Easter Term
[2024] UKPC 8
Privy Council Appeal No 0044 of 2022

JUDGMENT

Katra Holdings Ltd (Appellant) *v* Standard Chartered Bank (Mauritius) Ltd (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Hodge
Lord Briggs
Lord Stephens
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
9 April 2024

Heard on 30 January 2024

Appellant
Jonathan Crow CVO, KC
Gregory Denton-Cox
(Instructed by Mishcon de Reya LLP (London))

Respondent
David Alexander KC
Tikanand Gujadhur
(Instructed by Clifford Chance LLP (London))

LORD HODGE AND LORD BRIGGS:

1. This appeal challenges the grant by the Bankruptcy Division of the Supreme Court ("the Bankruptcy Court") of a winding up order of a Mauritian company, Katra Holdings Ltd ("the Company"), and the judgment of the Supreme Court (Civil Appeal Division) ("the Court of Appeal") upholding that order. The appeal involves a procedural issue (issue 1) and then three principal issues (issues 2 – 4). Issue 1 is whether the Court of Appeal erred in refusing to hear the Company's motion to introduce new evidence. Issue 2 is whether the Bankruptcy Court erred in not setting aside the statutory demand served by Standard Chartered Bank (Mauritius) Ltd ("the Bank") on the Company on the ground that there was a substantial dispute as to whether the debt between the Company and the Bank was owing. This involves deciding whether it is reasonably arguable that the Bank is not entitled to enforce the loan contract by which the Company borrowed US $20 million on the ground of illegality. Issue 3 is whether the Bankruptcy Court erred in not setting aside the statutory demand served by the Bank on the Company on other grounds. Issue 4 is whether the Bankruptcy Court, having refused to set aside the statutory demand, erred in ordering the winding up of the Company without requiring the Bank first to present a winding up petition.

1. Factual background

2. The Company, through its principal, Mr Ramesh Vangal, and an associated company registered in India, sought to profit by gaining control of and selling on to investors shares in a private Indian bank, called Tamilnad Mercantile Bank Ltd ("TMB"). This involved acquiring options (i) to purchase 95,418 shares in TMB, which represented 33.6% of the issued and paid-up equity shares in TMB and had been held in the name of a group of Indian investors called the Sterling Group, and (ii) to acquire a further 17% of TMB's shares (together "TMB shares"). It was proposed that these shares would be sold to investors who were not connected to each other, in tranches of less than 5% of the issued share capital of TMB so as to avoid breaching Indian foreign exchange and banking rules, to which the Board refers below. The agreement to assign the options provided that the placement of TMB shares with international investors was to comply with the guidelines and regulations issued by the Reserve Bank of India ("RBI").

3. In an agreement between Corsair Investments LLC, a USA-based private equity fund ("Corsair"), the Company and the Bank (and initially, before amendment, two other entities) ("the Escrow Agreement") it was agreed that TMB shares amounting to 40% of TMB's paid-up share capital would be placed into escrow with the Bank and released on sale to purchasers who were willing to purchase less than 5% stakes in TMB and whom Corsair was to identify. The TMB shares when sold on would be held by special purpose vehicles for each of the investors and the purchase funds would be

deposited into escrow. The Escrow Agreement is governed by the laws of India. The escrow account into which the share certificates and executed blank transfer forms were to be deposited and two other escrow accounts to hold the proceeds of the sale of the TMB shares (one in US dollars and the other in rupees) were to be held by Standard Chartered Bank, Mumbai ("SCB Mumbai") as sub-agent of the Bank.

4. Corsair undertook to obtain a legal opinion from Indian counsel that the proposed arrangement did not violate Indian laws and regulations, including relevant RBI guidelines. That opinion when obtained in relation to the early transfers of TMB shares under this arrangement in 2007 suggested that there would be no such violation and that the investments of the purchasers would not be aggregated so as to bring into being a group holding in excess of 5% of TMB's paid-up share capital.

5. Senior figures in the Standard Chartered Bank Group saw an opportunity to acquire an initial stake in TMB of less than 5% and the possibility of increasing involvement in TMB in future years when Indian regulations permitted.

6. The Company funded the purchase of the options by obtaining a short-term loan in August 2006 from the Galleon Group in New York which was due to expire on 31 December 2006 (the "Galleon loan"). Under an agreement, dated 29 December 2006 (the "Facility Agreement"), the Company obtained from the Bank a three-month loan facility ("the Facility") of US $20 million to re-finance the existing borrowing. The Company used the Facility and its own funds to repay the Galleon loan and the Bank became the lender which funded the acquisition of the TMB shares from the Sterling group of investors. The Facility Agreement, which is governed by the laws of Mauritius, was extended several times and expired on 15 November 2009. By then the Company had repaid part of the sums borrowed under the Facility by selling on TMB shares to investors. In 2007 the Company also borrowed further sums from the Bank which were repaid in 2008 through the Company's sale of 10,364 TMB shares which it held in its name. That second loan is not relevant to the issues on this appeal.

7. Since 2009 the Company has failed to repay the sums due under the expired Facility. On 13 October 2015, the Bank served a statutory demand on the Company claiming payment of US $19,225,911.32 (comprising US $15,080,690 of principal and US $4,145,221.32 representing accrued interest as at 30 September 2015).

8. The Facility Agreement provided that the security for the Bank's lending would include (a) the deposit of the title deeds to 62 acres of land in Bangalore owned by Mr Vangal and Arudrama Developments Private Ltd, an Indian development company under his control, "along with an undertaking that in the event of default [the Bank] would have the right to create equitable mortgage and sell the property", and (b) the deposit of the share certificates and blank transfer deeds of TMB shares, which were not

registered in the Company's name, representing 40% of TMB's paid-up share capital. Further security was provided in the form of pledges of shares in other companies, but it is no longer suggested that by the date of the winding up order they provided any security for the Facility. Accordingly, the assets which the Company has asserted are available as security for the Facility are the deposit of the title deeds of the land in Bangalore and the deposit into escrow of the TMB shares and the blank transfer forms to facilitate the transfer of those shares.

9. The Facility Agreement contained covenants that the Company would enter into an agreement with Corsair to arrange for the purchase of TMB shares comprising 40% of TMB's paid-up capital on behalf of independent investors who satisfied the guidelines set by the RBI and that the Company would enter into the Escrow Agreement. The covenants in the Facility Agreement included the following:

> "7. Receipt of all necessary governmental and regulatory approvals and third party consents, if required. …
>
> 10. No law or regulation shall be applicable in the judgment of the Lender that restrains, prevents or imposes materially adverse conditions upon the transactions contemplated hereby."

10. The conditions precedent to drawdown included (i) the placing into the escrow account of the share certificates and blank transfer deeds of TMB shares and (ii) the delivery to SCB Mumbai of the title deeds to 62 acres of land in Bangalore. Failure by the Company to enter into the Escrow Agreement within 15 days for the date of the Facility Agreement was one of the specified events of default. The Company warranted on a continuing basis that its entry into and performance of the transactions under the Facility "will not and do not violate … any law or regulation." The relevance of this warranty, along with the provisions in the Escrow Agreement (para 3 above) and in the Facility Agreement (para 9 above), is that it is evidence of the attempts by the Bank to make sure that the transactions which it was funding were lawful and the subject of regulatory consent.

11. The allegation by the Company that the Facility Agreement is unenforceable on the ground of illegality arises out of the following events. In March 2011 the Deputy Governor of the RBI made an order declining to acknowledge the holding of 5% or more of the paid-up capital of TMB by a group of investors including the Company, and stated that the holding in aggregate should be below 5% of the paid-up capital. The legal basis for this was the following. Regulations made under the Indian Foreign Exchange Management Act 1999 ("FEMA") required the approval of the RBI for transfers of shares in any Indian company between a resident of India and a non-resident. The RBI

issued guidelines under the Banking Regulation Act 1949 which made the allotment or transfer of shares in a private sector Indian bank subject to the approval of the RBI if the allotment or transfer took the shareholding of an individual or group to or above 5% of the paid-up share capital of the bank. This banking approval regime was placed on a statutory basis by the Banking Laws (Amendment) Act 2012.

12. On 17 December 2014 the Enforcement Directorate for the Ministry of Finance in India ("the ED") sent out notices to 26 addressees based in India, including SCB Mumbai and one of its directors, alleging contraventions of regulations made under FEMA and requiring them to show cause in writing as to why adjudication proceedings under section 6 of FEMA should not be held against them (the "Show Cause Notices"). The Show Cause Notice served on SCB Mumbai alleged that it had contravened the FEMA regulations by doing the following without the RBI's prior permission: (i) opening, and allowing the deposit of TMB shares in, the escrow account without having obtained permission from RBI and (ii) taking custody of the title deeds to the 62 acres of land in Bangalore and of TMB shares as collateral for the grant of the Facility.

13. On 18 December 2014 the ED issued a press release alleging contraventions of FEMA by SCB Mumbai in opening and operating the escrow accounts for the purpose of transferring TMB shares to foreign investors and in taking custody of title deeds to the land in Bangalore and TMB shares as collateral for the Facility.

14. The Company had contended before the Bankruptcy Court and the Court of Appeal that the Facility is unenforceable because the Facility Agreement is illegal under Indian law and is contrary to Mauritian public policy. The Company does not now contend that the Facility itself is illegal under Indian law. Its case, presented by Jonathan Crow KC, is that because the Facility Agreement is so inextricably bound up with transactions which are illegal under Indian law, the Facility is unenforceable under Mauritian law on grounds of public policy.

15. The Company commenced arbitration proceedings against Corsair, the Bank and others by invoking a dispute resolution clause in the Escrow Agreement. The Company pursued many claims, including allegations of fraudulent inducement of contract against Corsair, breach of contract against Corsair and the Bank, and breach of trust and conversion against, among others, the Bank. After the hearing, the Company alleged that the Escrow Agreement was void on the ground of illegality under Indian law and sought a declaration to that effect. The arbitrators (James Carter, E Leo Milonas and Joe Smouha) rejected all the Company's claims in their award and, on the Bank's counterclaim, declared that the Escrow Agreement (as amended) was valid and binding between the Company, Corsair and the Bank. In this appeal Mr Crow referred the Board to the arbitral award to set out the factual background to the dispute. David Alexander KC, on behalf of the Bank, did not rely on the declaration of the validity of the Escrow Agreement as a basis for a plea of res judicata or issue estoppel. He presented it as a

strong indication of the difficulties which the Company faces in establishing an arguable case that the debt due under the Facility is unenforceable on the ground of illegality because the Facility Agreement was so closely connected with the Escrow Agreement.

16. Before turning to the decisions of the Mauritian courts and the parties' submissions on this appeal, the Board sets out or summarises the relevant statutory provisions of the Insolvency Act 2009 ("the 2009 Act").

2. The statutory provisions on winding up

17. Section 102 of the 2009 Act empowers the court to wind up a company on the petition of, among others, a creditor where the company is unable to pay its debts. One of the means of establishing that a company is unable to pay its debts is by the service of a statutory demand. Where a creditor serves a statutory demand and the debtor company fails to comply with it, a company is presumed to be unable to pay its debts as they become due in the ordinary course of business: section 178. Section 180 provides that the statutory demand must be in respect of a debt that is due and is not less than 250,000 rupees and it must require the company to "pay the debt … or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within one month of the date of service, or such longer period as the Court may order." The ability of a debtor company to meet the requirements of a statutory demand by the provision of security to the reasonable satisfaction of the creditor is relevant to issue 3 in this appeal which the Board discusses below.

18. Section 181 of the 2009 Act empowers the Court to set aside a statutory demand on the application of the debtor company. Section 181(4) provides so far as relevant:

> "The Court may grant an application to set aside a statutory demand where it is satisfied that –
>
> (a) there is a substantial dispute whether or not the debt is owing or is due; …
>
> (c) the demand ought to be set aside on other grounds."

19. Section 181(6) provides:

> "(a) Where, on the hearing of an application under this section, the Court is satisfied that there is a debt due by the

company to the creditor that is not the subject of a substantial dispute, or is not subject to a counterclaim, set-off or cross-demand, the Court may-

(i) order the company to pay the debt within a specified period and that, in default of payment, the creditor may make an application to put the company into liquidation; or

(ii) dismiss the application and forthwith make an order under section 102 putting the company into liquidation,

on the ground that the company is unable to pay its debts as they become due in the ordinary course of business.

(b) For the purposes of the hearing of an application to put the company into liquidation pursuant to an order made under subsection (6)(a), the company is presumed to be unable to pay its debts as they become due in the ordinary course of business where it failed to pay the debt within the specified period."

20. The section 181(4)(a) (substantial dispute) ground is the subject of the first principal issue (issue 2) which, after addressing the procedural issue (issue 1) in paras 29-30, the Board discusses in paras 31-42 below. The setting aside of the statutory demand on other grounds (section 181(4)(c)) is the basis of issue 3 which the Board discusses in paras 43-59 below. Issue 4 is concerned with the decision of the Bankruptcy Court to pronounce a winding up order on dismissing the application to set aside the statutory demand without requiring the Bank to present a winding up petition (section 181(6)(a)(ii)). The Board discusses that issue in paras 60-65 below.

21. Sections 180 and 181 of the 2009 Act are similar in form to sections 289 to 291 of the New Zealand Companies Act 1993 and the Mauritian courts have drawn on New Zealand jurisprudence in their interpretation of those provisions in the 2009 Act: see *Areff International Ltd v ZSI Trading LLP* 2015 SCJ 437, per R Mungly-Gulbul J, *Hotfuse Engineering Services Ltd v Thermogenie* Ltée 2016 SCJ 217, per Angoh J, and the Court of Appeal in its judgment in this case.

22. Drawing on that jurisprudence, the principles governing the setting aside of a statutory demand under section 181(4) so far as relevant are as follows. The applicant

seeking to set aside a statutory demand has the burden of showing that there is arguably a genuine and substantial dispute as to the existence of the debt. The court's task is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due. The applicant must have an arguable basis upon which it is not liable for the amount claimed in the statutory demand. Mere assertion in affidavit or submission that there is such a dispute will not suffice. Material, short of proof, is required to support the claim that the debt is disputed. The court cannot resolve conflicts of evidence on affidavit but is not bound to accept evidence uncritically. The judge is entitled to act in a more robust and common sense manner: see *Areff* (above) and the New Zealand cases there cited, namely, *Amstar Interiors Ltd v AIS Insulation Ltd (In Liquidation)* [2011] NZHC 1117; *United Homes (1988) Ltd v Workman* [2001] 3 NZLR 447 (CA); *Denize Farms Ltd v Spotburn Farms Ltd (In Liquidation)* HC AK Civ-2011-404-5374. See also the judgment of the New Zealand Court of Appeal in *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578, in which at para 16 it summarises the relevant principles.

23. The Board mentions the New Zealand case law relating to the equivalent of section 181(6)(a)(ii) in its discussion of issue 4 below.

3. The decisions of the Mauritian courts

24. In a judgment dated 5 July 2017 Mungly-Gulbul J addressed two submissions by the Company. The first was that the Bank, being a secured creditor cannot have recourse to a statutory demand unless it first releases its securities. The second was that there was a substantial dispute as to whether the debt specified in the statutory demand was due. The asserted basis of that dispute was that, relying on the Show Cause Notice, the purpose of the Facility was to acquire shares in TMB in a manner which was against the laws of India as it involved breaches of provisions of FEMA. The judge did not accept either submission, rejecting the first on the basis that the 2009 Act did not prohibit a secured creditor from serving a statutory demand and the latter on the basis that the illegality asserted was not substantiated by any evidence. The judge added that the Facility was contracted in Mauritius between a Mauritian company and a Mauritian bank. It was governed by Mauritian law and the investigations of the Indian authorities did not affect the debt due under the Facility Agreement. The judge pronounced an immediate winding up order under section 181(6)(a)(ii), observing that the debt had been outstanding for seven years and the Company had both opposed the Bank's legal attempts to recover the debt and shown no intention to pay the debt if granted time to do so.

25. The Court of Appeal initially heard the Company's appeal from Mungly-Gulbul J's order in March 2018 and judgment was reserved. In May 2020 the Bank's attorney applied to the Court of Appeal for the appeal to be heard afresh because no judgment had been issued and one of the judges who had heard the appeal in 2018 had retired.

The Court of Appeal acceded to that request and a hearing was set down for 23 November 2020.

26. On 31 August 2020 the ED issued an order ("the ED Order") following the Show Cause Notice. The ED Order, as the Board discusses below, made findings against among others SCB Mumbai and its director Mr Ghosh. Several parties, including the Bank, have appealed against the ED Order. Mr Crow informed the Board that the Company's legal advisers received a copy of the ED Order only on the Thursday before the hearing fixed for the following Monday, 23 November 2020. At the start of the hearing before the Court of Appeal, counsel for the Company sought to introduce the ED Order into the appeal by making a motion for leave to adduce new evidence. The Court of Appeal refused to allow him to make the motion with the result that the ED Order was not before the Court of Appeal when it determined the Company's appeal. That refusal is the subject of issue 1 in this appeal.

27. The Court of Appeal upheld the judge's assessment of whether there was a genuine and substantial dispute as to whether the debt which was the subject of the statutory demand was due. The judge had applied the correct principles and had not erred in holding that the Company had failed to discharge the burden of showing that there was arguably such a genuine and substantial dispute. The Company's argument that the Bank was a secured creditor was mere assertion; it was not evident that there was an effective security over the land in Bangalore in a transaction under investigation by the Indian authorities, and the arbitral award confirmed that the Bank had no security over the TMB shares. The Court of Appeal held that section 102(2) of the 2009 Act did not preclude a secured creditor from presenting a petition to wind up a company and there was no legal impediment to its resorting to a statutory demand where it appeared that the Bank's position could be assimilated with that of an unsecured creditor. The allegations of illegality by the ED related to the transfer of shares by TMB and the use of the escrow accounts. They had been rejected by the arbitral tribunal which had held the Escrow Agreement to be valid. The allegations were not concerned with the Facility Agreement which was governed by the laws of Mauritius and subject to the jurisdiction of the Mauritian courts. The Court of Appeal dismissed the appeal.

28. The Company now appeals to the Board with the leave of the Court of Appeal.

4. The grounds of appeal and the Board's determination of them

(i) Issue 1: The Court of Appeal's refusal to hear a motion to introduce new evidence.

29. The Board can address this ground very briefly as it allowed the Company to refer to the ED order *de bene esse* and, having considered its terms, is satisfied that it

does not affect the outcome of the appeal on the question of the enforceability of the debt which the Board addresses in its discussion of issue 2.

30. The facts surrounding the Company's attempt to adduce the ED Order in evidence are not clear. The Board observes that the ED Order is a substantial document comprising 178 pages of closely typed script. There is no suggestion that the document had been given to the Bank before the hearing although the Company had had possession of the document since the previous Thursday. It is not clear whether the Court of Appeal was aware of the nature of the document in advance of the motion. If it were, the Court of Appeal was faced with the prospect of an adjournment of the hearing which was itself a re-hearing of the appeal more than two and a half years after the earlier hearing. In such a circumstance there would be no basis for challenging the discretionary decision not to hear the motion to adduce the ED Order as fresh evidence, notwithstanding the abruptness of the manner in which the Court of Appeal dealt with the motion. If the Court of Appeal were unaware of the nature of the fresh evidence when it refused to hear the motion, it would be difficult to justify that exercise of discretion as being procedurally fair. But, in view of the Board's decision on issue 2, it is not necessary to address this issue further.

(ii) Issue 2: Whether the Court of Appeal was wrong to uphold the judge's conclusion that there was no genuine and substantial dispute in relation to the claimed debt on the ground of the illegality of the transaction of which the Facility Agreement was a part.

31. Mr Crow's submission on behalf of the Company is in essence that the arrangements surrounding the Facility Agreement were in breach of Indian law and there was therefore a substantial dispute as to whether the debt, upon which the statutory demand was based, was enforceable. The purpose of the Facility was to re-finance the options to acquire the TMB shares and the Facility was inextricably linked to the wider transaction which included the Escrow Agreement which, he asserts, provided security to the Bank for the Facility. The Indian authorities had challenged the Escrow Agreement as a violation of FEMA in the Show Cause Notice and had later held that there was such a violation in the ED Order.

32. The Show Cause Notice alleged that the transfer in 2007 of TMB shares to foreign investors without the prior approval of the RBI was a breach of regulation 10A of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000. It alleged that the establishment of the escrow arrangements and the deposit into the escrow accounts of funds from the purchasers of TMB shares were breaches of that regulation and of regulation 3 of the Foreign Exchange Management (Deposit) Regulations 2000. It also alleged that SCB Mumbai's taking physical control of the title deeds of the land in Bangalore and the TMB shares as security for the Facility without the prior permission of the RBI were breaches of

regulation 3 of the Foreign Exchange Management (Guarantees) Regulations 2000 ("the FEMG Regulations") and section 6(3) of FEMA.

33. The ED Order, so far as relevant, determined that SCB Mumbai and its director, Mr Ghosh, were guilty of contraventions of regulation 3 of the FEMG Regulations. It found, in contrast with the finding in the award of the arbitral tribunal, that the TMB shares were held as security for the Facility. The ED Order imposed a fine of approximately US $12 million on SCB Mumbai and a lesser fine on Mr Ghosh.

34. In the Board's view, the Show Cause Notice would have been sufficient to amount to an arguable case of the illegality of the use made of the escrow arrangements in 2007, without fortification by the ED Order. But the difficulty which the Company faces and has faced throughout this litigation is in establishing a case that the Facility itself is either illegal under Mauritian law or unenforceable because the wider transaction involved breaches of Indian law. In addressing that question the Board must have regard to the relevant rules of Mauritian law.

35. Mauritius has a hybrid legal system in which the Code Civil Mauricien ("the Civil Code"), based on the Code Napoleon, has since 1804 governed much of its private law, including the law of contract and the law of delict. The courts of Mauritius look to French case-law and doctrine for persuasive guidance in matters borrowed from French law: *Sooklall v Sooklall* 2006 SCJ 210; *Mediterranean Shipping Co SA v Sotramon Ltd* [2017] UKPC 23, para 23. Since 1810 many areas of the law, such as company law, insolvency, evidence, and procedure have been influenced by the common law and legislation has been passed which, like the 2009 Act, is aligned with legislation of common law countries. One must, nevertheless, look to the Civil Code to ascertain the rules concerning the unenforceability of contracts.

36. Article 1131 of the Civil Code provides that an obligation without a cause or with a false cause, or with an unlawful cause, cannot have any effect.

37. Article 1133 explains the meaning of an unlawful cause and states:

> "La cause est illicite quand elle est prohibitée par la loi, quand elle est contraire aux bonnes moeurs ou à l'ordre public."

In this article there are therefore three grounds upon which a contract may fall within article 1131 on the basis of an unlawful cause: (i) the cause may be illegal under domestic law through statutory provision; (ii) it may be contrary to good morals; or (iii) it may be contrary to public policy. It is necessary therefore to consider whether the obligations undertaken by one or other or both of the parties to a contract are invalidated

on one of those three grounds: *Saks v Hassamal* 2015 SCJ 405, per Angoh J citing Dalloz Répertoire Pratique Vol III (Contrats et Conventions en general) notes 349, 350 and 354. In this context, one must look not only at the particular obligations of each party but also for the determining reason or purpose (motif déterminant, cause impulsive et déterminante) which led the parties, or one of them, to enter into the contract: Barry Nicholas, *The French Law of Contract* 2nd ed. (1992) p 128, citing a judgment of the Cour de cassation, Civ. 4.12.1929, s. 1931.1.49 set out in O Kahn-Freund, C Lévy, and B Rudden, *A Sourcebook on French Law* 3rd ed. (1991) pp 228-229, and Cour de cassation Civ. 12.7.1989, D 1989 IR 216. See also Christian Larroumet, *Droit Civil* 2nd ed. (1990) Vol. 3 "Les Obligations Le Contrat", para 487f, and Philippe Simler, JCI. Civil Code, art 1131 à 1133 - Fasc 30: Contrats et Obligations – Cause -Illicéité ou immoralité de la cause, para 15.

38. Under the Facility Agreement the Bank agreed to lend and the Company agreed to repay the sums which the Bank advanced as a short-term loan. Such a loan was not prohibited by any Mauritian legislation. Nor was the purpose of the loan, which was to re-finance the acquisition of options to purchase TMB shares, contrary to good morals. The question is therefore whether the enforcement of the repayment of the Facility would be contrary to Mauritian public policy. The only basis on which the obligation to repay the loan could be contrary to public policy in Mauritius would be if the enforcement of the Facility Agreement would be a breach of international comity because the implementation of the Facility Agreement involved in some way a serious breach of Indian law.

39. While the question before the Board is a matter of the interpretation of the Civil Code, it is helpful when considering international comity to look by way of analogy to the approach of the common law in such circumstances. In English law the court will not enforce a contract (i) if the contract *necessarily* requires an act in a friendly foreign state which would be unlawful by the law of that state or (ii) where the intention of the parties to the contract is to perform an act in a friendly foreign state which is illegal by the law of that country, even if the contract could have been performed in a manner which was legal in that country. The first principle is vouched by *Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 KB 287; the second principle by *Foster v Driscoll* [1929] 1 KB 470. The House of Lords explained that the basis of both principles is international comity: see *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301, 318-319 per Viscount Simonds, p 323 per Lord Reid and p 327 per Lord Keith of Avonholm. See also *Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financiere SA* [1979] 2 Lloyd's Rep 98, 107 per Robert Goff J. The Board agrees with Cockerill J's observation in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), para 307 that the two principes are "complementary aspects of comity as it applies to foreign illegality." See also the judgment of Lord Collins of Mapesbury in the Hong Kong Court of Final Appeal in *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544, paras 55-58.

40. The Company no longer alleges that the Bank, by entering into the Facility Agreement as part of the wider transaction to facilitate the acquisition of TMB shares, was involved in a conspiracy to commit acts which were illegal in India. In any event, the obtaining by Corsair of the legal advice referred to in para 4 above strongly points against such a contention. There is nothing in the Facility Agreement which discloses a determining purpose that any part of the wider transaction be carried out in a manner which was contrary to Indian law. On the contrary, it is clear from the taking of legal advice and the terms of the Facility Agreement that the parties to that agreement envisaged that the Escrow Agreement could and should be implemented in a way which was legal under Indian law: see paras 4, 9 and 10 above.

41. The Indian authorities asserted in the Show Cause Notice that the illegal acts were the alleged failures by SCB Mumbai to obtain the prior permission of the RBI (i) before operating the escrow accounts and (ii) before taking security over the land in Bangalore and over the TMB shares: para 12 above. The Company was not able to suggest that the failure to obtain RBI permission was an act or omission which was necessitated by the Facility Agreement or by the Escrow Agreement which were each a part of the wider transaction. SCB Mumbai could have sought to obtain the permission of the RBI, but it apparently did not. Thus, while it was clearly arguable that there has been illegality under Indian law in the performance of the wider transaction in India, no basis has been advanced for suggesting that the illegality of performance was a necessary part of the transaction or was intended by the parties to the Facility Agreement.

42. In those circumstances the Board sees no basis for the argument that the enforcement of the Facility Agreement against the Company in Mauritius would involve a breach of international comity and hence public policy. The Company has therefore failed to establish that there is a genuine and substantial dispute as to the existence of the debt which is the subject matter of the statutory demand. Its appeal on issue 2 fails.

(iii) Issue 3: Whether the Bank could serve a statutory demand while retaining its securities for the repayment of the Facility.

43. The Company's third ground of appeal is that the courts below should have set aside the Statutory Demand because of the Bank's status as, or as equivalent to, a secured creditor which had not surrendered its security. It is important to review how this case was put by the Company to the courts below because, as will appear, there is an important difference in the way that the case under the same general heading of security has been put to the Board.

44. Before the Bankruptcy Court the Company took two security-based points. The first was that a secured creditor which did not first surrender its security was simply

outside the class of persons who could have recourse to an insolvency-based winding-up remedy under the law of Mauritius. The second was that it was an abuse of process for a secured creditor to do so as a means of seeking to recover commercial debts.

45. The first point was, as the Company accepted, unsupported by any specific ground in section 181(4) of the 2009 Act for the setting aside of a statutory demand but was said to be supported by analogy with UK and Mauritian personal insolvency (i.e. bankruptcy) law, and could be fitted within the "other grounds" rubric of section 181(4)(c). The reasons given were (taken from para 18 of the Company's skeleton argument) that:

> "it is submitted that the Learned Judge is empowered to use her wide discretion under s.181(4)(c) of the Insolvency Act 2009 to set aside the statutory demand for the following reasons:
>
> > (a) The prescribed form of a statutory demand is such that a secured creditor cannot issue a statutory demand without unless (*sic)* he surrenders his security since the debtor would be in compliance with the statutory demand.
> >
> > (b) A secured creditor, being clearly outside of liquidation proceedings cannot initiate such proceedings by serving a statutory demand."

Reason (a) is based upon section 180 (d) of the 2009 Act, which provides that the statutory demand must require the alleged debtor either to pay the debt or (inter alia) to "give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor".

46. The abuse of process argument was based on a statement in a New Zealand textbook that:

> "The statutory demand procedure should be used as a means to establish a presumption of insolvency rather than to recover commercial debts."

47. The judge rejected those arguments. She noted that the 2009 Act did not prescribe the holding by the creditor of security as a ground for setting aside a statutory demand. She acknowledged that section 181 conferred a wide discretion upon the court, and that a creditor holding full and realisable security might have no proper reason to have recourse to a statutory demand followed by liquidation proceedings. But she noted that both the value and the effectiveness of the securities had been put in issue by the Bank and she briefly explained, in relation to the TMB shares and the land in Bangalore, why that was so. It is implicit in her judgment that, to have a statutory demand set aside on the ground that the creditor holds adequate security, the debtor has the burden of demonstrating adequacy, if that is put in issue by the creditor.

48. The Company repeated the same arguments before the Court of Appeal, which upheld the judge's analysis. In addition, the Court of Appeal relied upon section 102(2)(d) of the 2009 Act, which provides that a winding up petition may be presented by "a creditor, including a contingent or prospective creditor, of the company", a phrase that was wide enough to include a creditor holding security of uncertain value.

49. The Company complained that the judge had wrongly made findings about the inadequacy of the security held by the Bank but the Court of Appeal held (rightly in the Board's view) that she had done no such thing. Nonetheless, on the basis of its own appraisal of the evidence, the Court of Appeal concluded that the Bank's position "could practically be assimilated to that of an unsecured creditor".

50. There was a substantial amount of evidence and argument about the adequacy or otherwise of the Bank's security in the courts below, raising mainly factual issues. Although the judge and the Court of Appeal reached the same end-point on this issue generally, it cannot be said that this is a straightforward case of concurrent findings of fact by the courts below, so as to lead the Board to decline even to entertain the issue in the absence of exceptional circumstances pursuant to its settled practice, as set out in *Devi v Roy* [1946] AC 508*,* and recently affirmed in *Water and Sewerage Authority of Trinidad and Tobago v Sahadath* [2022] UKPC 56, paras 15-16. But the courts below did both conclude, on the evidence, that this was plainly not a case where the creditor was shown to be in possession of realisable security sufficient in value to clear the debt.

51. Perhaps mindful of this Mr Crow took a new and different course under this heading. The position originally taken that a secured creditor simply had no locus standi to present a petition (or therefore to have resort to a statutory demand) was abandoned. So was the position that the Company had demonstrated that the Bank held sufficient realisable security to discharge the debt in full. In its stead the emphasis was placed upon the wide discretion afforded by section 181(4)(c) to set aside a statutory demand upon other grounds, and the requirement for a secured creditor when proving in a liquidation, either to surrender its security or to value it and prove for the unsecured balance. The Company's Written Case concluded that:

> "For the reasons outlined above, the Respondent held security from which the debt might be repaid. However, it refused either to take steps to enforce its security, or to relinquish it so that it was available to enable the Appellant to pay the debt. In those circumstances, it would be unjust to presume from non-compliance with the demand that the Appellant was unable to pay its debts. The Judge and Court of Appeal erred in failing to set aside the statutory demand under s. 181(4)(c)."

52. An even more nuanced case was presented by Mr Crow in his oral submissions. He said that it did not really matter whether the Bank held security in a strict sense, but only that, under the scheme, the TMB shares and the title deeds to the land in Bangalore were held by SCB Mumbai as agents for the Bank in circumstances where, as a matter of commercial reality, their realisation was always meant to constitute the means of payment of the debt. If push came to shove, the Bank could achieve that result by the exercise of the control which it held over SCB Mumbai. But it was unjust that the Bank should, like a dog in the manger, be able at one and the same time to hold on to the TMB shares and the title deeds to the land in Bangalore through its agent while at the same time seeking to wind up the Company for non-payment of the debt. That was a sufficient "other ground" for setting aside the statutory demand.

53. As finally deployed before the Board, this was in substance a new case, however skilfully and sympathetically presented. At all stages in the lower courts the Company's case had only two prongs: (i) that continuing to hold any security was enough to disentitle the Bank from serving a statutory demand, and/or (ii) that the Bank held sufficient realisable security to enable it to be repaid in full. The first prong has now (rightly in the Board's view) been abandoned, while the Company had twice failed to establish the second essentially factual prong in the courts below, and (for reasons briefly set out in the following paragraph) had no real prospect of succeeding upon it before the Board.

54. In the Board's view the deposit of the title deeds to the land in Bangalore, even if it were correctly classified as a security under Indian law, did not create a readily realisable security. The Bank would have to attempt to create an equitable mortgage and have that mortgage enforced by the Indian courts. Similarly, even if the TMB shares, which were not registered in the Company's name, were correctly categorised by the ED as security for the Facility, it is wholly unclear how the Bank could legally dispose of those shares and retain the proceeds of their sale to pay off the outstanding balance of the Facility. In view of the assertions in the Show Cause Notice and the findings in the ED Order that the taking of both securities was illegal under Indian law, the Bank would face formidable hurdles in any attempt in the Indian courts to enforce such rights as it

may have as a security. In those circumstances, the Board considers that the Court of Appeal was justified in equating the Bank to an unsecured creditor.

55. It is not unknown for the Board to admit a new argument, not run in the courts below, where it is one of pure law, based on facts which are either agreed or no longer susceptible to challenge, and where the point can be fully argued out with no prejudice to the opposing party. But even then the Board may decline to do so where the point of law is one upon which the Board would have wished to have the opinion of the courts below, and in particular the appellate court in the territory where the issue had arisen: see *Baker v The Queen* [1975] AC 774, 782-783, 788, followed in *Port Authority of Trinidad and Tobago v Daban* [2019] UKPC 22, para 26 and *Flashbird Ltd v Compagnie de Securite Privee et Industrielle SARL* [2021] UKPC 32; [2022] Bus LR 55, para 22.

56. The Board's view is that this new case does not fall into the narrow category where it ought to be admitted, for the first time, before the Board. It amounts to an invitation to exercise, for the first time, a broad justice-based discretion, under the "other grounds" element in section 181(4), but on the basis of a limited deployment of facts and circumstances where the focus has thus far been directed to a different analysis. The case which the Bank came to court to answer in the courts below was that it was a secured creditor and thereby disentitled for that reason alone to pursue the winding up of the company. The Bank therefore went to considerable lengths to persuade the courts below that it was not in fact a secured creditor at all, or at least not secured by reference to assets of sufficient realisable value with which to pay the debt. The case now advanced is that, whether or not strictly a secured creditor, the Bank has sufficient control over the main assets of the Company that it would be unfair and unjust for the Bank to persist in seeking its liquidation while holding on to those assets, from which it would be in a practicable position now to obtain payment. But that case would involve a further factual investigation into the precise basis on which the Bank is, through SCB Mumbai, holding assets not actually charged as security under the scheme, and the constraints affecting its ability to use or even to release them for as long as the criminal investigation by the RBI, including the appeal from the ED Order, continues.

57. The Board was given no reason to doubt the conclusion of both the courts below that it had by no means been shown that the Bank was possessed of sufficiently valuable and realisable security to have been able to pay off the Company's debt by its own efforts. There has been no effective challenge to its case that those of the TMB shares over which it did hold security had been sold, and that its rights over the title deeds to the land in Bangalore deposited with SCB Mumbai fell short of an existing security.

58. The Board would be minded to agree with the Company's submission that there may be circumstances where it would as a matter of discretion be just to set aside a statutory demand under section 181(4)(c), for example where a creditor was seeking to

put improper pressure on a solvent debtor to pay an undisputed debt when the creditor was unreasonably refusing to exercise its rights over readily realisable security of sufficient value to recover the debt in full. Those might well constitute "other grounds" for setting aside under what is unquestionably a wide discretion. But that discretion would fall to be exercised having due regard to all relevant circumstances, at a hearing at which the creditor had, on reasonable notice of such a case, had a fair opportunity to respond.

59. That is not this case, and by a wide margin. The materials thus far deployed in evidence point firmly away from a conclusion that the Bank has presently realisable security, and the submission that it is at fault for hanging onto control of assets which could be deployed to pay the Company's debt scarcely passes beyond mere assertion. The Board therefore rejects this ground of appeal.

(iv) Issue 4: Whether the judge erred in ordering the immediate winding up of the Company.

60. Where in Mauritius the court refuses an application to set aside a statutory demand it has a choice under section 181(6)(a)(ii) of the 2009 Act, either to leave the creditor to present a winding up petition based upon the unsatisfied demand in the usual way, or to make an immediate order for winding up. The former is the default position in New Zealand, from where the insolvency law of Mauritius has been largely derived: see *GLW Group Ltd v AFI Management Pty Ltd* [2018] NZHC 1460, para 62. In *Norman v ANZ National Bank Ltd* [2012] NZCA 356 the Court of Appeal held that this choice should be exercised by reference to the particular circumstances of each case. There were no rigid classes of case where one or the other choice had invariably to be made.

61. In the Board's view the two typical reasons why it may be best to follow the default rule and leave the creditor to present a petition are (i) to give the Company a final chance to pay the debt and (ii) to enable other stakeholders in the Company (such as other creditors) to have their say in court on whether a winding up order should be made, the jurisdiction always being ultimately discretionary. In many cases the court will not know, at the end of an unsuccessful application to set aside a statutory demand, whether either of those reasons do, or even might, apply.

62. Reasons why the court might make an immediate order include where there is perceived to be a threat to the remaining assets, which could be mitigated by the immediate appointment of a liquidator, or where requiring the creditor to go through the process of presenting a petition would just be a waste of time and money: see again the *Norman* case.

63. In the present case the judge decided to make an immediate order because the debt had been outstanding by then for over seven years, the Company had consistently opposed the Bank's attempts to obtain payment over a long period of time and had not shown any intention to pay the debt if given more time to do so. In considering the matter now, it appears to be common ground that there are no other creditors of the Company who might wish to appear and be heard upon the presentation and later hearing of the petition. There has still been no sign of any intention by the Company to pay the debt, more than six years later, while the winding up order made by the judge has been stayed.

64. The Board reminds itself that this question was a matter for the exercise of discretion by the judge. Mr Crow submitted that no adverse inference could be drawn about inability or disinclination to pay the debt during a period (however long) when the Company was advancing a bona fide dispute to liability to pay, even if that dispute failed to amount to anything sufficient in the event to stave off a statutory demand. The Board disagrees. The threshold of substance which a dispute as to liability to pay needs to surmount in order to enable a statutory demand to be set aside is not a high one. In the present case the supposed dispute has been found, by three successive courts, to be of no substance at all. The other (security-based) grounds have fared similarly badly. Where a company fails to pay a statutorily demanded debt which turns out not to have been disputed on substantial grounds there is, in the absence of evidence to the contrary, a sufficient basis for the court to conclude that it either cannot or will not pay the debt.

65. The Board is content to reject this ground of appeal for the simple reason that no basis has been shown for a conclusion that the judge misapplied her discretion. Nonetheless, were the matter to be considered afresh, the additional circumstances now known to the Board (referred to above) make it even clearer that an immediate order to wind up the Company should now be made.

5. Conclusion

66. In addition to dismissing the Company's appeal, the Board will lift the stay on the judge's winding up order which has been in place pending these appeals, so that a winding up may immediately proceed.