

SUPREME COURT OF SEYCHELLES

Reportable [2019] SCSC 669
MA72 /2020 arising in CS 27/2008

IN THE MATTER OF AILEE DEVELOPMENT CORPORATION (in liquidation)

AND

IN THE MATTER OF THE COMPANIES ORDINANCE 1972

EODC

(rep. by Frank Elizabeth)

Applicant

v

Gerard Lincoln (the Liquidator)

(rep. by Olivier Chang Leng)

Respondent

Neutral Citation: *EODC v Gerard Lincoln (the Liquidator)* (MA 72/ 2020 (Arising in CS 27/2008) [2020] SCSC 669 (18 September 2020)

Before: Twomey CJ

Summary: Section 219 of the Companies Ordinance, 1972 - whether the irregular appointment of a liquidator invalidates the entire liquidation proceedings: commercial morality in the interests of the public at large are relevant: thus, failure to meet the requirements in appointment do not invalidate the appointment - irregularity regarded as curable - court not inclined to rule on matters which the Official Receiver and Presidentially appointed Commission of Inquiry are seized with.

Heard: 1 July 2020, 8 September 2020

Delivered: 18 September 2020

ORDER

The application is dismissed. No order is made as to costs.

RULING

TWOMEY CJ

The Pleadings and Submissions before the Court

[1] The Applicant in a notice of motion supported by affidavit applied for orders of this Court that the liquidation of Ailee Development Corporation (hereinafter Ailee) was legally flawed and unlawful, that the appointment of the Liquidator be cancelled, annulled and all actions of the Liquidator done pursuant to his appointment be

declared null and void, that the Liquidator pay the creditor the sum of SCR 44,000,000 together with interests and costs and to make any further and other orders deemed fit and necessary in the circumstances.

- [2] Mr. Mark Davidson, the Managing Director of EODC supported this motion by averring that various payments made by the Liquidator have been criticised by the Official Receiver and by the Court¹ as being improper and contrary to law and some of which have not been proven to have been paid at all.
- [3] He has further averred that this Court had ordered that evidence be provided of the security bond of SCR 1, 000,000 ordered by Perera J (as he then was) in 2008 (the 2008 Order) to be paid by the Liquidator be made available and that the security bond be paid to the Official Receiver.
- [4] He has also averred that the security bond was not properly furnished by the Liquidator in line with section 219(1)(a) of the Companies Ordinance, 1972 and that therefore the Liquidator was not legally capable of acting as such in the liquidation of Ailee.
- [5] He has also averred that stamp duty in the sum of SCR 24,000,000 was paid on the transfer of Parcel T147 to European Hotels by the Liquidator although such stamp duty is exempted under section 296 of the Companies Ordinance and should therefore be returned to the Creditors.
- [6] He has further averred that with regard to fees the Liquidator paid himself- a sum of SCR 21,000,000 – the sum was wrongly calculated and that the Liquidator if paid under the correct formula should only have received SCR 609,000 and that he should be ordered to refund the overpaid fees together with interest to the Creditors.
- [7] In submissions on the motion, the Applicant has highlighted the central issue to be addressed by the court: whether the payment of the bond after the process of liquidation was nearly completed renders the process of liquidation and all acts done by the Liquidator null and void.
- [8] The Applicant has admitted to not finding case law on the matter but has referred the court specifically to sections 219(1)(a) of the Companies Ordinance and sections 114

¹ Referring to this court's judgment in *Lincoln v EODC* (XP 27/2008) [2019] SCSC 908 (16 October 2019).

(1)(a) and 122(2) of the Insolvency Act 2013. It submits that Regulation 47(b) made under the Ordinance should not have been referred to in the 2008 Order but rather Regulations 44(b) and (c), but that in any case as the 2008 Order was not complied with, the Liquidator was in contempt of the Order and all his actions null and void. This, it submits, is so even if section 219 was repealed as the Insolvency Act provisions (section 114) also makes it mandatory that the Liquidator provide security before he acts as Liquidator. In circumstances where the Liquidator does not comply with the provisions of the Act the court has wide powers of sanction.

[9] The Applicant also submits that in the alternative the Court should order the Liquidator to pay the sums of SCR 44 million and SCR 24 million with interest and costs as the Liquidator made several illegal payments to himself and the Government respectively, which are not permitted by the Ordinance.

[10] In his response, the Liquidator has submitted that in respect of the security for his appointment in the sum of SCR 1,000,000, the 2008 Order gave him the option of either furnishing the amount by way of a bond in his own recognizance with one surety to the satisfaction of the Registrar of the Court or by providing professional indemnity insurance cover for the amount. He submits that there was no requirement to pay the same into court. The bond only became relevant as a result of the order of the Court of 16 October 2019 calling for the bond to be forfeited as the Liquidator had breached some of his duties. This has now become a non-issue as it has been paid.

[11] The Respondent also submits that the Applicant's prayer that the liquidation should now be null and void is also inappropriate. The Respondent has benefitted significantly from the liquidation and in any case the Applicant is prescribed from raising the issue. It could have either appealed the 2008 Order or apply for its execution which is now prescribed as section 233 of the Seychelles Code of Civil Procedure (SCCP) only allows six years from the date of the order for its execution.

[12] With regard to the claim of SCR 44,000,000, no basis for that amount has been given and it cannot therefore be sustained, especially so as the indemnity bond has now been forfeited. Further as the matter is now before a Commission of Inquiry set up by the President, the order for the liquidation of any further order by the court during this inquiry would be to pre-empt its findings.

- [13] Further submissions on these issues were subsequently filed by both parties. The Applicant has submitted, inter alia, that the bond ordered to be paid by the Court in the 2008 Order ought to have been in the prescribed manner and to the satisfaction of the Registrar. With regard to how the sum of SR 44,000,000 was arrived at, the applicant submits that this is from the illegal payment of stamp duty by the Liquidator and the sum of SCR20,000,000 is the payment of fees illegally made to himself. With regard to the Court pre-empting findings of the Commission, the Applicant has submitted that this is a misguided submission by the Respondent as the present issues are not relevant and will have no bearing on the enquiry into the overall circumstances surrounding the liquidation of Ailee Development.
- [14] The Respondent has replied to these submissions by submitting that the question about his indemnity insurance was never raised during the time of the proceedings in the past twelve years and the purpose of the bond was precisely for the eventuality that has now come to pass.
- [15] With regard to the payment of stamp duty, the Liquidator has submitted that he was ordered to sell the land for SCR 480,000,000 which he did and duly received the payment with interest. He has in this regard fulfilled his duty. The Official Receiver has not queried the transaction. Further, the Applicant has not demonstrated why it should not be prescribed from having the liquidation declared null and void.

The Official Receiver's request for clarification of taxation of fees

- [16] The Official Receiver by letter dated 31 August 2020 wrote to the court asking for a ruling on the issues relating to the taxing of the Liquidator's fees and professional charges incurred. In particular, he has queried the Liquidator's view that no liquidator's fees and expenses were paid after July 2011 and that no taxing of the fees or excess fee arises.
- [17] The Liquidator has submitted that the court's order on this issue is clear in that paragraph 242 of the October 2019 judgment makes it clear that the Liquidator's fees, expenses and legal fees made after July 2011 are subject to taxation. He submits that the only payments made after July 2011 were legal fees. The Court's judgment makes it clear that these are subject either to taxation or authorisation by the court as the

lawyers were sanctioned by the court (Egonda-Ntende, CJ) and that in the circumstances, the Court is invited to approve the fees upon finding them reasonable.

[18] I propose to deal with the issues raised in no particular order.

The Official Receiver's query about the taxation of the Liquidator's fees.

[19] The Official Receiver has referred the Court to parts of its October 2019 judgment in seeking amplification about the taxation of fees.

[20] With reference to paragraphs 192, 201, 202, 203, 204, 206, and 242 of the judgment it would appear that the Official Receiver or the Liquidator has read these paragraphs in a way that suggests that they all relate to para 242 only to the extent that payments were made after July 2011. This may be because paragraph 242 has asked for a report in respect of payments made after 2011.

[21] The court made several findings in paragraphs 192, 201, 202, 203, 204, and 206, relating to fees and costs made before and after July 2011, which have to be read with paragraph 242.

[22] In paragraph 192, the Court made a finding that the Liquidator's fees were not based on the correct method and should have been correctly be calculated and taxed. In this regard, it must be noted that the Liquidator employed Regulation 2 Head IV (ii) and (iii) of the Companies Ordinance, 1972, which sets out the method applicable to the Official Receiver. These fees were made in two stages - the first on the sale of the asset in 2008 and the second on the distribution of the proceeds in July 2011. In this respect the finding in paragraph 192 related to the fees made between 2008 and July 2011.

[23] Paragraph 201 relates to the legal expenses paid to Messrs. Francis Chang Sam and De Commarmond & Koenig between 2008 and 2012 amounting to SCR 637, 725. It was common cause that the amount was not taxed. The court, in paragraph 204, rejected the Liquidator's objection that this claim had prescribed.

[24] In paragraph 205, the court found that the June 2011 judgment of Chief Justice Egonda-Ntende (corrected in July 2011) confirmed the payment of legal fees "in Seychelles and Mauritius" for a total of SR 300,000. Thus, the question whether that

amount ought to be taxed fell outside the court's remit and the court made a finding that payments after this date either had to be taxed or authorised by the court. In this respect it found at paragraph 206 that: "the payments totalling SR 493, 000 were not in order. They ought to be taxed or authorised by this Court."

[25] Thus, paragraphs 201 to 206 relate to the taxation of legal fees that had not been authorized by the court.

[26] In paragraph 242, the court has asked for:

1. 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.

2. Details of Liquidator's Running Expenses paid after July 2011 need to be taxed or approved by the Court.

3. Details of Legal and Professional expenses after July 2011 which need to be taxed or approved by the Court.

[27] Read with paras 192, 201, 202, 203, 204, and 206, it is patent that what is asked from the Liquidator is to report back on fees and costs and where relevant the taxation thereof, made before and after July 2011. However, given the judgment of Egonda-Ntende CJ made in June 2011 (corrected in July 2011) 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, this court cannot sit on appeal of this finding.

[28] In the schedule to which the June 2011 order relates, legal fees and liquidator's fees were SCR 300 000 and SCR 7 210 250 respectively. Those amounts, being confirmed by court order, would not in the circumstances be able to be revalued.

[29] The only matter outstanding are the liquidator fees, legal fees and costs which had not been taxed and/or sanctioned by my predecessor. In this regard the Official Receiver is directed to exercise his powers to tax the same and/or ask the court to authorise their payment if he deems it reasonable.

The nullity of the winding up

- [30] The Applicant has made the point that section 219 of the Companies Ordinance is cast in mandatory terms and that Perera J's order does not take away its requirements. The Respondent has raised the issues of prescription of the issue under section 233 of the SCCP and the Commission of Inquiry addressing the requirements of section 219;
- [31] The difficulty lies in the fact that section 219 is indeed mandatory, raising the question as to whether the irregular appointment of a liquidator invalidates the entire proceedings. There are no cases on point in the company law of Seychelles as conceded by Counsel for the Applicant. However, there are in our law of contract several cases which provide a useful parallel.
- [32] There may be drastic repercussions when the conditions necessary for the validity of contracts are not met but the consequences arising therefrom are not clear-cut either in French or Seychellois law: they are either the *nullité relative* or *absolue* of the contract. Traditionally, French law has viewed a contract as a living person composed of organs. These organs can be defective. Where the basic conditions for a contract are not met, the private agreement between the parties essential to bringing the contract to life is stillborn. In this case nullity of the contract is absolute.² However, when there exists a contract between the parties but there is a defect in the sense of error, fraud or duress the contract is only sick and therefore can be cured. In this case the nullity is relative. Although it is not clear, it would appear that generally a contract is void or annulled (*nullité absolue*) where it infringes the law or public policy but is voidable (*nullité relative*) where it affects private interests only. In this context the concepts of absolute and relative nullity may be compared to the English concepts of *void* and *voidable (irregular)* contracts.
- [33] Our company law is based on English law from whom we borrowed the provisions of our Companies Ordinance and some judgments of the United Kingdom provide some guidance. I say guidance, because the UK legislation differs from our Companies Ordinance but also because it suffers from the same lack of clarity as the French jurisprudence. Significantly, the UK legislation contains provisions that validate acts

² This is a translation of the explanation given by Francois Terré. See Francois Terré, Phillippe Simler and Yves Lequette, *Droit civil: Les obligations* (Daloz 10th edn 2009)106. Article 1117 of the Civil Code of Seychelles states that: "Contracts entered into by mistake, duress or fraud shall not be null as of right; they shall only give rise to an action for nullity or rescission..."

despite defects in appointment. Further, in the context of insolvent companies, the question of voidable or irregular appointments is still unclear, with several contemporary conflicting judgments.³

34. The starting point is *Macfoy v United Africa Company Limited (West Africa)* PC 27 Nov 1961; [1961] UKPC 49; [1961] 3 All ER 1169, in which Lord Denning stated that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. ...

No Court had ever attempted to lay down a decisive test for distinguishing between [nullities and irregularities]: but one test that is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw?”

- [35] However, there are several conflicting high court judgments in the UK addressing the question of nullity versus irregularity in the context of liquidation.

- [36] In the case of *Morris v Kanssen* [1946] AC 459, which concerned the purported appointment of directors and subsequent allotment of shares to another, the court was asked to consider the implication of section 143 of the Companies Act, 1929 which stated that “acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.” Lord Simonds said (at 471):

“There is, as it appears to me, a vital distinction between (a.) an appointment in which there is a defect or, in other words, a defective appointment, and (b.) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case there is not a defect, there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director...”

³ *Hill v Stokes PLC* [2010] EWHC 3726 (Ch), [2011] BCC 473; *In Re Virtualpurple Professional Services Ltd* [2011] EWHC 3847 (Ch), [2012] BCC 254; *National Westminster Bank plc v Msaada Group* [2011] EWHC 3423 (Ch), [2012] BCC 226; *Re Synergi Partners Ltd* [2015] EWHC 964 (Ch); *Re G-Tech Construction Ltd* [2007] BPIR 1275; *Re Care Matters Partnership Ltd* [2011] EWHC 2543 (Ch).

- [37] At 475-476 of *Morris v Kanssen*, Lord Simonds stated that there was no authority for the proposition that a director or de facto director could invoke section 143 of the Companies Act so as to validate a transaction which was in fact irregular and unauthorised. *Morris v Kanssen* was followed in *OBG Limited and others (Appellants) v. Allan and others (Respondents) Douglas and another and others (Appellants) v. Hello! Limited and others (Respondents) Mainstream Properties Limited (Appellants) v. Young and others and another (Respondents)* [2007] UKHL 21.
- [38] In his dissent, Mance LJ suggested that the acts of the receivers might have been binding upon *OBG*, and thereby committed it to a disadvantageous settlement, by virtue of section 232 of the Insolvency Act 1986: "The acts of an individual as administrator, administrative receiver, liquidator or provisional liquidator of a company are valid notwithstanding any defect in his appointment, nomination or qualifications."
- [39] Lord Hoffman, writing for the majority in the House of Lords expressed his doubt as to whether this section would have applied to the administrative receivers in this case. For this, he relied on *Morris v Kanssen*. He stated:
- "91. In this case there was no colour of authority for the appointment of the receivers. Although it is unnecessary to express a concluded view, I think that it follows from Morris v Kanssen that section 232 would have had no application. If it had, it would have operated for the benefit of the receivers as well as anyone who dealt with them. There is nothing in its language to suggest that its application is in any way restricted. "*
- [40] It appears that the import of *Morris v Kanssen*, as confirmed in *OBG Ltd v Allan* is this: the appointment of a director/receiver/liquidator will be set aside where (a) there was never any appointment to start with, due to a fraud committed and (b) where there was no authority to appoint in the first place. In such instances, the appointment may be deemed void. There was no question, in those cases, with purely procedural defects in the appointment. Rather, they mainly concerned the basis (or rationale/power to) for the appointment. The distinction is significant. In this second instance, where the problem arises at the foundation of the appointment, i.e. where there is no power to

appoint, the result seems to be to declare the appointment null and void.⁴ This has to be distinguished from the first instance of a defective procedure, the appointment may be irregular but not void.

[41] Applied to the current facts, it would seem that the failure by the liquidator to pay the security should fall into the category of an irregularity that is not fatal to the appointment. For this conclusion, I rely on the reasoning employed by Mr Justice Arnold in the Chancery Division in *Bootes & Ors v Ceart Risk Services Ltd* [2012] EWHC 1178 (Ch) (03 May 2012). *Bootes* concerned an application made by Peter Bootes, the sole owner and director of Ceart Risk Services Ltd (“the Company”), and by Jeremy Frost and Stephen Wadstead (“the Administrators”) for a declaration that the Administrators were validly appointed as administrators of the Company under paragraph 22 of Schedule B1 to the Insolvency Act 1986 notwithstanding a failure to obtain the prior consent of the Financial Services Authority (“the FSA”) to the appointment, or for alternative relief.

[42] Before I set out the approach taken by Mr Justice Arnold, I must mention that *Bootes* is part of a line of the line of conflicting high court judgments that have addressed the question of nullity versus irregularity in respect of the technical defects in the appointment of administrators. Two distinct lines of authority emerged. In *Re Minmar (929) Ltd* [2012] 1 BCLC 798, the appointment was held to be a nullity because there was no quorate meeting of the directors, the board had never properly resolved to do anything and those who attended the meeting had no power to appoint. In an obiter comment, the Chancellor expressed a view that an appointment was invalid if notice was not given to those persons prescribed under paragraph 26 (2) of the Insolvency Act (“IA”) 1986 Schedule B1 even where there was no one to serve under para 26(1), in this case the holder of a qualifying floating charge. This was directly contradictory to the earlier decision of *HHJ McCahill QC in Hill v Stokes PLC* [2010] EWHC 3726 (Ch) that a failure to serve a para 26(2) notice was not fatal to the appointment of administrators. The *Minmar* decision was followed by Warren J in *National Westminster Bank plc v Msaada Group* [2012] 2 BCLC 342 whilst on the same day

⁴ By analogy, one might look to *In re Pritchard* [1963] Ch 502 where the Court of Appeal held that the issue of the originating summons was a nullity because a district registry had no power to issue such originating process.

the Hill decision was followed by Norris J in *Virtualpurple Professional Services Ltd* [2012] 2 BCLC 330.⁵

[43] Justice Arnold took into account the conflicting views on the subject, to hold that the appointment was not a nullity. I find it useful to set out his approach in full:

“Were the Administrators validly appointed with effect from 19 January 2012 or 8 February 2012?”

10. The Applicants do not dispute that section 362A applies in relation to the Company. Nor do they dispute that the Company purported to appoint the Administrators under paragraph 22 of Schedule B1 without at that time having the consent of the FSA. The Applicants’ first contention is that the Administrators were nevertheless validly appointed with effect from 19 January 2012, alternatively 8 February 2012, once the FSA gave its consent.

11. This contention raises a question of construction of section 362A(2). When this says that an administrator “may not be appointed ... without the consent of the Authority” does that mean that a purported appointment prior to such consent being obtained is incurably invalid or is it merely defective such that the defect can be cured by subsequent consent? If the latter is the case, a further question arises: does the appointment take effect from (a) the date of the purported appointment or (b) the date when the FSA’s consent is obtained or (c) the date when the consent is filed with the court in accordance with section 362A(3)(b) or (4)(b)?

*12. I was informed by counsel for the Applicants that there is no authority on this point, but he relied by way of analogy upon the decisions of HHJ McCahill QC sitting as a Judge of the High Court in *Hill v Stokes plc* [2010] EWHC 3726 (Ch), [2011] BCC 473 and of Norris J in *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3847 (Ch), [2012] BCC 254.*

*13. The issue in those cases was whether directors had validly appointed administrators in circumstances where they had failed to give a copy of a notice of intention to appoint to one of the categories of person prescribed in rule 2.20(2) of the Insolvency Rules 1986 (in *Hill v Stokes*, to landlords who were distraining (rule 2.20(2)(a)) and in *Virtualpurple*, to the company (rule 2.20(2)(d)) as required by paragraph 26(2) of Schedule B1. This depends on whether paragraph 28 of Schedule B1, which provides that an appointment “may not be made under paragraph 22 unless the person who makes the appointment has complied with any requirement of paragraphs 26 and 27”, should be interpreted as meaning “any requirement of paragraphs 26(1) and 27”. That is a question upon which there has been an unfortunate difference of*

⁵ For further discussion on these judgments, see Corporate Insolvency Legal Update, prepared by Chris Brockman and Holly Doyle, Guildhall Chambers February 2013.

judicial opinion. HHJ McCahill QC in *Hill v Stokes* and Norris J in *Virtualpurple* answered it in the affirmative, whereas Sir Andrew Morritt C in *Minmar (929) Ltd v Khalatschi* [2011] EWHC 1159 (Ch), [2011] BCC 485 (to whom *Hill v Stokes* was not cited) and Warren J in *National Westminster Bank plc v Msaada Group* [2011] EWHC 3423 (Ch), [2012] BCC 226 (a judgment handed down on the same day as *Virtualpurple*) decided it in the negative. In *Re MG Global Overseas Finance Ltd* [2012] EWHC 1091 (Ch) Mann J indicated a preference for the former pair of decisions over the latter, but did not have to decide which was correct.

14. Even if the Chancellor in *Minmar* and Warren J in *Msaada* were correct on that point, as to which I express no view, HHJ McCahill QC in *Hill v Stokes* at [61]-[68] and [70] and Norris J in *Virtualpurple* at [24]-[26] also held, as an alternative ground for their respective decisions, that the failure to give a copy of the notice of intention to appoint to the required person did not mean that the appointment was incurably invalid, but rather constituted a curable defect. As Norris J pointed out in *Virtualpurple* at [24], this issue was not addressed by the Chancellor in *Minmar*. It was briefly addressed by Warren J in *Msaada* at [42]-[43], but it appears that Warren J did not have cited to him the decision of the House of Lords which Norris J applied in *Virtualpurple* by reference to Norris J's own earlier judgment in *In re Bezier Acquisitions Ltd* [2011] EWHC 3299 (Ch), [2012] Bus LR 636 (which was handed down after the argument in *Msaada*, albeit prior to the judgment in the latter case).

15. As Norris J pointed out in *Bezier* at [19], the most authoritative approach to issues of this kind is to be found in the speech of Lord Steyn (with whom Lord Carswell and Lord Brown of Eaton-under-Heywood agreed) in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340. Lord Steyn outlined the problem, and an earlier approach to it which had been adopted by the courts, at [14]:
“A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. ...”

16. As Lord Steyn explained in [15], however, the speech of Lord Hailsham of St Marylebone LC in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 at 189–190 led to “the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity.” Having reviewed subsequent case law in this country, New Zealand, Australia and Canada, Lord Steyn concluded at [23]:

“... I am in respectful agreement with the Australian High Court [in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355] that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction. ...”

17. Applying this approach to section 372A(2), the starting point is to identify the purpose of the requirement to obtain the FSA's consent. In my view it is clear that section 372A(2) constitutes an aspect of the FSA's regulatory role with respect to financial services companies. It enables the FSA to vet persons who are proposed to be appointed as administrators of such companies to ensure that they are suitable persons to undertake that role. It also enables the FSA to check whether the appointment of an administrator is likely to achieve a better outcome for the company's creditors than an alternative course of action. Finally, it gives the FSA an opportunity to draw to the attention of the administrator other obligations imposed on insolvency practitioners dealing with authorised companies by Part XXIV of FSMA 2000.

18. The next step is to consider the consequences of non-compliance with section 372A(2). In my view it is clear that the requirement to obtain the FSA's consent is an important one. It does not follow, however, that it is essential to obtain such consent prior to the appointment of the administrator. As the facts of the present case demonstrate, if the need to obtain the FSA's consent is overlooked prior to the appointment, it remains possible to seek and obtain such consent after the event. It is difficult to see how the interests of creditors are prejudiced if the FSA approves the appointment after the event rather than before. By contrast, if the appointment is incurably invalid if prior consent is not obtained, then problems may arise which do cause detriment to the interests of creditors.

19. Against this background, I must consider the wording of section 362A(2). The words “may not be appointed ... without the consent of the Authority” clearly indicate that it is essential to obtain the FSA's consent. They do not

clearly indicate that it is essential to do so prior to the appointment. Thus subsection (2) does not say “without the prior consent of the Authority”. Although subsections (3)(b) and (4)(b) provide that the consent “must be filed ... along with the notice of intention to appoint” or “must accompany the notice of appointment”, that wording does not compel the conclusion that the consent must be filed at the same time as the notice of intention to appoint or notice of appointment, as the case may be. A consent filed the following day could still be said to have been filed “along with” a notice to intention to appoint or to “accompany” the notice of appointment. Even if one interprets subsections (3)(b) and (4)(b) as requiring the consent to be filed simultaneously with the notice of intention to appoint or the notice of appointment, that does not compel the conclusion that the consent must be obtained prior to the appointment. The appointment could be made on day 1, consent obtained on day 2 and the notice of appointment and the consent filed simultaneously on day 3. Finally, nothing in section 362A explicitly states, or necessarily implies, that a failure to obtain the FSA’s consent prior to the appointment means that the appointment is incurably invalid.

20. Having regard to the purposes of section 362A(2), the consequences of non-compliance, the wording of section 362A(2) and the other provisions in section 362A, can Parliament fairly be taken to have intended that failure to obtain the FSA’s prior consent should incurably invalidate a purported appointment under paragraph 22 of Schedule B1? In my judgment, the answer to that question is no. Rather, I consider that Parliament should be taken to have intended that failure to obtain the FSA’s prior consent constitutes a defect in the appointment which is capable in appropriate circumstances of being cured subsequently”

(own emphasis).

- [44] What appears from *Bootes & Ors v Ceart Risk Services Ltd* [2012] EWHC 1178 (Ch) (03 May 2012), is an adoption, in the instance where no clear consequence for non-compliance is set out, of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, “whether Parliament intended the outcome to be total invalidity”. Rather than looking to the “rigid mandatory and directory distinction, and its many artificial refinements, [that] have outlived their usefulness.” In so doing, the court would look not simply at the wording, but also at the purpose of the provision.
- [45] Bringing it back to Seychelles, I also rely on the provisions of section 183 of the Companies (Winding Up) Regulations, 1975. This section stipulates that:

“Formal defects not to invalidate proceedings

(1) No proceedings under the Ordinance or these Regulations shall be invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.

(2) No defect or irregularity in the appointment or election of an Official Receiver, liquidator or member of a committee of inspection shall vitiate any act done by him in good faith.”

[46] The Regulation in 1975 incorporated the formal defect validation clause into the legislation.⁶ Recall that section 219 of the Ordinance provides, without more, that the liquidator has to notify the Registrar of his appointment, and pay the required security with the registry. Except for the mandatory word “shall”, the provision does not stipulate what the consequences of not meeting the requirements are. If we take the approach in *Bootes*, which seems sound, we would look not just at the “rigid and directory distinction”, but also at the purpose of the provision. If it is accepted that one of the purposes of section 219 is to ensure that the Registrar is apprised as to the details of the liquidator, and second, to satisfy the Registrar of the court that there is an amount put aside to defray from in the event that the liquidator fails to perform according to the Ordinance, then it seems clear that, despite the use of the word “shall”, a non-compliance with the provision does not invalidate the appointment. This is what section 183 of the Regulations intends. Clearly in this case, the non-compliance can without injustice, be remedied by court.

[46] Particularly relevant on the point of ability to remedy without injustice, is the fact that the liquidator has already remedied his non-compliance, by paying the security. The question of remedy effectively became a moot point.

[47] Finally, an important element of this case, is the length of time that has since passed and the intervening proceedings, which implicate the public interest. It has long been held that a Court may refuse to act upon the mere assent of the creditors, and considers not only whether what is proposed is for the benefit of creditors, but also

⁶ In terms of section 308 of the Ordinance, the Governor in Council was empowered to make regulations for the winding up of companies. The 1975 Regulations were made in terms of this general provision.

whether it is conducive or detrimental to commercial morality and to the interests of the public at large.⁷

[48] In the same context, the point raised on prescription by the Respondent is also valid.

[49] In the circumstances it follows that the application on this point should fail.

The payment of sums by the Liquidator.

[50] The Applicant has also asked for two sums of money to be repaid by the Liquidator: with regard to SR 44,000,000 in respect of payment of undue stamp duty and SR 20,000,000 in illegal fees to himself.

[51] With regard to the stamp duty payment, that payment seems to have been deducted from the purchase price of the transfer of property to European Hotels when as was concluded from the October 2019 judgment the same should have been exempted. As this issue forms part of the inquiry by the Commission specifically set up by the President on the recommendation of the Court, I cannot pre-empt its finding as to why and how the money was paid and if paid to the government whether it should be returned. In the circumstances, the Commission's findings will have to be awaited for further action by the Liquidator.

[52] With respect to what the Applicant has termed the illegal payment of fees by the Liquidator to himself the Court has already ruled on the issue. The Court anticipates, in light of the findings in that ruling that this issue is being dealt with by the Receiver. At this stage, it will be premature, in the light of that ruling, to definitively rule on the issue.

⁷ See in this regard, the South African judgment of *Klass v Contract Interiors CC (in liquidation) and Others* (08/31973) [2009] ZAGPHC 35 (23 February 2009), citing *In Re Telescriptor Syndicate Limited* (1903) 2 CA 174, 180 where Buckley J held:

“Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In In Re Hester (1) some trenchant observations of Fry LJ will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country.”

[53] I therefore order that the application is dismissed and make no order as to costs. I further order that the Official Receiver and the Commission of Inquiry chaired by Justice MacGregor be served with this Ruling.

Signed, dated and delivered at Ile du Port on 18 September 2020

Twomey CJ