large discrepancies' from the affidavit

provided by the Liquidator to the court in support of the final distribution payable to the Secured Creditors. The major discrepancies and issues he identified were:

- (a) The affidavit to the Supreme Court upon which the final distribution was ordered shows legal expenses as SCR 300 000, whereas the final liquidation account shows a balance of SCR 637 725.*
- (b) There is no evidence that the payments were taxed in accordance with sections 157 and 165(2) of the Companies (Winding-Up) Regulations.*
- (c) Apart from the legal fees, a payment in the sum of USD 28 078 was made to ACM Corporate Services on 2 August 2010. There are no particulars of this payment, which by nature may be subject to taxing (section 157 of the Regulations).*
- (d) A sum of USD 42 153.67 was expended by the Liquidator on 20 August 2009 and described as 'liquidation running expenses'. It is not clear whether the payment would fall under section 164(1) of the Winding-up Regulations.*
- (e) The Liquidator's remuneration was erroneously claimed under the Companies (Winding up) (Fees and Costs) Regulation 1975. The rates provided therein are only applicable to the Official Receiver when he acts as the Liquidator.*
- (f) Further, the final account shows the Liquidator's fees as SCR 21 267 042, but the affidavit supplied to court by the Liquidator dated 24 June 2011 shows that his fees amounted to SCR 7 210 250.*
- (g) The Liquidator's Cash Book, however, shows the following amounts to being paid to the Liquidator: USD 1.7 million paid on 28 October 2008, USD 11 065.40 paid on 20 August 2009, and SCR 7 211 625 paid on 30 June 2011.*
- (h) From this, it seems the Liquidator did not disclose to the Court in his affidavit that an amount of USD 1 711 065.40 had been paid to him or his associates. Nevertheless, the Liquidator in communications with the Receiver claims that the creditors were aware of the Liquidator's fees by several affidavits sworn and no objection was made by the creditors concerning his fees.*
- (i) The bills of costs of De Commarmond & Koenig fall under Article 14 of the Business Tax Regulations 2005 entered into between Seychelles and Mauritius (the Double Taxation Agreement or DTAA), however, the bill of cost needs to be taxed by the Taxing Officer in terms of the local regulations.*
- (j) The fees payable to the Liquidator, as a resident of Mauritius fall under Article 15 of the DTAA as the income would not be in the nature*

of professional services of an independent character. Since he was appointed by the Court, he derives remuneration falling in the category of Dependant Personal Services which may be taxed in Seychelles.

[33] In light of these issues and discrepancies, the Official Receiver made recommendations which included the following:

- (a) In respect of section 122(1) of the Winding Up Rules – because the net proceeds of the Liquidation was not sufficient to satisfy the Secured and Preferred Creditors’, the final meeting of creditors may be dispensed with. But for the sake of good order, the Secured Creditors should confirm in writing to the Liquidator that the amounts payable to them, as stated in the July 2012 court order, had been received in full.*
- (b) In respect of sections 164(1) and 165(2) of the Winding Up Rules – payments made in respect of legal services should be subject to taxing in accordance with the rules, and any excess be refunded for the benefit of the creditors.*
- (c) In respect of section 220(2) of the Companies Ordinance 1972 – the Court, in assessing the remuneration of the Liquidator as required by section 220(2), must review the various affidavits of the Liquidator and that the Court direct the quantum of the remuneration payable to the Liquidator.*
- (d) That the Liquidator obtain confirmation from the Seychelles Revenue Commissioner that his fees are not to be taxed in Seychelles under the DTAA.*
- (e) That the Liquidator and trustees of the secured creditors recover such sums held by them and pay to the Court the Official Receiver’s fees laid down in Regulations.*
- (f) That the Liquidator be discharged from his appointment only when the Court is satisfied that the issues, discrepancies and recommendations have been addressed.*

[34] In the proceedings of 4 April 2018, the attorney for EODC stated that it required time to draft submissions in response to the Receiver’s report.

The urgent application by the EODC

[35] On 15 May 2018, EODC applied on an urgent basis, for orders directing the Official Receiver and the Liquidator as follows:

- (a) That the Official Receiver, in the interest of justice and equity investigate in forensic detail and report back on the movements of moneys and the numerous serious improprieties and failures of the Liquidator summarised in the founding affidavit;*
- (b) Confirming that Mr Bernard Pool has been the Official Receiver since 1983 when he was appointed upon the death of Michael Angas and not when he was ‘reappointed’ for ‘the avoidance of doubt’ by former Chief Justice Egonda-Ntende on 1 April 2014 – as this has a significant bearing on numerous of the Liquidator’s acts and omissions;*
- (c) Directing the Official Receiver to investigate whether there are any residual amounts in possession of the Liquidator;*
- (d) Directing the Liquidator to comply with all the recommendations of the Official Receiver as contained in his report of 19 March 2018, particularly that payments made to legal and other services as well as the fees of the Liquidator, be taxed in accordance with the law and any over payment be brought back into the liquidation accounts for distribution with the Creditors.*
- (e) That the Liquidator should not be released and the company not be dissolved until such time that he has complied with the recommendations of the Official Receiver and the orders of the Honourable Court.*
- (f) Any order the court deems appropriate; and*
- (g) Costs.*

[36] In the affidavit, EODC raised the allegation that there were several discrepancies which the Receiver did not address. The alleged discrepancies it highlighted included:

- (a) In relation to the purchase price for the Plantation Club, which was set at SCR 480 000 000, the amount that appears in the Central Bank entry was SCR 439 839 106. This indicates that money was fraudulently withheld from the proceeds of liquidation from the outset;*
- (b) That the actual amount paid to the Liquidator by the Central Bank was SCR 432 700 000, whereas the Liquidator claimed to have received SCR 480 000 000 although no evidence existed to substantiate the claim;*

- (c) *That the transactions represent a shortfall of SCR 47.3 million and that the only evidence of how much was actually paid into the Central Bank of Seychelles and how much was paid to the Liquidator comes from the certified financial statement of the Central Bank of Seychelles for 2008;*
- (d) *That the report of the Auditor General of 2008 states that two ‘payments in connection with the Plantation Club’ totalling SCR 118 million were charged to the General Revenue Balance (GRB) in October and November 2008 respectively, unsubstantiated by documents and that the audit could not establish their validity – and also stating that the payments were made without proper appropriation of funds. These amounts are not in the Liquidator’s final accounts;*
- (e) *In the same report, the Auditor General states that a sum of SCR 7.5 million was advanced to the Liquidator by the Government. There seems to be no basis for this in the context of the liquidation and this sum appears nowhere in the Liquidator’s accounts nor is there evidence that this money was ever paid back, even though a smaller advance of SCR 1 million was noted in the Liquidator’s account as having been received and repaid.*
- (f) *That payments and advances made to the Liquidator by the Central Bank and the Government of Seychelles in 2008 bears no relationship to the SCR 480 million that the court ordered should be paid. There is no explanation why the amounts were paid to him and what the true sums are which were paid to him, lawfully or unlawfully. In the absence of concrete evidence, there is no way to untangle the amounts of money which the Liquidator, the Central Bank and the Government have moved about, with no explanation and possibly, no justification since the commencement of the liquidation. As payments and advances were made in respect of the liquidation they should feature in the Liquidator’s cash book and liquidation accounts. This is not the case, yet the Official Receiver has not investigated this movement of money.*
- (g) *The company avers that the above circumstances should have raised red flags with the Official Receiver, which he failed to investigate despite the evidence. The Receiver also failed to present the Liquidator’s justifications or explanations in the report. He should have directed the Liquidator to do so with urgency and unless he is directed to do so in a detailed and forensic fashion, then the creditors will be denied justice in determining whether fraud, impropriety or malfeasance occurred during the liquidation. The company also avers that there is a high probability of fraud and the withholding or*

disappearance of funds belonging to the creditors and misuse of government funds under the guise of a liquidation. Crimes may, in its view, have been committed and the creditors defrauded of monies rightfully belonging to them.

(h) The report of the Official Receiver has raised several serious and major discrepancies with the accounts of the Liquidator which justify an order that he not be released unless and until the address those issues in his accounts to the satisfaction of the Official Receiver and the Court.

[37] Other issues that EODC highlighted which, in its view, constituted a failure by the Liquidator to properly exercise his duties include:

(a) Failing to cause to be prepared a statement of affairs of the company at the beginning of the liquidation denying the creditors and shareholders and the Official Receiver, a factual basis of the liquidation from the very beginning;

(b) Failing to present its accounts and cash books to the Official Receiver on a sixth monthly basis thereafter, contrary to section 226 of the Companies Ordinance and Regulation 149 of the Companies (Winding-Up) Regulations, as a result of which, there is a nine-year period during which the Liquidator had the proceeds of liquidation in his possession, but which cannot be reviewed by the creditors and shareholders, nor by the Official Receiver himself, who must simply take the Liquidator's word for how he handled the money in his possession;

(c) Doubt is raised as to the reasons why the Liquidator paid the money received by him into several accounts spread over multiple banks in Seychelles and Mauritius and there are concerns that this was done contrary to any directions by the Court under section 225(1) of the Companies Act;

(d) The Liquidator's final accounts with his affidavit dated 24 October 2012 which consisted of a few insubstantial pages of figures and notes which were incomplete, unprofessional and inadequate to give a complete and true picture of how he handled the monies he held;

(e) The evidence of poor record keeping by the Liquidator and failure to report regularly, as required by law, gives great doubt as to whether the Liquidator kept a proper and complete 'Cash Book' as required in Regulation 147 of the Companies (Winding-Up) Regulations, which if not would deny the creditors and shareholders and the Official

Receiver himself the possibility of reviewing and verifying the movements of money handled by the Liquidator and that the Cash Book should be made available for inspection by the creditors as permitted under s 224 of the Companies Ordinance.

- (f) The Liquidator refused to hold meetings of creditors and shareholders' despite repeated requests casting doubt as to whether he was acting in the interests of and according to the rights of creditors and shareholders;*
- (g) The Liquidator refused to allow any bidder except the ultimate winning bidder to increase their bid;*
- (h) A relatively simple liquidation of a company with a single asset has been in court for more than ten years and is still not concluded which is not normal or explicable, casting doubt on the propriety of the entire liquidation.*
- (i) On 12 November 2012, the Liquidator attempted to obtain an ex parte order from the Supreme Court to have him released without his final account being audited by the Official Receiver, claiming that the liquidation was concluded, which if the order had been granted would have been the end of the liquidation and the end of the creditors' and Official Receiver's ability to review and challenge the Liquidator's accounts and ultimately to uncover what really took place in the liquidation;*
- (j) Despite complaints, a senior judge stated that he was unable to decide if there was an Official Receiver, and if so, who he was although copious and irrefutable evidence was presented before the Court which stretches credulity and the court refused to give the order to have the Liquidator present his account to the Official Receiver for auditing;*
- (k) It took a further five years before the Liquidator finally presented his accounts to the Official Receiver for auditing and this only when ordered to do so by the present bench. The seemingly unwillingness of the Liquidator to have his accounts scrutinised would put in the mind of any reasonable person that there are improprieties in the liquidation that the Liquidator does not wish to be exposed;*
- (l) The Department of State of the United States Government and the US Ambassador in 2008 and 2009 raised serious concerns about corruption in the liquidation;*
- (m) The Official Receiver in his report failed to address the matter that in exhibit A to the Liquidator's affidavit of 24 October 2012 the Liquidator stated that there remained a residual amount of SCR 2 431*

730 in his custody even though he claimed in the affidavit that the liquidation had been concluded;

- (n) The sum of suspicious circumstances in the liquidation process such as the apparent disappearance of money, unexplained movements of money, discrepancies, inactivity of judges, unjustifiable delays in the proceedings, failure by the Liquidator to follow the requirements of the law and the lack of detailed accounts of records all indicate very strongly and are enough to validate the belief that massive fraud was committed behind the veil of a liquidation and that if this is allowed to happen it will be a travesty of justice and as per s 228 of the Companies Ordinance, there is utmost urgency to have these matters investigated before it is too late and the creditors suffer massive irretrievable damage and loss;*
- (o) Thus, the orders sought must be granted.*
- (p) After the Liquidator has addressed all the issues raised and all the recommendations of the Official Receiver in his accounts that he be ordered to submit a fresh report to the court as to whether the Liquidator should be released.*

[38] On 17 May 2018, the Official Receiver made a request that his report be held in abeyance pending further investigations into the allegations made in the application by EODC. The Official Receiver cited the seriousness of the allegations and the accusations of contradicting evidence in the statements produced by the Liquidator. The Court requested submissions from the Liquidator on the issues raised by the Official Receiver and to appear in Court on the next mention date of 6 June 2018.

[39] On 6 June 2018, the court commented that no counter affidavit or submissions had been received. Counsel for the Liquidator stated that the Liquidator was not in Mauritius at the time. A further date was set for submissions.

[40] On 4 July 2018, the Liquidator filed objections to the EODC's urgent motion. The grounds for the objection were:

- (a) The notice of motion, at first glance, was misleading and not properly headed. It is wrong in law because it seeks in one motion an application for urgent hearing and some other orders;*
- (b) It is not stated in the motion under what provision or under what law it is made and as a result the Liquidator is not able to fully answer to it;*

- (c) The deponent has not provided proof that he may swear to an affidavit on behalf of EODC;*
- (d) With regard to order no 2, the issue was the failure of EODC to prove that Mr Pool had indeed been appointed as Official Receiver and the scope of his appointment, as the EODC was asserting;*
- (e) Concerning order no 4, it is too late for the Liquidator to comply with an order of the Official Receiver to ask that the bills for legal services be taxed. Both payments are presently prescribed. More importantly, there were never bills for these amounts. Each of the two bills represent the totality of the amounts billed by the lawyers in Seychelles and Mauritius and paid by the Liquidator over the years, since 2009, the year the Liquidator first sought the advice of the attorney in Seychelles;*
- (f) That the motion be dismissed, and he be released as prayed in 2014.*

[41] In the affidavit, deposed to by the Liquidator, he stated that the Central Bank of Seychelles received the equivalent of SCR 480 000 000 from the European Hotels and Resorts Limited. (Reference is made to Annexure A, which is a letter from the Central Bank confirming receipt of the equivalent of SCR 480 000 000). The Liquidator claimed that he received the proceeds plus interest from the Central Bank of Seychelles which were used to repay the creditors as detailed in the Final Account of the liquidation.

[42] In response to the allegations in paras 7 and 8 of the urgent motion, the Liquidator took note of these without making any admission.

[43] He denied the allegation in para 8(c) of EODC's affidavit. He explained that the SCR 480 000 000 was received in September 2008 from the sale of the Plantation Club Hotel as evidenced by the letter from the Central Bank. In October 2008, SCR 40 106 894 was used to purchase USD 5 000 000 and deposited in a bank account held at Bank of Baroda as evidenced in the bank statement dated 4 November 2008 (Annexe C). This explains the difference between the total proceeds from the sale of the hotel (SCR 480 000 000) and the amount of SCR 439 893 106 which was reported in the Central Bank of Seychelles' audited report dated 31 December 2008. The amount of USD 5 000 000 was used for payment of preferential claims of the Company.

- [44] The Liquidator also denied the allegations in paragraphs 8(b) and (c) of EODC's affidavit. He stated that he received SCR 480 000 000 plus interests from the Central Bank, which was reflected in the final account (Annexe B). From the realisation of the assets, a total of SCR 574 426 962 was distributed to Bank of Baroda Seychelles and EODC. This evidence was enough to show that he had received SCR 480 000 000 with interests.
- [45] In relation to paragraph 8(d) of EODC's affidavit, the Liquidator insisted that he received SCR 480 000 000 plus interests from the Central Bank. With regards to paragraph 8(e), he responded that he received an advance of SCR 1 million from the Government of Seychelles as was clear from the bank statement of the company (Annexe D) and the email from the Ministry of Finance (Annexe E). This advance from the Government was used to pay the Liquidator's expenses of the company. This amount was refunded to the government in 2011, as evidenced in the bank statement (Annexe F).
- [46] He denied the allegations in paragraph 8(f) of EODC's affidavit and stated that the claims made were vague and unsubstantiated. The proceeds of SCR 480 000 000 were invested in both USD and in Government of Seychelles Treasury Bills. The rates of interest were very high at the time and as a result of his proactive treasury management, he generated income of SCR 109 852 069 over the period. The successful acquisition of USD 5 million in 2008 at SCR 8.2 million saved the company an estimated SCR 25 750 000.
- [47] He denied the allegations in paragraphs 11 and 12 of EODC's affidavit, and stated that these were false and defamatory against him. In relation to paragraph 13(a), he averred that the total amount of SCR 637 725 was paid to De Commarmond & Koenig and Francis Chang-Sam (as detailed in Annexe B). Following the Court Order dated 27 June 2011, an amount of SCR 322 000 was paid compared to the planned amount of SCR 300 000. The small difference related to unplanned legal costs. Earlier payments totalling SCR 322 000 were paid on 26 November 2008 for legal services provided at that date. This was disclosed in the Final Account.
- [48] With regards to paragraph 13(b) he stated that the amount of USD 28 078 was paid to ACM Consultancy according to a service agreement concluded on 1 January 2009

(Annexe G). With reference to paragraph 13(c), his response was that USD 42 153.67 related to the expenses incurred in the execution of his duties and those of staff/associates which consisted mainly of air fares and accommodation costs. The expenses incurred by a Liquidator in the performance of his duty must be borne by the Company before any payment of a preferential claim.

[49] With regard to paragraphs 13(d) and (f) he stated that the total amount of SCR 21 267 042 was paid as liquidation fees and detailed in Annexe B. This was based on the Companies (Winding Up) Regulations 1975 (Regulation 2 Head IV) which are fees payable to the Official Receiver when acting as Liquidator of a company. There are no provisions in the Company Regulations 1975 which provides the quantum of fees payable to a Liquidator other than the Official Receiver. He applied the same formula.

[50] In addition, he had discussed and agreed his fees with both the preferential creditors representatives, namely Mr Bernard Georges (EODC) and Mr Kieran Shah (Bank of Baroda) in 2011 where they agreed to reduce his fees by SCR 363 708 as evidenced in Annexe B. The fees were calculated and based on the realisation of the assets amounting to SCR 480 000 000 and not the total receipts of the liquidation assets in the amount of SCR 594 168 051. Thus, he waived a sum of SCR 1 712 520 on this latter sum. In total, he waived SCR 2 076 228. Further, the Company Ordinance states that liquidation fees must be decided by the court. The expenses were laid out in court and discussed with the aforementioned counsel and all agreed prior to asking for a court order.

[51] As regards paragraph 13(g) he stated that the purpose of the affidavit dated 24 June 2011 was to seek approval for the final distribution of the remaining balance on the liquidation account. Consequently, only the remaining Liquidator's fees of SCR 7 210 250 was mentioned in the affidavit dated 24 June 2011. However, payments were fully disclosed and the final account (Annexe B) fully shows the total amount of fees charged on disposal of assets (SCR 14 420 500) and the fees to be charged on distribution of proceeds (SCR 6 846 542).

[52] In relation to paragraph 14 of the Official Receiver's Report, he averred that no refund would be received since the company was highly indebted to the Seychelles Revenue

Commission. In response to paragraph 15, he averred that the whole liquidation process was conducted under the supervision of the Supreme Court, including the remuneration paid to the Liquidator.

- [53] With regards to paragraph 16, he stated that he did not understand the meaning of the provision. His remuneration was part of the final liquidation account approved by the court. In terms of paragraph 17, he stated that these were irrelevant to the present matter. Insofar as paragraph 18 was concerned, he stated that he was unclear about what it was supposed to cover and could thus not answer.
- [54] With regards to paragraphs 19 to 26, he stated that except for paragraphs 19(j) and (m), he employed the reasoning in paragraph 5 of the objections.
- [55] With regards to paragraph 21, he stated that the said sum of SCR 2 431 730 was a gain on exchange of USD currency to SCR between the affidavits of 24 June 2011 and 24 October 2012 which was duly paid to EODC via Frank Elizabeth. A total of SCR 140 249 899 was paid to EODC which include the gain on exchange rate of SCR 2 431 730.
- [56] Given the seriousness of the issues raised I fixed the matter for hearing of evidence. Prior to the hearings, in a letter dated 8 November 2018, the Official Receiver added the following clarifications to be read with his report dated 19 March 2018, which were in response to Mr Davison's affidavit:

(f) Para 8(a)

The sum received from the Central Bank, according to the Liquidator's records, was SCR 480 000 000.

An amount of USD 5 million (SCR 40 106 894) was transferred from the Central Bank account to another account of the Liquidator leaving the balance of SCR 439 893 106 at 24 October 2008. This amount tallies up with the Central Bank financial statement of 31 December 2008.

From further records produced by the Liquidator, the USD 5 million was dealt with as follows:

USD 1.7 million – paid to Ernst & Young

40 000 – legal fees

28 078 – paid to ACM Corporate Services

53 219.07 – liquidation expenses

125 – bank charges

Total – USD 1 821 422.07

The balance, in the sum of USD 3 178 577.93 was used to settle part of the secured creditors accounts (Bank of Baroda Consortium). Confirmation of receipt of these funds needs to be obtained from the creditors.

(b) Para 8(b)

During the period January 2009 to February 2009, the Liquidator's accounts show that the following sums were invested:

5 January 2009 – CBS maturity date 7 April 2009 – SCR 405 950 500

13 January 2009 – CBS maturity date 15 April 2009 – SCR 13 687 758

10 February 2009 – CBS maturity date 13 May 2009 – SCR 13 085 800

Total – SCR 432 724 058

The assumption is that the reference note in the Central Bank's financial statement for the year ended 31 December 2008 reflects the above transaction.

(c) Para 8(d)

It is confirmed that the Liquidator's accounts do not show such sums as having been received. It is therefore recommended that further clarification be obtained from the Auditor General's office about the alleged payments.

(d) Para 8(e)

The Liquidator's account only shows SCR 1 million as having been received by the Liquidator. This amount was eventually repaid to the Government.

It is recommended that clarification is obtained from the Central Bank about whether SCR 7.5 million was made out to the Liquidator or to another and the reasons therefore.

(e) Paras 8(f) and 10

The allegation that the Receiver did not investigate movements of money is unfounded, since he was not privy to the Central Bank's financial statements, not did these form part of the Liquidator's

accounts submitted for audit. He also rejects the statement in paragraph 10 that this should have raised red flags.

(f) Para 13(c)

Once the Court approves the quantum of the remuneration payable under section 165 of the Companies Winding up Rules, then this will be clarified.

(vii) Para 19(a)

He had not been presented with a copy of the ‘Statement of Affairs’ required under section 215(1) and (2) nor any court order to do otherwise. The Liquidator should make this available, if it exists. Section 215 requires that this statement be submitted and verified by the directors of the company.

The Receiver’s letter has attached as Appendix A (i), a copy of entries of Ailee’s Central Bank amounts.

[57] From the above, it seems the Receiver added a few further issues: the requirement of the Liquidator to provide a Statement of Affairs, if one exists. Second, the seemingly unexplained SCR 7.5 million that was transferred to the Nouvobanq account; and the balance, of the USD 5 million transferred from Central Bank to another account; and the sum of USD 3 178 577.93 used to settle part of the secured creditors accounts (Bank of Baroda Consortium). The Receiver has asked for confirmation of receipt of these funds from the creditors.

[58] These issues and alleged discrepancies were dealt with in oral evidence by some of the witnesses summoned to the hearings.

The Hearing

Testimony of the Official Receiver, Mr. Bernard Pool

[59] Mr. Bernard Pool, a 73-year-old accountant, testified that he had been reappointed Official Receiver on the enactment of the new Insolvency Act. He stated that he had received a set of accounts dated 19 March 2018 from the Liquidator in the present matter. In relation to his findings, he confirmed that he had received a letter from the Central

Bank of Seychelles confirming that they had received the sum of SCR 480 million for the sale of the Plantation Club. He had a copy of the bank statement from the Liquidator to the Central Bank showing receipt of the said amount.

- [60] In respect of the discrepancies raised in his Report he stated that the final Liquidator's accounts showed legal expenses of SCR 637,725 made up of fees paid to De Commarmond and Koenig and Mr. Chang-Sam together with bank charges. However, in the affidavits produced in court the total legal expenses are stated as SCR 300,000.
- [61] In addition, the payments for legal expenses in accordance with sections 157 and 165(2) of the Regulations ought to be taxed by the Registrar of the Supreme Court unless the Supreme Court had authorised a fee agreement.
- [62] A fee of USD 28 000.78 on the presentation of invoices from ACM Corporate Services (for professional services) was also met by the Liquidator without the agreement of the Court and therefore ought to have been taxed.
- [63] He had not been able to ascertain if the sum of USD 42 000 paid in respect of the item "Liquidation Running Expenses" fell within the ambit of section 164(1) of The Companies (Winding Up) Regulations, 1975 (The Regulations) or not. If those expenses related to travel expenses or other direct expenses they would not be subject to taxation. However, if they were for professional expenses they would be subject to taxation.
- [64] The Liquidator had also paid himself the sum of SCR 21 267 000.42 which he claimed as remuneration. That sum was not allowable in law as remuneration in this regard is only claimable by the Official Receiver when he is also acting as the Liquidator. A different formula applies to when the Liquidator is a separate person to the Official Receiver. When the Official Receiver audits the accounts of the Liquidator under Regulation 2 the Official Receiver is paid 1 ½ percent in the first SCR 50,000, 1 percent on the next SCR 950,000 and $\frac{1}{8}$ percent on any sum above SCR1 million.
- [65] When the Official Receiver also acts as the Liquidator, he is paid 6 percent in the first SCR 50,000, 5 percent on the next SCR 950,000 and 3 percent on any sum above SCR1 million. This was not the case and the Liquidator should not have paid himself the fees.

[66] The Liquidator also erroneously drew the sum of SCR 7 210 250 since these fees should have been taxed as there is no documentation to show that they were approved by the Court. The only other possibility of such fees being allowable would be if the creditors had approved the fee charged by the Liquidator. There was no such documentation.

[67] In normal circumstances, the Liquidator's fees are produced every six months per the Cash Book and after audit by the Receiver he is paid the fee. In this case, the sum of USD 1,711.00.65 was paid to the Liquidator and his associates but was not disclosed to the Court. The Liquidator has stated that the fee was not objected to by the creditors. The Official Receiver stated that the Court ought to review all the Liquidator's affidavits in respect to the winding up in order to approve his fees as is required by the law.

Testimony of Christophe Edmond, First Deputy Governor of Central Bank of Seychelles

[68] Mr. Christophe Edmond, the First Deputy Governor of the Central Bank of Seychelles testified. He was personally aware of the sale of the Plantation Club to European Hotels and Resorts Ltd as at that time he was Director of Banking Services with the Central Bank. The 2008 order of Perera ACJ set the purchase price at SCR 480 million. The sum received by the Central Bank from the proceeds of sale was USD 54,315,000 and not USD 60 million as was expected. The conversion rate at the time the transaction was booked (4 September 2008) was SCR 8.0214 to the USD and when the dollar amount was converted the amount received was SCR 435 682 341.

[69] He agreed that the letter dated 29 August 2008 sanctioning the sale of the property stated that the purchase price was SCR 480 million. The USD 54 million also included the 5% payable as stamp duty on the property by the purchaser as was stated on the Swift message from the Federal Reserve Bank which is the Central Bank's correspondent bank in New York. The Ministry of Finance then topped up the amount to SCR 480 million. On 20 October 2008, a disbursement of USD 5 million (Exhibit Court 6) was made to the Liquidator on the account of Ailee Development Corporation in Mauritius on the instructions of the Liquidator.

[70] He was aware that the court order was to the effect that the Government was to retain the foreign currency with the Liquidator to be paid in rupees. A rupee account was therefore

opened in the Central Bank for the Liquidator. Subsequently, treasury bills were purchased on behalf of Ailee in liquidation in the sums of SCR 405 950 500 on 6 January 2009, SCR 13 678 758 on 14 January 2009 and SCR13 085 600 on 10 February 2009. The maturity of the bills was 91 days. The first tranche matured on 7 April 2009 and the sum of SCR 432 209 050 was credited to Ailee account. The second tranche matured on 15 April 2009 and the sum of SCR 14 670 775.8 paid to the account. The third tranche matured on 13 May 2009 and the amount of SCR13 908 580 was received into the account. A 10% withholding tax had been deducted from these sums before the amount was credited to Ailee account.

- [71] The Ministry of Finance paid SCR 68 318 million in October 2008 to the Liquidator in respect of what was noted as “FX seller payback” (Court Exhibit 4) on instructions from Ahmed Afif, then the Principal Secretary at the Ministry of Finance to Jennifer Morel, then Deputy Governor of Central Bank. Mr. Edmond could only surmise that that was the top up to make up the shortfall of what was the agreed purchase price and as bankers to the government he acted on their instructions.
- [72] Two tranches of money that had been invested in 91-day Treasury Bills and had matured were reinvested as follows: On 7 April 2009 the sum of 415 176 110 was reinvested as was another SCR 50 610 000, on 13 May 2009. On the maturity of the first bill on 7 July which then amounted to SCR 439 407 611 after deduction of withholding tax, part of it was again reinvested. The second tranche matured on 15 August 2009 and the amount of SCR52 311 000 was paid into the account. Out of the amount of SCR 439 407 611, SCR426 000 000 was reinvested and matured in October yielding SCR 438 125 000.
- [73] In 2009, several payments were made out of Account 2121 at the Central Bank in the name of Plantation Club Liquidation Deposit: the sum of SCR 67 118 554 was transferred to Nouvobanq (Court Exhibit 5), on 6 October SCR 258 750 000, on 14 October SCR105 100 000. The balance of SCR 899 269 was transferred to Nouvobanq.
- [74] In total the Central Bank disbursed SCR 455 351 298.80 to the Liquidator in the following amounts:

1. USD 5 million (equivalent to SCR 40 million) on 20 October 2008
2. SCR 67 million on 12 August 2009
3. SCR 258.75 million on 6 October 2009
4. SCR 73.4 million on 7 October 2009
5. SCR 105 million on 14 October 2009
6. SCR 899,269.00 on 3 November 2009.

[75] This total transferred included the money and the interest accrued for the investments in treasury bills. The Auditor's Report for the year ending 31 December 2008 on the account of the Central Bank refers to the sum of SCR 432.7 million being paid to the Liquidator. The discrepancy is explained by the interest accrued on the treasury bills and the SCR 40 million paid previously.

Evidence of Mark Davidson, Managing Director of EODC

[76] Mr. Davidson was cross-examined on the averments in his affidavit as set out above. He admitted that there were two powers of attorney issued to him in respect of his representation of EODC in court, one in 2011 and one in 2012. In between those two dates there had been a change of directorship in the company. He had in any case been Managing Director of the company since his father's untimely death in 2004.

[77] He had brought the present application after seeing the Official Receiver's report and out of the company's right to make objections once the liquidation accounts had been audited. The Liquidator had responded to the various objections he had made but not satisfactorily. The purpose of the ACM contract was not explained. He accepted that EODC had been paid liquidation proceeds in a sum in excess of SCR 125 million in respect of the sale of Ailee assets. Similarly, Bank of Baroda had been paid USD 48 million. These disbursements were made after agreement by the creditors and confirmed by the Court.

[78] He accepted that the Liquidator was an officer of the Court and that the present liquidation had been going on for over 11 years and that various applications and orders were made in this respect over the years. He could not say if the Liquidator's fees and the legal fees had been negotiated between the parties and approved by the Court as he had

not been personally present at the negotiations but EODC's legal representative, Mr. Bernard Georges had been there. He accepted that EODC was paid the full amount according to the June and July Court Orders of 2011 but not the full amount claimed. Residual amounts claimed on 12 November 2012 by EODC had still not been paid.

[79] On being shown the Liquidator's affidavit dated 7 July 2011, he agreed that the Order made by CJ Egonda-Ntende referred to the appended schedule of the Liquidator's and the legal fees and confirmed them. On 27 July 2011 the Court corrected mistakes contained in the June Order in which the sum of USD 3 million dollar had been double-counted. He personally did not accept that these were genuine mistakes as it seemed to be a very large sum for a very experienced accountant to make a mistake about.

[80] He agreed that he had communicated with the Liquidator on numerous occasions and had even thanked him but that this was done out of courtesy. He disagreed that the Liquidator had acted under the supervision of the Court and that he had distributed all sums that were the proceeds of liquidation to the creditors.

[81] On re-examination, he stated that he had averred that the Liquidator had acted fraudulently and he stood by his averments and his objection to the Liquidator being released from his duties.

Testimony of Anthony Miller, Audit Manager in the Office of the Auditor General

[82] Anthony Miller had worked for the Auditor General for thirty years. During the years 2008 and 2009, Mr. Marc Benstrong had been the Auditor General but had since passed away. In his conclusion on the audit of Central Bank for the year ending 2008, Mr. Benstrong stated that proper accounting records had been kept by the Bank. In that Report a liquidation deposit of SCR 439 893 106 is indicated in respect of the Plantation Club.

[83] With regard to the report for the year ending 2009, the Auditor General remarks that the General Revenue Balance of the Bank included two payments of SCR 68 million and SCR 50 million effected in October and November respectively, but in the absence of

sworn documents he could not establish the validity of the payments and whether the expenditure was incurred without appropriation.

[84] There was another relevant statement in the Report to the effect that an advance of SCR 7.5 million was made in respect of the Plantation Club subject to the condition that it would be recovered on the finalisation of the sale of Ailee. He was not aware of the payment of SCR 7.5 million being repaid. In 2012, SCR 1 million was repaid and there was a write off of the balance. He was unsure if the SCR 1 million that was repaid was in connection with the advance of SCR 7.5 million.

Testimony of the Liquidator, Mr. Paul Gerard Lincoln

[85] Mr. Lincoln stated that he was appointed Liquidator for Ailee Development Corporation. He had read the objections made by EODC in respect of his application to be released as Liquidator and to wind up Ailee and had countered them with an affidavit on 4 July 2018.

[86] With respect to his fees and those for legal expenses there were two amounts claimed and he applied the quantum charged when the Liquidator also acts as Official Receiver as there was no provision in Seychellois law at the time relating to the quantum to be paid to a professional insolvency practitioner like he was. It made sense to charge the same percentages as they are in line with international practice. The norm is for the Liquidator to charge 5% on the asset realisation. In this particular case it ended up being about 4 ½ percent. Comprising 3% on the sale of the asset and 1 ½ percent on the distribution. The payment was in two legs - the first on the sale of the asset in 2008 and the second on the distribution of the proceeds. He had been fully transparent about his fees. He had on 17 July 2009 in a Notice of Motion (Court Exhibit 21) attached an Annexe G clearly detailing his expenses and detailing the equivalent of SCR 14 420 500 taken as fees on the sale of the asset. The legal fees paid up to that date were for SCR 322,000.

[87] The application to Court in 2011 concerned the distribution of the balance of the money remaining and the SCR 7 million charged were for his fees after 2009. Since his own unfortunate error had resulted in less money being available he had borne some of the consequences and had waived SCR 363,000 of his fees, hence the difference between what he charged – SCR 7.2 million and the final amount paid - SCR6.9 million.

- [88] In respect of the legal fees and the discrepancies raised by the Official Receiver, the same applied - he had already paid fees amounting to SCR 322,000 in 2009 and there was an estimated balance of SCR 300 000 to be paid after the sale. In the end it ended up being SCR 315,000.
- [89] The fees he applied were disclosed prior to the Court Order of 2011 to the parties including the Bank of Baroda which was the leading consortium bank and EODC. The parties were represented by Kieran Shah and Bernard Georges respectively. They actually negotiated the split of the funds available at the time. It was in the library of the old court house and an agreement was reached in the ratio three quarters to one quarter. Three quarters went to Bank of Baroda and one quarter to EODC.
- [90] In that discussion his fees of SCR 7 million was discussed and the balance agreed and then the mistake in the calculations occurred and he agreed with both the parties' lawyers that he would reduce his fees by SCR 367,000. He did not charge any fees on what he called treasury management, that is, the SCR 120 million odd rupee of value added that he brought to the liquidation by proactive investments in treasury bills, in dollars. At an early stage he talked to the parties about the USD 5 million he had bought and how it would benefit the recipients, that is, the beneficiaries. He limited his fee to the 80 million and not on the 120 million of value added on which he could have claimed instead. In the June 2009 negotiation with the parties he had agreed to only charge his fees on the sale of the assets. This decision was confirmed by the Courts in the June and July Orders as the annexes to these Orders show the payments made.
- [91] With regard to the sale of the hotel, the purchase price was also confirmed by the court – the sum of SCR 480 million. He received this amount through the Central Bank of Seychelles. No stamp duty was paid on this amount. The stamp duty was paid by the buyer. The gross proceeds therefore were equivalent to the net proceeds of the sale.
- [92] As to the purchase of USD 5 million from Central Bank he had done so at the recommendation of the Court (see the second paragraph of Perera ACJ's decision at Page 16 in which he states that the undertaking given to the creditor, the Bank of Baroda to be paid in foreign currency should be honoured fully or partly) Bank of Baroda wanted the

60 million in dollars; what they had advanced in dollars they wanted back in dollars. At the time Seychelles was experiencing a foreign exchange crisis and it was general knowledge that once the exchange control in place was lifted, the rupee would devalue. It was because of this that as soon as the sale was made, his priority was to convert as much as he could for the proceeds of sale into dollars.

[93] He entered into negotiations with Central Bank to get the USD 5 million and subsequently he continued to actively look for dollars. In the end he was able to obtain about USD 12 million which he distributed.

[94] From the realisation of the assets he made a total distribution of SCR 574 426 962 to Bank of Baroda and EODC Operations Limited substantially more than the SCR 480 million because although the rupee depreciated after foreign exchange control was removed, interest rates were high. In terms of his fiducial duties he did well to proactively manage the funds to generate value for the benefit of distribution. The sum distributed was made after deducting the liquidation fees and other expenses incurred. The creditors were pleased although they would have preferred to have be paid in dollars.

[95] There was an advance of SCR 1 million taken from the government, the purpose of which was to settle employee compensation. This was later refunded. He was not aware of any other advances from the government including the USD 5 million deal mentioned by the Central Bank in its testimony (Christophe Edmond). He reconciled his figures with that stated by the Central Bank and there was a difference of SCR 6 million. His cash book showed a total amount of SCR 545 million, that is SCR 510,927,315 added to the USD 5 million he received in October 2008 which when converted into rupees gave a total amount SCR 551 million received. This gave a difference of SCR 6 million compared to the figures given by Central Bank in their testimony. He did not receive this money and the difference of SCR 6 million was internal between the Central Bank and the Government. All he had received was SCR 551 million.

[96] There was now nothing left to distribute apart from the remaining balance of SCR 2.4 million to EODC which represented an exchange gain of SCR 1 170 000. This reflected a noncash item. There was however also cash paid. He had communicated to Mr. Davidson

to confirm the balance of SCR1.5 million payable. He did pay the sum of SCR 1 544 626 which emptied the bank account. The banks were unclear about the court order but eventually in 2013 on his instructions the final amounts were paid to EODC. The details were as follows: Nouvobanq paid out SCR 92 212 in August 2012, Habib Bank paid SCR 1 142369.62 on 1 February 2013 and Seychelles Savings Bank SCR 310 034.80 making up the total of about 1.5 million paid out. Victoria Law Firm (EODC's lawyers) confirmed the payment of SCR 125 518 169 in March 2012 but not the other sums. The amount paid to EODC included interest accrued of SCR 436 000 over and above the figures agreed.

- [97] He had also paid USD 28,078 to ACM Consultants for their services in helping him to manage the treasury. He was from Mauritius and did not understand the economy in Seychelles and needed local expertise to help him trade in the treasury bills and to invest in the commercial banks and transact in foreign exchange. Such consultants would normally be paid a percentage of the assets they managed but because he wanted to keep costs low he negotiated the sum paid to them.
- [98] The sum of USD 42,153,67 queried by the Receiver related to out of pocket expenses for flights and hotel bills which is common in the industry. Everything he did was with the approval of the Court and was done in a transparent manner.
- [99] In cross examination, he stated that he was personally appointed provisional Liquidator and not his firm. After being appointed he secured the assets. He tendered the hotel for sale in 2008 and European Hotels and Resorts was approved by the Seychelles Investment Board to buy the asset. Their bid was for USD 60 million. The Court ordered that the transaction be done in rupees. He discovered in the course of these proceedings that they paid USD 60 million but he was only paid the equivalent of USD 54 million that is SCR 480 million. He left the money in the Central Bank by investing in treasury bills. After their maturity he replaced the money in commercial banks in Seychelles. He did open one account in Mauritius with the initial USD 5 million. The SCR 480 million invested rose to SCR 551 million.

- [100] In October 2008, he paid SCR 14 million to obtain USD 5 million which he transferred to Mauritius. That was the only forex transaction he managed to get out of the Central Bank which he transferred to Bank of Baroda in Mauritius in the name of Ailee Development Corporation. Out of this he paid Bank of Baroda USD 3.2 million on 1 August 2011 and the first tranche of his fees at USD 1.7 million on 27 October 2008 and USD 20,000 legal fees each to both De Commarmond and Koenig in Mauritius and Chang Sam Chambers on 26 November 2008. ACM was paid on 11 August 2010 and the liquidation expenses on 20 August 2009. He informed the parties of this transaction sometime in 2009. He did not send reports every six months to the Official Receiver because at the time there was no Official Receiver and in any case all the proceedings were being performed in front of the court with full disclosure to the court. He took USD 1.7 million as fees very early in the liquidation process because according to the rules when the Liquidator also acts as Official Receiver his remuneration is obtained in two tranches- first, on the disposal of the assets and secondly on the distribution of the proceeds, which is what he did. He made full disclosure of this to the court on 17 July 2009 and the statement of account is attached to the Perera ACJ's ruling of that day.
- [101] He did not pay EODC at the same time as the other creditors as he was told initially to bank the money in Nouvobanq and subsequently not to do that. The delay was because he awaited instructions. The solution was found in court after March 2012 when it was agreed to effect payment through Victoria Law Firm. Renaud J made the order on 5 March 2012 and SCR 125.8 million was paid to EODC. It was paid from a Seychelles bank account.
- [102] He was not familiar with a transaction of SCR 7.5 million mentioned in the Auditor's Report in respect of an advance to Ailee to be repaid upon the finalisation of the sale of the hotel. He was not familiar with a Plantation Club account in Nouvobanq in respect of a deposit of SCR 5.4 million made on 13 February 2008 by the government. He only received the sum of SCR 1 million on 29 February 2008 from the government to pay the redundancy costs and he subsequently refunded it to the government.

[103] On being recalled Mr. Lincoln explained that after looking at the accounts closely he was able to understand the transaction of 7.5 million. There were three elements leading to it. A payment of SCR 5.4 was paid in respect of worker compensation which was supported by workings sent to the Ministry of Finance. Another SCR 1 041 000 was the payroll for February 2008 and the third element is the SCR 1 million payment of an advance already mentioned. These payments were made by the government using the Nouvobanq account that he was not aware of. The bank statements support this. There were 236 employees and 236 cheques made out from the account. These were in a pre-liquidation account.

[104] He opened a liquidation account for Ailee in Nouvobanq on 18 February 2008 (Account number 01002034718003). The advance of SCR 1 million for compensation was paid into that account. The SCR 5.4 million did not enter the account as it was paid before the account was opened and the staff had to be paid compensation urgently. He did not see this figure as a liquidation cost. The redundancy responsibility was taken over by the government.

[105] He did not place the sale proceeds into that account but left it in the Central Bank. This was unusual but it was due to the fact that the country had a strong Central Bank with foreign exchange control and it was the only bank one could do meaningful foreign exchange dealings with at the time.

Evidence of Rita Boudane of Nouvobanq

[106] Ms. Boudane delivered a bank statement in respect of an existing account (No 01002001197005) of Plantation Club with Nouvobanq showing a balance of SCR35 000. She confirmed that SCR 5.4 million was drawn on Government of Seychelles to credit Plantation Club. She could not tell who the signatory was and who paid or withdrew money from the account. The bank kept cheques for up to ten years and would still have them in the archives.

Evidence of Ahmad Sayeed, CEO Nouvobanq

[107] He was familiar with Account number 0100200119700(5) in the name of Plantation Club at Nouvobanq. Statements in relation to this account had been produced to the court. He

did not keep records (such as cheques) of the account transactions, only the bank statements. These had been destroyed as per the provisions of the law after seven years.

Evidence of Patrick Payet

[108] Mr. Payet works at the Ministry of Finance as the Secretary of State. In 2008, he was the Director of Financial Planning at the Ministry and recalls meeting with Mr. Davidson in 2012/2013 in relation to three amounts transferred to Nouvobanq. The first was for SCR 5.4 million in February 2008, the second was for SCR 1 041 000 million in late February 2008 and the third for another SCR 1 million in early March 2008 making a total of SCR 7.4 million. Vouchers for these amounts were raised and transferred into the Ailee Development Account 0100203471800. He had seen correspondence with Mr. Ahmed Afif, then Principal Secretary and the payments related to compensation of employees and some salaries. This money was not paid back by the Liquidator. This was because Plantation Club had lent the government USD 3 million in 2000 and in a letter written by Mr. Davidson and Ms. Sydna Cesar it was confirmed that the amount outstanding from government in respect of the loan was around SCR 7.5 million. The third amount of SCR 5.4 million was transferred into Account 0100200119700 in the name of Plantation Club because it was going to be used for payment of salaries and perhaps because it was urgent.

Mark Davidson of EODC (recalled)

[109] The loan of USD 3 million to the government was made by EODC, the parent company and a separate entity to Ailee Development. It should have been repaid to EODC and not to the Plantation Club. Mr. Payet's recollection was wrong. He had met him in April 2014 when Mr. Pierre Laporte was the Minister of Finance and he had asked him why the loan had been repaid to Plantation Club. The vouchers for payments were shown to him then. When Plantation Club encountered difficulties, EODC borrowed money from the government using the dollar loan to the government as security.

Closing Submissions

EODC's submissions

[110] These submissions are confusingly titled Ailee's submissions when in fact they should read EODC's submissions. Much of the submissions, however interesting they might be, relate to matters which I have already cautioned are not within the remit of the present application. I have therefore chosen to ignore them.

[111] Among the matters that are relevant to the present applications are first, the issue of the appointment of the Official Receiver which I shall presently deal with. EODC contends that because of the inaction, inability, unwillingness or incompetence of Chief Justice Egonda-Ntende and Renaud J it could not get an order from the Court to have the Liquidator present his final liquidation accounts. EODC falls just short of accusing the Court of wilful misconduct in this respect. This it states has breached the rights of the creditors.

[112] Secondly, the Liquidator is accused of perjury and/or misleading the Court in representing to the Court that the fees he had charged were made pursuant to the law when in fact they were not. In its submission therefore, these fees were unlawful and the order of the court invalid. There is also no evidence of the total of SCR 6.4 million the Liquidator claims to have paid in respect of staff wages and gratuities pursuant to section 278 of the Companies Ordinance. Even if the Liquidator had paid compensation to staff, the total for the 236 employees would have been a maximum of SCR 472,000 as each claimant could not receive more than SCR 2000 each under section 278 of the Companies Ordinance. He has therefore perjured himself in this respect and also in regard to his statement that he did not remember when he first entered the Plantation Club.

[113] Thirdly, the Liquidator failed in his duties under the law to cause to be prepared a Statement of Affairs of Ailee. Having not done so, more than eleven years on, there is no point of reference and no complete and conclusive evidence of Ailee's financial state at the beginning of the liquidation.

- [114] Fourthly, the Liquidator by refusing repeated requests to hold meetings of the creditors and shareholders and in failing to present accounts to the Official Receiver every six months breached his statutory duties.
- [115] Fifthly, the Liquidator fraudulently paid himself fees in excess of what was permitted by law and some ten years before the law allowed for him to be paid. He retained a large amount of foreign exchange for himself (USD1.7 million) during a time when foreign exchange was in short supply. He justified these fees on the grounds that these had been mentioned in his affidavit of 24 June 2011 and therefore authorised by the Court when the latter approved the division of proceeds in the liquidation. The creditors suffered a substantial loss in terms of interest which would have accrued on the excess sums the Liquidator paid himself both in terms of what he paid himself but also in terms of the interest the amount would have accrued for the period of ten years if it had stayed in the account. In any case his fees should have been paid in rupees. These fees were paid in breach of the Companies (Winding-Up) Regulations. His fees should have been paid under Head 1 as he was only acting as Liquidator and not as Official Receiver also acting as Liquidator.
- [116] Sixthly, the Liquidator was unable to reconcile the SCR 7.4 million transferred to accounts under his control. The movement of this money was shown in court in the form of three payment vouchers from the Central Bank in three tranches of SCR 5.4 million, SCR1 041 million and SCR1 million during February and March 2008. The Auditor General's Report for 2008 lists this as an advance but does not show it as having being repaid. Mr. Patrick Payet claimed that this was the repayment by the government of the balance of a loan from EODC but in fact this was not the case. In any case the Liquidator should have been able to explain such a large amount being paid into accounts over which he had control but essentially claimed he had no part in it.
- [117] With respect to the SCR 1 041 million transfer between February and March 2008, the Liquidator falsely claimed that this represented interest from Treasury Bills when in fact he didn't invest in treasury bills until January 2009.

- [118] With respect to the advance of SCR 1 million, the Liquidator claimed that this was an advance from Government for the payment of staff which was repaid. Mr. Christophe Edmond, First Deputy Governor of Central Bank ((sic) as in fact this was the testimony of Anthony Miller from the Auditor General's Office) stated that there was no such record of the SCR 1 million being repaid. There is in any case an inconsistency in the Liquidator's accounts as he booked the SCR1 million advance but not the remaining SCR 6.441million.
- [119] It is also not credible that the SCR 5.4 million was received in the Plantation Club account only five days after the Liquidator's appointment and two days after he first set foot on the property was then paid out in respect of workers on his assessment and calculation in such a short time. The Liquidator has not been able to properly account for the SCR 5.4 million advanced to Ailee.
- [120] Seventhly, the Liquidator failed to keep proper records of Ailee. Failure to inform the company's bankers and particularly Nouvobanq to secure all accounts of the company and the funds therein together with all records pending the winding-up of Ailee was a breach of his duties. Similarly, Mr. Ahmad Saeed, CEO of Nouvobanq in allowing the cheques to be destroyed had breached his duties in regard to an ongoing liquidation.
- [121] Eighthly, it appears that the sanction fee for the purchase of the Plantation Club was paid out of the proceeds of liquidation and not separately by the purchaser, representing a further loss of SCR 24 million to the Creditors.
- [122] Ninthly, there are glaring contradictions between the Liquidator's Accounts, the Central Bank and government records. The letter from Francis Chang Leng, Governor of Central Bank states that the Bank received 480 million for the sale of the hotel. The audited financial statement for 2008 of the Central Bank states that it received SCR 489 million. The Liquidator states that he received SCR 480 million.
- [123] Finally, the Liquidator has still not satisfactorily shown that he has paid all proceeds of liquidation as borne out by residual amounts in bank accounts and his statements to creditors that there were still outstanding payments to be made to them.

The Liquidator's Submissions

- [124] The Liquidator submits that the majority of the alleged discrepancies and improprieties raised by the Official Receiver and EODC has been satisfactorily put to rest. With regard to the fees that he has charged, he submits that these were agreed by the parties and endorsed by the Court through various orders. Even if the Official Receiver is right that the formula applied by the Liquidator for calculation of his fees was erroneous, this was endorsed by the Court. In any case he was entitled to his fees as this was a matter that has dragged on for more than ten years during which time he had had to fly back and forth from Seychelles in gruelling and lengthy negotiations between creditors and relevant authorities and be constantly involved in court proceedings. Since there was no formula available he did the correct thing by having his fees approved by the parties and the court.
- [125] Similarly, the amounts he charged for professional fees and expenses were understandable as he was not a Seychellois and needed to engage professionals who knew how Seychelles worked. This helped in managing the assets and permitted massive returns from the treasury investments which ultimately benefitted the creditors and not him personally as his fees did not take into account the return on the investments.
- [126] The Official Receiver in his report only noted the differences between what the Liquidator stated in his affidavits of June and July 2011 and that in the final liquidation accounts but did not look at the court orders. He therefore had a limited perspective of what occurred and the major discrepancies he noted did not take into account the fact that the affidavits did not include sums already paid out as fees and expenses but only the balance as opposed to the final liquidation accounts which has the total expenditure.
- [127] The application to have the bills taxed at this late stage is in any case prescribed and in any event the payment of the bills was agreed by the parties.
- [128] With regard to the sale of Plantation Club, the Court had ordered that it be sold for SCR 480 million. He received confirmation from Plantation Club that SCR 480 million had been received and he saw no need to enquire where it came from or how. His duty was to sell the asset for this amount and distribute the proceeds, which he did. Until the hearing of the case he was unaware that the government had topped up part of the SCR 480

million. In any case he invested the sum he received and made an extraordinary return as he ultimately distributed SCR 574 426 962 to the Creditors, a sum far in excess of the sale price. He tried as much as he could to purchase USD with the proceeds of sale so that he could pay the creditors as much as possible with dollars as this was the recommendation of the court. Hence he acted in line with his duty as Liquidator and in the interest of the creditors.

[129] With respect to the as yet unclosed account with Nouvobanq in the name of Plantation Club, he was unaware of its existence. The simple explanation was that this was an old account pre-liquidation. He was never a signatory to it and his first task on appointment had been to open fresh bank accounts in the name of Ailee. Hence he submitted, this was never an account under his control. As it turned out, the account was used to pay compensation to past employees of Plantation Club.

[130] It must be noted that the Official Receiver has recommended that he be released if the court is satisfied that the discrepancies raised in the Report are adequately dealt with and he submits that this has been done. The allegations of fraud and illegality on his part are baseless and most certainly not alluded to by the Official Receiver. In any case the Court cannot audit the Official Receiver's finding but only act on the recommendations therein. Its powers therefore are circumscribed.

The issues for the court

[131] This court is thus faced with two key questions: 1. Should the Liquidator be released? 2. If not, what is the appropriate relief that this court may offer. In order to resolve these two issues, it is apposite, at this stage, to deal with how in the ordinary sense, the old companies law envisaged liquidations work.

Liquidations under the Companies Ordinance 1972 and the Companies (Winding Up) Regulations 1975

[132] The Companies (Winding Up) Regulations, 1975 (The Regulations) must be read with the now repealed provisions of the Ordinance, which largely mirror the Regulations. At the enactment of the Insolvency Act 2013 it was submitted that the Regulations were

unduly burdensome, onerous and poorly understood by the practitioners and the courts. They may partly be the reason why the present winding up has been problematic from the beginning.

[133] Part IV, section 27 of the Regulations deals with the Liquidator. It provides that the court would, on petition and with sufficient grounds, appoint a Provisional Liquidator if it deems this necessary. Section 27(3) provides that the Provisional Liquidator

'shall be entitled to be paid out of the property of the company, all the costs, charges, and expenses properly incurred by him as Provisional Liquidator (including such sum as would be payable under the scale of fees for such time being in force, where the Official Receiver is appointed Provisional Liquidator) and may retain out of such property the amounts of such costs, charges, and expenses.

[134] Further, section 27(4) states that where any other person, other than the Official Receiver, has been appointed Provisional Liquidator and the Official Receiver has taken steps to obtain a statement of affairs or has performed any other duty prescribed by the Regulations, the Provisional Liquidator must pay the Official Receiver such sums as the court may direct.

[135] There are some provisions (section 31 for instance) which deal with some administrative steps that must be taken by the Registrar of the Supreme Court after a Provisional Liquidator has been appointed. There are also requirements to advertise the winding up of the company and appointment of the Liquidator (section 34).

[136] The Regulations requires the submission of a Statement of Affairs to the Official Receiver by the Liquidator (section 38). The Statement of Affairs must be verified by affidavit, and filed with the Supreme Court. The Liquidator who makes a Statement of Affairs must submit an estimate of costs and expenses that he anticipates will be spent on drawing the Statement of Affairs (section 42).

[137] In terms of section 43 of the Regulations, a first creditors meeting with the shareholders is generally held and the Official Receiver or chairperson of that meeting must provide results of that meeting to the Supreme Court.

[138] Subsection 43(5) provides that where a Liquidator is appointed a copy of the order appointing him must be transmitted to the Registrar by the Official Receiver. His appointment must be advertised. The Liquidator must give security. The security must be given to an official directed by court. The costs of furnishing security must be borne by the Liquidator personally.

[139] In the present case, the Liquidator's security was set at SCR 1 million. The court said:

(g) 'I fix the amount of security in a sum of Sey Rs. One million, or its equivalent in any convertible foreign currency. This amount shall be furnished by way of a bond entered by the Liquidator in his own recognizance with one surety to the satisfaction of the Registrar of this Court, or by providing a professional indemnity insurance cover for that amount, before acting as Liquidator.'

[140] With the Liquidator appointed, the collection and distribution of assets in the winding up must commence. In terms of section 56 of the Regulations, the duties imposed by the Court in relation to collection of the assets and application in assets in discharge of the company's liabilities shall be discharged by the Liquidator as an officer of the Court, but, subject to the control of the Court.

[141] Section 56(2) states that for purposes of discharging his duties, the Liquidator shall, for purposes of acquiring or retaining possession of the property of the company, be in the same position as if he were the receiver of the property appointed by the Court.

[142] In terms of section 57 of the Regulations, the Liquidator has the power to request delivery of property of the company. They may request any banker or agent to deliver or transfer into his hands, any money which the company is, prima facie, entitled to.

[143] The Liquidator must also settle the list of contributors as soon as he is appointed. The list shall contain the number of the contributories, the extent of their shares in the company,

amounts paid in respect of those shares and what kind of classes of shares they have. He must give notice of the settlement of the list (sections 58 and 59 of the Regulation).

- [144] The Liquidator may, subject to certain provisions, apply to court to call on contributories or shareholders [for payment of moneys deemed necessary to satisfy the debts of the company] as an officer of the court.
- [145] There is a duty on creditors to prove their debt against the company, after notice has been given by the Liquidator and unless the Court has directed that creditors shall be admitted without proof. A debt may be proved by affidavit verifying the debt sent to the Liquidator, and shall contain or refer to a statement of account showing particulars of the debt, and must stipulate whether it is a secured debt (sections 69 to 73, and section 83).
- [146] Where there are numerous claims for wages or accrued holidays by employees, the claim may be made by one person on behalf of all. They may attach a list of names and amounts due to them (section 80).
- [147] The Liquidator must assess every proof of debt and the grounds of the debt, and must in writing admit or reject it in whole or in part thereof, and must justify any rejection (section 84). This rejection may be appealed by the creditor (section 85).
- [148] The Liquidator must, on the first day of every month, file with the Registrar a certified list of all proofs received during the preceding month, distinguishing those debts he admitted and those rejected and stand over ones. He shall include proof of these debts (section 91). There are time frames within which he must deal with these proofs.
- [149] It is required of the Liquidator to give notice to the Registrar of his intention to declare a dividend on the proved creditors. This must be done not more than two months before declaring a dividend, and the Registrar must publish this in the Gazette. The notice must also state the latest date up to which proofs shall be lodged (section 96). The order by which the Liquidator is authorised to make a return shall have a list setting out in a table, the full names and addresses of the persons to who the returns are to be paid, and the amount of money payable to them.

- [150] There are several meetings that the Liquidator must hold in respect of the winding up. The first meeting of creditors and shareholders must, unless the court directs otherwise, be held within one month after the date of the winding up order. Notice must be given to creditors in the Gazette, and personal notice to the officers of the company. The Official Receiver must also then provide the creditors mentioned in the company's statement of affairs and any person on the company books or shareholder, a summary of the company's state of affairs (section 98 to 103).
- [151] In addition to the first meeting, and to meetings of creditors and shareholders, the Liquidator may summon and hold meetings of creditors or shareholders and contributories to ascertain their wishes in all matters relating to the winding up (section 104). The costs for calling such meetings must be shouldered by the Liquidator, out of the assets of the company – if the court so orders, or where a resolution is made to this effect (section 109). Where any ordinary resolution is made, the Liquidator must file this with the Registrar of the Supreme Court (sections 111 and 112). Creditors have, subject to certain conditions, an entitlement to vote at the meetings and the manner in which secured creditors may vote is strictly circumscribed. They may also vote by proxy in some instances (sections 116, 118 and 123 to 133).
- [152] The Liquidator must take and keep minutes of meetings in a minute book, and must keep record of the creditors, shareholders and contributories present.
- [153] Where the Liquidator's attorney is required to attend any court proceedings, the Liquidator need not attend in person unless his presence is necessary (section 135).
- [154] The Liquidator may not accept any benefit beyond the remuneration that he is entitled to under the regulation, unless the ordinance provides otherwise (section 136). He may not purchase any part of the company's assets and where he carries on the business of the company, may not, without a court order, obtain profit from the carrying on of the business (sections 137 and 138).

- [155] Payments out of bank accounts maintained by the Liquidator [pursuant to section 225 of the Ordinance] must be made by cheque payable to order, and every cheque shall be marked with the name of the company and signed by the Liquidator (section 145).
- [156] The Liquidator has to keep a Record Book in which he records all minutes, all proceedings had and resolutions passed and all relevant information that is necessary to give a correct view of the administration of the company's affairs. This excludes any confidential documents (section 146).
- [157] He must also keep a Cash Book in which he must enter from day to day the receipts and payments made by him. The Liquidator must submit the book, and any other book and vouchers, for inspection to a Committee of Inspection (if appointed), once every three months. This Cash Book must be audited by the Committee of Inspection (section 148).
- [158] At the expiry of six months from the date of the winding up order, and every succeeding six months thereafter, until his release, the Liquidator must send to the Official Receiver, a copy of the Cash Book in duplicate, with other vouchers, for audit by the Committee of Inspection. He must also forward a summary of the company's statement of affairs with amounts realised and explanations for unrealised assets. He must also submit, to the Official Receiver, a report upon the position of the liquidation of the company at the end of every six months (section 149).
- [159] If the Liquidator carries on the business of the company, he must keep a distinct account of the trading which must be incorporated into the Cash Book (section 150).
- [160] When the Liquidator's accounts have been audited, this must be certified by the Official Receiver and a duplicate copy filed with the Registrar of the Supreme Court where any person may inspect it after payment of a fee (section 151). The Official Receiver must prepare a summary of the accounts and send the summaries to the creditors, shareholders and contributors who have provided their address in Seychelles. These costs are charged on the company (section 152).

- [161] A Liquidator may be released, but his release shall not take effect unless he has delivered over to the Official Receiver all the books, documents, papers and accounts which he is required to deliver (section 154).
- [162] Attorneys employed by the Liquidator shall on request of the Liquidator, deliver a bill of costs or charges for purposes of taxation. If he fails to do so within the time stated, the Liquidator must continue to declare and distribute the dividends and the claim shall be forfeited. For these purposes, the Taxing Officer shall be the Registrar of the Supreme Court (section 157). The person whose bill or charges are to be taxed must furnish a copy of the bill and payment thereof is charged on the assets of the company. The Official Receiver may contest the bill or charge (section 160). Except where it is otherwise provided, every bill of costs arising out of proceedings shall be taxed as if it were a bill of costs arising out of proceedings in court under its ordinary jurisdiction (section 162).
- [163] In the instance that a bill or charges of an attorney or any other person employed by the Liquidator is payable out of the assets of the company, a certificate signed by the Liquidator must be produced on taxation, the Taxing Officer, and must set out any special terms of remuneration that had been agreed, and in the instance of a bill of costs of an attorney, a copy of the resolution or authority sanctioning their appointment to assist the Liquidator and the instructions given to that attorney (section 163).
- [164] The assets of the company remaining after payment of the fees and expenses properly incurred in preserving or realising the assets shall, unless a court orders otherwise, be liable to the following payments which must be made in the following order of priority:

First – The taxed costs of the petition including the taxed costs of any person appearing on the petition whose costs are allowed;

Second – The remuneration of the special manager;

Third – The costs and expenses of any person who makes or concurs in making the company's statement of affairs;

Fourth – The necessary disbursements of any Liquidator appointed in the winding up by the Court, other than expenses properly incurred in preserving, realising or getting in the assets heretofore provided for;

Fifth – The costs of any person properly employed by any such Liquidator;

Sixth – The remuneration of any Liquidator.

Seventh – The actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to approval of the Official Receiver (section 165).

[165] There may not be any payment of a bill of costs or charge or expenses of attorneys or other persons unless they have been duly taxed and allowed by the Taxing Officer. The Taxing Officer must satisfy herself, before passing the bill or charge, that the appointment of the attorney to assist the Liquidator had been sanctioned (section 165(2)).

[166] In terms of section 166, a winding up of a company which has been wound up by court order is deemed to be concluded at the date of the order of the Registrar releasing the Liquidator pursuant to section 228 of the Ordinance.

[167] The statement with respect to the proceedings and position of the liquidation, required by section 299 of the Ordinance, to be sent to the Registrar where the winding up is not concluded within one year of its commencement must be sent twice in every year in the following manner:

(a) The first statement, starting at the date when the Liquidator was first appointed, and brought down to the end of twelve months, must be sent within 30 days from the expiration of the twelve months or an extended time that the Registrar sanctioned. The subsequent statements must be sent at intervals of half a year, with each statement being brought down to the end of the half year for which it is sent. In the instance where the company's assets are fully realised and distributed, before the expiration of the half yearly interval, then a final statement must be done (section 167).

[168] Before a Liquidator may make an application for his release, he must give notice of his intention to do so to all the creditors who have proved their debts and all shareholders, and must send a summary of all receipts and payments in the winding up with the notice (section 172(1)). When the Registrar has granted a Liquidator his release, a notice thereof must be published in the Gazette (section 172 (2)).

Fees payable for winding up of estate, the Companies (Winding Up) (Fees and Costs) Regulation, 1975

- [169] The provisions relating to fees payable to the Liquidator for the winding up of the company, and the stages at which payments must be made, are not altogether clear. The Regulations were passed to direct fees payable under Part VI of the 1972 Regulations. Part VI deals with the Statement of Affairs of the company, and the Official Receiver's role therein. The Fees and Costs Regulation has a Schedule to it, which sets out the Table of Fees in Winding Up proceedings.
- [170] In terms thereof, for the audit of the Liquidator's accounts by the Official Receiver the fee is calculated in accordance with the following scale, after certain deductions have been made from the credit amount: on the first SCR 50 000, 1 and a half per cent; on the next SCR 950 000, 1 percent; above SCR 1 million, one fifth percent.
- [171] When the Official Receiver acts as the Provisional Liquidator, and where no winding up order is made on the petition, or an order is rescinded, or the proceedings are stayed, then he is entitled to such amounts as the Court may consider reasonable.
- [172] Where a winding up order is made and the Official Receiver is not continued as Liquidator (in other words, a Liquidator continues) after the statutory meetings of creditors of contributories, in respect of every 10 members, creditors and debtors and every fraction of 10 up to 1000, the fee is SCRC 50. For every 10 or fraction thereof above 1 000, the fee is one quarter percent. On the value of the Company's property as estimated in the statement of affairs, after the deduction of amounts due to debenture holders the fee is as follows: on the first SCR 100 000, one and a quarter percent; on the next SCR 500 000, three quarter percent; above SCR 1 million, one quarter percent.
- [173] But in the instance where the Official Receiver acts as Liquidator and a Special Manager is appointed, the fee is such amount as the Court, on application of the Official Receiver may consider reasonable.
- [174] In all other cases where the Official Receiver acts as the Liquidator, fees are SCR 100 in respect of every 10 members, creditors and debtors and every fraction of 10. Upon the

total assets, including produce of calls on contributories realised or brought to credit by the Official Receiver after deducting sums on which fees are chargeable under Head V and the amount spent in carrying on the business of the company; on the first SCR 50 000, 6 percent; on the next SCR 950 000, 5 percent; above SCR 1 million, 3 percent.

[175] On the amount distributed in dividend or paid to contributories, preferential creditors and debentures holders by the Official Receiver, one half of the above percentages.

[176] The same percentages, as specified above [para174], are payable where the Official Receiver collects calls or realises property for debenture holders. Where the Official Receiver realises property for secured creditors other than debenture holders, the same fees apply. Where he performs any other function not provided for in the regulations, he would be entitled to such fees as the Court on application by him may consider reasonable.

[177] For travelling fees and other reasonable expenses, the Official Receiver is entitled to the amounts disbursed. Provision is also made for the exact amounts claimable for miscellaneous fees like copies of documents and publishing costs for notices.

What the present Liquidator did in terms of the winding up of Ailee

[178] In the present case, the Liquidator performed various functions. He received several amounts which included the purchase price for the Plantation Club which was SCR 480 million, and it seems, three advances from the Government in the sums of SCR 5.8 million, SCR 1.041 million and SCR 1 million respectively. He invested (parts of) the SCR 480 million in foreign currency and Treasury Bills and gained significant returns on interest. The moneys were held in Central Bank and in several commercial bank accounts, including a bank account in Mauritius. His explanation for this is that he served to gain more returns by spreading out the moneys. He collated a list of the creditors, how much they were owed, and their class as creditors. In terms of the records, he only held one meeting of creditors. But, the winding up was made under the supervision of the Court.

[179] He made payments to himself throughout the stages of the winding up. He also made payments to employees, and paid taxes, and made payments to his attorneys and to a local financial firm (ACM Associates) which he says helped him with investing the proceeds. He repaid the government's SCR 1 million and paid the employees' statutory dues. As mentioned earlier, the July 2011 Court order stipulated the amounts to be paid to the secured creditors, including the EODC. Subject to some delays with the EODC, these payments were made to the secured creditors.

[180] In paying his Liquidation fees, he says that he applied the formula applied to calculate fees for the Official Receiver. He did not apply any taxing to the fees and costs of the attorneys that he used in the winding up.

[181] He claims now that he has divested his duties as Liquidator, and that Ailee has no more assets left. He wants the court to release him as Liquidator.

The Court's findings in respect the issues raised by e EODC in its application

[182] The documents provided by the Liquidator, the report of the Receiver and the oral evidence have shed light on how much went in and out of the insolvent estate. The findings and observations that follow answer the question whether the Liquidator has divested his duties as anticipated in the Ordinance and Regulations.

[183] To start with, I look at the claim by EODC that the Liquidator's fees were irregular. As mentioned, the Liquidator invested the amount received in respect of the sale of the proceeds. The investments were made in Habib Bank, Nouvobanq (two amounts), MCB Seychelles (two amounts), Seychelles Savings Bank, Bank of Baroda Mauritius, Bank of Baroda Seychelles.

[184] The total interest received from investing in banks was SCR 13 588 585. The total amount of interests generated from placement in the Treasury Bills was SCR 96 263 484. The total interest collected was SCR 109 852 069.

[185] The Liquidator's fees on disposal of assets, in accordance with the Companies Regulations 1972 and 1975 (Reg 2 Head IV (ii), consisted of the following sums: 6% of

50 000, 5% of SCR 950 000 and 3% of SCR 479 000 000. The total fees on assets disposal was SCR 14 420 500.

[186] The Liquidator's fees in distributions of proceeds were calculated in accordance with the Companies Ordinance 1972 (Regulation 2 Head IV (iii)). In terms of this calculation, the total fees of asset disposal is divided up in half (i.e., 50% of SCR 14 420 500) to get SCR 7 210 250. From this is deducted an amount of SCR 363 708, which is the reduction of fees agreed between the parties. The total fees on distribution of proceeds is thus SCR 6 846 542.

[187] The total fees on disposal of assets (SCR 14 420 500) and the fees on distribution of assets (SCR 6 846 542) were then added, to make a total of SCR 21 267 042.

[188] I find the Liquidator's calculation of this total in fees due to him unclear (SCR 21 267 042). If one has careful regard to the calculation, there is a peculiarity that is hard to follow. This sum appears to amount to a double payment: The total amount in respect of asset disposals is SCR 14 420 500.00. In order to get the total amount of the fees on distribution this total (i.e. SCR 14 420 500) is halved - 50%. This amounts to SCR 7 210 250.00 with the 'reduction in fees agreed with parties' which is 363 708. The total left is SCR 6 846 542. Next, this amount is then added to the SCR 14 420 500 to bring in a total of SCR 21 267 042. The court cannot understand why the SCR 14, 420 500 is halved, and then this half added to the SCR 14 420 500.

[189] This has not been ventilated in the documents or account presented by the Liquidator.

[190] EODC's grievance with this amount relates to whether the Liquidator was entitled to use the provision he did to calculate his remuneration. It says that the method does not apply to Liquidators. The statutory method stipulates: upon the total assets, including produce of calls on contributories realised or brought to credit by the Official Receiver after deducting sums on which fees are chargeable under Head V and the amount spent in carrying on the business of the company; on the first SCR 50 000, 6 percent; on the next SCR 950 000, 5 percent; above SCR 1 million, 3 percent.

- [191] The deductions envisaged in this method include, it seems, collection calls or where the Liquidator has realised property for debenture holders. It seems, in this instance, that there were no debenture holders or collection calls.
- [192] In this respect, if it is accepted that he was entitled to the rate, the only discrepancy would be the calculation of the total amount of the fees on distribution referred to above. I therefore find that the Liquidator's claim is not based on the correct method and must be correctly recalculated and taxed.
- [193] Linked to his fees, are the running expenses which include his costs. The Liquidator has accounted for the running expenses of the company during the provisional liquidation. He has stated that the total running expenses, which include the Liquidator's costs and 'salaries and other related', amount to SCR 4 982 864. It is not clear whether this amount includes the USD 1.8 million in respect of 'professional fees' with regard to the liquidation. This was invoiced on 24 September 2008.
- [194] Section 27(3) of the regulations provide that the Provisional Liquidator "shall be entitled to be paid out of the property of the company, all the costs, charges, and expenses properly incurred by him as Provisional Liquidator (including such sum as would be payable under the scale of fees for such time being in force, where the Official Receiver is appointed Provisional Liquidator) as may retain out of such property the amounts of such costs, charges, and expenses."
- [195] The word 'properly incurred' in the subsection presupposes that there must be justification for the costs. The Liquidator was appointed provisionally before his appointment as Liquidator. The costs incurred would have to be assessed against the work he did, assuming 'costs' include fees and other disbursements. I find that this has not been properly explained and the claim cannot stand until proper accounting is made.
- [196] It is worth highlighting, at this stage, the figure for 'salaries and other related'. There is no entry concerning fees for 'redundancy payments'. In the Liquidator's oral evidence, he testified that he obtained an amount of SCR 5.8 million as Provisional Liquidator to defray costs for redundancy payments. He (and Mr Davidson and Mr Payet) testified that

the government had owed EODC some money, and this SCR 5.8 million essentially cancelled off the loan. He testified that it was sent into the Nouvobanq account, and paid out to workers. This would be an expense, naturally. But, it does not appear in this account. It was for the first time referred to in oral evidence.

[197] Unlike the amount of SCR 5.8 million, account is given of an advance of SCR 1 million paid to it by Government ‘at the start of the liquidation to enable the Liquidator to pay employees compensation when they were made redundant during the provisional liquidation’. This money was later reimbursed to the Government. Again, there seems to be a divergence on the account about the SCR 5.8 million, which, according to the Liquidator was also advanced to pay for redundancy costs – and also during the provisional liquidation.

[198] Turning to the legal expenses, the following amounts were paid between 2008 and 2012 to Messrs. Francis Chang Sam and De Commarmond & Koenig. On 26 November 2008, 30 June 2011 and 23 July 2012, Mr. Francis Chang Sam was paid amounts of SCR 161 000, 250 000 and SCR 65 000 respectively. On 26 November 2008 and 10 April 2012, De Commarmond & Koenig was paid SCR 161 000 and 725. The total paid to the lawyers was SCR 637 725.

[199] It is common cause that these amounts were not taxed. In terms of section 165 of the Regulations the assets of a company in a winding up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets shall subject to any order of the Court, be liable to the following payments which shall be made in the following order of priority, namely –

First – The taxed costs of the petition including the taxed costs of any person appearing on the petition whose costs are allowed;

Second – The remuneration of the special manager;

Third – The costs and expenses of any person who makes or concurs in making the company’s statement of affairs;

Fourth – The necessary disbursements of any Liquidator appointed in the winding up by the Court, other than expenses properly incurred in preserving, realising or getting in the assets heretofore provided for;

Fifth – The costs of any person properly employed by any such Liquidator;

Sixth – The remuneration of any Liquidator.

Seventh – The actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to approval of the Official Receiver.

Importantly, section 165(1) states that:

‘No payments in respect of bills of costs, charges or expenses of attorney, managers, accountants, auctioneers or other persons (other than payments for costs, charges or expenses fixed or allowed by the Court under the Ordinance or these Regulations or sanctioned by the Official Receiver under regulation 42) shall be allowed out of the assets of the company unless they have been duly taxed and allowed by the Taxing Officer shall, before passing the bill of costs, charges or expenses of an attorney, satisfy himself that the appointment of an attorney, to assist the Liquidator in the performance of his duties has been duly sanctioned.’

[200] But, there is an exception to protect the rights to costs of the company or opponents:

‘section 165(2) Nothing contained in this regulation shall apply to or affect costs which, in the course of legal proceedings by or against a company which is being wound up by the Court, are ordered by the Court in which such proceedings are pending or by a judge to be by the company or the Liquidator, or the rights of the person to whom costs are payable.’

[201] The provisions of section 165 seem to suggest, first, that there is a sequence in terms of which payment of attorneys’ fees are made. They can be paid first if it is for the taxed costs of the petition. Or fifth, as a person properly appointed by the Liquidator. But, the costs have to be taxed. This is clearly stipulated in section 165(2). The Taxing Officer must satisfy herself, before passing the bill or charge, that the appointment of the attorney to assist the Liquidator had been sanctioned.

[202] The only deviation from the above is when a court order has stated otherwise. The provisions of section 165 must be read with sections 162 and 163: Attorneys employed by the Liquidator shall on request of the Liquidator, deliver a bill of costs or charges for purposes of taxation. If he fails to do so within the time stated, the Liquidator must continue to declare and distribute the dividends and the claim shall be forfeited. For these purposes, the Taxing Officer shall be the Registrar of the Supreme Court (section 157). The person whose bill or charges are to be taxed must furnish a copy of the bill and payment thereof is charged on the assets of the company. The Official Receiver may

contest the bill or charge (section 160). Except where it is otherwise provided, every bill of costs arising out of proceedings shall be taxed as if it were a bill of costs arising out of proceedings in court under its ordinary jurisdiction (section 162).

[203] In the instance that a bill or charges of an attorney or any other person employed by the Liquidator is payable out of the assets of the company, a certificate signed by the Liquidator must be produced on taxation, the Taxing Officer, and must set out any special terms of remuneration that had been agreed, and in the instance of a bill of costs of an attorney, a copy of the resolution or authority sanctioning their appointment to assist the Liquidator and the instructions given to that attorney (section 163).

[204] The Liquidator's rebuttal to this is that any claims to the legal costs have prescribed. The Liquidator's Report establishing payment made to the lawyers was delivered in 2017. Prior to this, the extent of payments made had not been revealed to the creditors. The claims have thus not prescribed.

[205] The June 2011 Order by Chief Justice Egonda-Ntende confirms the payment of legal fees "in Seychelles and Mauritius" for a total of SR 300,000. I cannot therefore comment on the propriety of this payment. It was authorised and whether or not it should have been taxed is at this point in time purely academic.

[206] But that was the only amount authorised. Any payments after this date either had to be taxed or authorised by the court. Hence the payments totalling SR 493, 000 were not in order. They ought to be taxed or authorised by this Court.

[207] Lastly, the distributions made to Secured and Unsecured Creditors were as follows: Two Secured Creditors, Bank of Baroda and EODC Operations each claimed amounts of SCR 1 592 500 000.00 and SCR 2 180 199 961 respectively. They were each paid SCR 424 285 118.01 and SCR 140 249 899.50 respectively. The shortfall for Bank of Baroda was SCR 1 168 214 886.99, and SCR 2 039 950 061.50 for EODC. The total paid to the secured creditors was SCR 564 535 021.51.

[208] The distributions made in respect of the Preferential Creditors included the employee claims, the refund to government of the SCR 1 million, legal fees, and liquidation fees, liquidation expenses of just over SCR 4.6 million, the tax payments and the pension fund payments. Again, as regards the government refund, no mention is made of the SCR 5.8 million. This is a significant failure on the Liquidator's part.

[209] Before turning to the oral evidence, it is worth mentioning another aspect which indicates a discrepancy in respect of the SCR 480 million, and how it appears in the income of the liquidation account.

[210] The transfer deed, in respect of the sale of the property records that the consideration for the purchase is SCR 480 000 000. It says that 'the sum has been paid.' Further, that the transferee 'shall bear all the costs relating to the preparation, stamping and registration of this transfer.'

[211] The sanction letter from the Minister of National Development, dated 29 August 2008 provides that the property purchase price is SCR 480 000 000. It then attached several conditions to the sale, which were to be charged on the consideration amount:

*A sanction processing fee of 1.5% to be paid to the Ministry of National Development, through the Central Bank, prior to registration of the property; and
5% stamp duty, to be paid through the Central Bank*

[212] Despite these conditions, the amount entered in the Inflow of the final account is still SCR 480 000 000. It is unclear whether these amounts had been waived or deducted after the entry. But that does not appear in the Outflow. It is also not explained why stamp duty was paid when section 296 of the Companies Ordinance provides that in the case of a winding up by court, every instrument of transfer shall be exempt from duties chargeable under any enactment.

[213] In the Auditor General's report for the year ended 31 December 2008' (signed 29 March 2009), the deposited amount is reflected as SCR 439 893 106. There is a note, in the account explaining this deposit:

'liquidation deposit represents funds deposited at the Bank by the Liquidator following the disposal of a property in Seychelles. The proceeds, denominated in foreign currency, were converted into SCR at the spot rate at the date of the transaction due to the foreign exchange restrictions prevailing at that date, and lodged with the Bank. The deposit is non-interest bearing and the liability of the Bank is restricted to the SCR amount deposited at the date of the transaction.'

[214] Later in the report (at page 27), it is noted that an amount of SCR 432.7 million of the liquidation deposit has been transferred to the Liquidator. There is another excerpt titled 'Report on the results of 2008 audits' which is not complete. Entry 26 of that report states that the General Revenue Balance (GRB) – which is an account maintained to account for such transactions as exchange rate variations, bank charges, reimbursements etc- especially under rate variations, two payments in connection with the Plantation Club amounting to SCR 68 million and SCR 50 million made in October and November 2008.

[215] The note further states that:

'In the absence of supporting documents explaining the reasons, Audit could not establish the validity of such payments. Further, such expenditures may have been incurred without appropriation.'

These payments were made after the sale, which occurred in September 2008. They do not appear to be linked to the sale of the property. It is unclear what these were in respect of, as they have not been dealt with in the final account.

[216] The EODC have, in their application raised this issue, i.e. the total reflected in the Central Bank account in respect of the purchase price was just over SCR 439 million, and not SCR 480 million. The explanation, given by Mr. Christophe Edmond in evidence was that the government paid the difference into the Central Bank account. None of this is reflected in the final account.

The discrepancies dealt with in oral evidence

- [217] For the most part, some of the main issues that required clarification during the oral hearings were (a) the Central Bank entry in respect of the purchase of the Plantation Club which was supposed to be SCR 480 000 000, but was just over SCR 439 million instead. For the first time in oral evidence, it was stated that the difference of this was paid by the Government to make up for the shortfall.
- [218] No explanation for or documentary evidence of this was provided. The EODC's attempts to get swift copies of bank transfers failed. The Liquidator had not accounted for this. Clearly, he should have. However, third parties are inextricably linked to this vexatious issue and must be required to provide explanations. The Government seems to have received USD 54,315,000 million for the sale of Plantation Club (the equivalent of SCR 435,682,341) instead of the USD 60 million which was the bid accepted. Why was that accepted when the sale had been agreed for SR480 million and why was the government required to top up this amount? Although this is clearly outside the remit of the present applications and not the concern of the Liquidator, they are issues that must be addressed by appropriate authorities.
- [219] The second issue related to the investments made by the Liquidator, through the Treasury Bills and the purchase of US dollars by depositing large sums of capital into different banks. The Liquidator's evidence on this was that he needed to do so to yield the best possible interest returns. He would not have been able to realise as much interest if he had kept the money in one account.
- [220] While this explanation seems to make sense, it is not clear why, after making all the investments, he did not bring the capital amounts and the interests back into a single account, and then from there, make payments or distributions. The moneys were scattered in different bank accounts, and different payments were made at different times, from different banks. It is thus difficult to trace how much was where, at the various stages of the liquidation.

- [221] Another aspect arising from the above, which is unclear, is which provisions the Liquidator acted in terms in making the investments. Perhaps these provisions would provide guidance about how such investments must be dealt with.
- [222] The third issue was the seemingly unexplained SCR 7.5 million that was transferred into the Nouvobanq account. Only in evidence was an explanation provided, which had not been addressed in the final account or the affidavits of the Liquidator. The explanation was that this amount was a repayment of a loan by Government, which went towards payment of redundancy fees to employees. This was raised as an explanation for the first time in the hearing. There are several inconsistencies in this explanation.
- [223] The June Order endorsing disbursements by the Liquidator makes provision for SCR 1 million in respect of “Government of Seychelles – Employees compensation” for SCR 1 million and a preferential payment of SCR 93, 971.27 in respect of “Employees claims”. The Liquidator’s explanations therefore are not borne out by the evidence. His statement that these payments were made into a pre-liquidation account over which he had no control is also not supported by the evidence. He was appointed as Provisional Liquidator on 8 February 2008 and the payments amounting to SCR 7.5 million were made in three tranches between 13 February and 27 March 2008.
- [224] In respect of these tranches of money I am satisfied that the SR 1 million tranche was indeed repaid but I am uncertain and therefore unsatisfied as to what it was in respect of. The tranche of SR 1 041 001.62 is satisfactorily explained as it is supported by documentary evidence showing the Ailee February 2008 payroll for that exact amount. However, this should have been in the Liquidator’s Report.
- [225] As for the SCR 5.4 million tranche advanced to Ailee no satisfactory explanation has been given to the Court and therefore remain unaccounted for. A sweeping statement that it was for workers’ compensation is not acceptable. The payment of such a large amount of money without any record or any minutes is most concerning. I must emphasise at this

point that I have not made any finding of fraud on the part of the Liquidator. My finding only relates to the fact that records of payments which may have been entirely legitimate have not been produced or kept.

[226] I now turn to two outstanding issues which seem to have been a concern throughout the entire winding up proceedings but never seem to have been put to rest. The first relates to Mr. Davidson's authority to act on behalf of EODC. The Liquidator cast doubt on his authority. Mr. Davidson's power of attorney is dated 2012. At the time that the distribution was made to EODC in 2012, Mr Davidson was the managing director. And throughout the period in which the Liquidator was busy with the company's assets, he was the managing director. The alleged discrepancies complained of all arose during that time frame. I am satisfied that Mr. Davidson legally represents EODC.

[227] The second issue relates to the status of Mr. Bernard Pool as Official Receiver. In MA86/2014 an ex parte application was made for "confirmation" of Mr. Bernard Pool's status as official receiver. The record reflects that EODC was under the impression that Mr. Pool had been the Official Receiver since 1983, upon the death of Mr Michael Angas. However, the pleading also asks the court for an order "confirming Mr Bernard Pool as Official Receiver pursuant to section 214 of the Companies' Ordinance 1972".

[228] When the case was heard by Chief Justice Egonda-Ntende on 26 March 2014, the Chief Justice and Mr Elizabeth agreed in court that the Official Receiver's tenure was continuous and not ad-hoc, and that it continued until revoked by the Chief Justice. The Chief Justice undertook to look into whether an official appointment was ever made in the case of Mr Pool, and whether it would be necessary to make a "fresh appointment".

[229] The Chief Justice proposed to appoint the Registrar General as Official Receiver rather than Mr. Pool, noting concern that a private Official Receiver would have to be compensated. Mr. Elizabeth objected, not on the grounds that Mr Pool was the Official Receiver and had been all along, but on the grounds that it was necessary to have a person skilled in accounts. The Chief Justice was persuaded by this and expressed that

the ex parte application was unnecessary and that the matter could have been addressed by Mr. Elizabeth merely sending a letter stating that there “is no official receiver” and asking for one to be appointed.

[230] On 1 April 2014, the Chief Justice issued to the Justices of the Supreme Court, the Attorney General’s Office, and the Ministry of Finance, a notice of the appointment of Mr. Bernard Pool as Official Receiver. The appointment was made in terms of the Insolvency Act of 2013, and not, as prayed in the Notice of Motion, the Companies Ordinance 1972. The Notice stated that the appointment is “effective from today”. The appointment was clearly a fresh one and not a declaratory confirmation of incumbency.

[231] When the case was next mentioned, on 14 May 2014, in front of Judge Renaud, he announced that the Chief Justice has made an appointment of Mr. Pool. No objection was made.

[232] More than three years passed before the case appeared before court again, in which time Mr. Elizabeth’s clients sent letters but did not make any more objections or substantive motions. The court reconvened before me on 20 September 2017. Mr. Chang-Leng asked for confirmation of who the Official Receiver was. I and Mr. Elizabeth both confirmed that it is Mr. Bernard Pool.

[233] Again, on 25 October 2017, I confirmed that Mr. Pool had agreed to remain the Official Receiver and that this had been gazetted. I referred to Mr. Pool’s term as being “extended” as he has agreed to stay on as Official Receiver.

[234] On the 15th of May 2018, an interlocutory application MA 118/18 was made by EODC, supported by an affidavit attested to by Mark Davidson. The heading contains reference to The Companies Ordinance of 1972. The second prayer of the notice of motion reads:

“An order confirming that Mr Bernard Pool has, indeed, been the Official Receiver since 1983, when he was appointed upon the death of Michael Angas and not simply when he was “re-appointed” “for the avoidance of doubt” by former Chief Justice Fredrick Egonda-Ntende on 1st April 2014, as this has a significant bearing on numerous of the liquidators acts and omissions.”

- [235] The application was heard before me on 8 October 2018. Mr Elizabeth raised the issue of the Official Receiver without laying out any argument. I intimated that “the issue of the Official Receiver was dealt with in open Court”. Mr Elizabeth disagreed, but did not raise the issue of the 1983 appointment or the old Companies Ordinance.
- [236] Having gone through the proceedings extensively it is clear that the 2014 motion was not granted. A fresh appointment was made, not a confirmation. The appointment was also not the declaratory relief sought by the applicants, but rather an administrative action granted without reasons. The appointment was also made in terms of the Insolvency Act, not the Ordinance.
- [237] The motion was also not denied or dismissed. Indeed, for more than four years the case proceeded as if the relief had been granted. The underlying legal question is thus far unanswered and I am not bound to accept the mistaken position that the issue was resolved, even if that view was shared by the parties.
- [238] It is perhaps arguable that the intervening four years constitute a tacit acceptance, on the part of the parties, of the sufficiency of the 2014 appointment, or a waiver of the right to re-litigate that issue for a number of reasons: Despite the fact that the Insolvency Act makes clear the process of appointment of the Receiver, the question is important for the clarification of Seychellois company law. It is apparent that even the legal professionals involved do not understand the relationship of the old Companies Ordinance to the Insolvency Act in respect of grandfathered provisions. It is also apparent that there is a lack of understanding of the role of the Official Receiver, the extent of his term, the nature of appointment/reappointment/confirmation/removal, and the requirements for his expertise and compensation structure. This is of course very important in a jurisdiction which interacts so frequently with complex corporate entities.
- [239] EODC claims that the tenure of the Official Receiver has a significant bearing on the underlying merits of the main application. It is certainly necessary to consider this issue in order to adequately assess the case as a whole. The failure to address this issue is, at

least in part, due to the oversights of the court itself for which I can only unreservedly apologise.

[240] Mr Davidson, at least, has been fairly consistent in raising this issue with at least enough detail to warrant its consideration in this judgment. To dispose of this matter once and for all, I only need to cite section 391(3) of the Insolvency Act which provides that:

“A person appointed as Official Receiver under section 214 of the Companies Act, 1972 shall continue to act as Official Receiver as if appointed under this Act, until such time that another person is appointed as Official Receiver under this Act.”

I have no hesitation therefore in stating that Mr. Bernard Pool has remained the Official Receiver throughout the winding up of Ailee. This of course has a direct bearing on the fees charged by the Liquidator.

Concluding Remarks

[241] Given the concerns raised by the Official Receiver and now the concerns of the Court as articulated above I am unable to release the Liquidator. He has failed in his fiduciary duties in respect to the company by not acting with care and diligence. The contentious issues highlighted above still have to be addressed. In terms of Article 166, a winding up of a company shall be deemed to be concluded, in the case of a company wound up by order of the Court, at the date on which the order dissolving the company has been reported by the Liquidator to the Registrar or at the date of order of the Registrar releasing the Liquidator pursuant to section 228 of the Ordinance. Section 228 of the Ordinance provides that when a Liquidator of a company wound up by the order of court has realised all the assets and has distributed the final dividend, the Official Receiver shall submit a report to the Registrar with a recommendation that a release should or should not be granted.

[242] The Official Receiver’s report has unequivocally stated that the Liquidator may not be released, until he has addressed the queries raised in the report and the clarification letter. The Court will not overstep the Official Receiver, because it is a statutory requirement

that he recommends the release of the Liquidator. The documentary evidence adduced in these proceedings together with the oral evidence lead me to the conclusion that the Liquidator has not satisfactorily accounted for all matters relating to the winding up. He needs to specifically address and give account to the Official Receiver on the following issues:

1. A Statement of Affairs relating to Ailee on 8 February 2008
2. Details of money paid in and out of Account Number 01002001197005 in the name of Plantation Club with Nouvobanq.
3. Details of Liquidator's fees paid after July 2011 which bill needs to be taxed according to Regulation 2, Head I of the Companies (Winding Up) (Fees and Costs) Regulations 1975, and/ or approved by the Court.
4. Details of Liquidator's Running Expenses paid after July 2011 need to be taxed or approved by the Court.
5. Confirmation from the Seychelles Revenue Commissioner that the Liquidators fees are not subject to taxation in Seychelles under the Double Taxation Agreement existing between Mauritius and Seychelles.
6. Details of Legal and Professional expenses after July 2011 which need to be taxed or approved by the Court.
7. Confirmation by the secured creditors that they have received the amounts in full disbursed by the Liquidator.

[243] Upon confirmation from the Official Receiver that the above matters have been satisfactorily dealt with, I shall consider the release of the Liquidator from his duties and order the winding-up of Ailee. The Official Receivers fees will have to be defrayed from the Liquidators bond of SCR 1 million which is now forfeited given the inadequacies highlighted.

[244] The concerns raised in this case need to be addressed in a forum outside this court where they relate to unexplained money received and disbursed by the government through Central Bank in respect of the Plantation Club. In this regard, this decision will be served

on the President of Seychelles, to whom the court recommends the consideration of the institution of a Commission of Inquiry pursuant to the Commissions of Inquiry Act Cap 39 to inquire into the matters I have outlined.

[245] I therefore Order that:

- (a) The Liquidator's application to be released and for Ailee Development Corporation Limited to be wound up is refused.*
- (b) The Liquidator is to furnish particulars of the outstanding matters relating to the winding up of Ailee Development Corporation Ltd (in liquidation) to the satisfaction of the Official Receiver.*
- (c) That after taxation and/or confirmation of payable fees any excess thereof shall be paid into this court and distributed to the creditors*
- (d) That the bond of SR 1 million in respect of the present winding-up by the Liquidator be forfeited and surrendered to the Court from which the fees of the Official Receiver shall be paid pursuant to the Regulations.*
- (e) EODC's costs in these proceedings are allowed and to be defrayed from the Liquidator's fees.*
- (f) A copy of this decision is to be served on the President of Seychelles with the recommendation of the Court that a Commission of Inquiry be set up to inquire into the matters as outlined in this decision.*

Signed, dated and delivered at Ile du Port on 16 October 2019

Twomey CJ