

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

On appeal from the Commercial Division

HCVAP 2011/040

SPECTRUM GALAXY FUND LTD.

Appellant

and

XENA INVESTMENTS LTD.

Respondent

Before:

The Hon. Mde. Janice M. Pereira

Justice of Appeal

The Hon. Mr. Geoffrey Belle

Justice of Appeal [Ag.]

The Hon. Mr. Gerard St. C. Farara, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Richard Evans, with him Mr. Jerry Samuel for the Appellant

Mr. Stephen Moverley Smith, QC, with him Ms. Keisha Durham for
the Respondent

2012: April 17;
July 23.

Civil appeal – Insolvency Act, 2003 – Whether assignee of redemption proceeds can attain the character of a creditor with locus standi to seek liquidation of a company

Redemption proceeds were assigned to Xena Investments Ltd. by Pentagon Select Ltd. which entity, through its agent Somers Dublin Ltd., subscribed for a number of shares in Spectrum Galaxy Fund Ltd. Somers, on behalf of Select, gave notice of its intention to redeem all of its shares held in the Fund. Subsequently on 1st May 2009, Select assigned the redemption shares, receivables and all related rights to Xena. On that basis, Xena claimed to be a creditor of Spectrum in respect of redemption proceeds in the sum of \$21,404,471.02.

Xena applied for and was granted an order appointing joint liquidators over Spectrum. Spectrum appealed on the basis that Xena, as an assignee of redemption proceeds has no locus standi to seek liquidation of Spectrum.

Held: allowing the appeal and discharging the order dated 27th July 2010 appointing joint liquidators, that:

1. A claim for redemption proceeds is precluded by virtue of section 197 of the Insolvency Act ("the Act") from being an admissible claim and is accordingly caught by the prescription contained in section 12(c) of the Act. The assignment of the redemption proceeds to Xena does not thereby convert the claim for redemption proceeds which is a non-admissible claim under section 197 of the Act into an admissible claim by virtue of the assignment. Consequently, Xena's claim as an assignee of the redemption proceeds would be a non-admissible claim in the liquidation.

Sections 9, 12 and 197 of the **Insolvency Act, 2003** applied; **Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al** Territory of the Virgin Islands HCVAP 2010/014 (delivered 28th March 2011) followed.

2. Xena's claim not being an admissible claim in the liquidation cannot therefore confer on Xena the character of a creditor with locus standi to apply for the appointment of liquidators over Spectrum.

REASONS FOR DECISION

- [1] **PEREIRA JA:** This is a judgment of the Court. The appeal in this matter was heard on 17th April 2012. The Court allowed the appeal and the Order of the learned trial judge appointing joint liquidators over the appellant company ("the Fund") was discharged,¹ with written reasons to follow. We now do so.

Background

- [2] The Fund is a private limited liability fund which was incorporated in the Virgin Islands on 21st December 1995. An entity by the name of Somers Dublin Ltd. ("Somers" - acting as agent for another entity called Pentagon Select Ltd. ("Select")) subscribed at various times for a number of shares in the Fund. Somers (on behalf of Select) gave notice of its intention to redeem all of its shares held in the Fund. That notice was effective as of 30th June 2008. Consequent on the global financial crisis that began in 2008, a forbearance agreement was entered into by and among the Fund and Select on 19th December 2008 whereby

¹ A Certificate setting out the result of the appeal was approved by the Court 19th April 2012.

Select agreed not to demand immediate repayment of the redemption proceeds to which it was entitled for a period of two years. That period has now expired.

- [3] By a Deed of Assignment dated 1st May 2009 (“the Assignment”) Select assigned “the Redemption Shares, Receivables and all Related Rights”² to the respondent (“Xena”) a company incorporated in the Cayman Islands. The Assignment was said to be governed by BVI law.
- [4] On 6th July 2010, Xena filed an Originating Application seeking the appointment of joint liquidators over the Fund. No statutory demand had been served on the Fund. Xena claimed to be a creditor of the Fund in respect of the “Redemption Proceeds” in the sum of \$21,404,471.02.
- [5] On 27th July 2010, the Application for the appointment of joint liquidators was granted. At that time the state of the law was as pronounced by the court below following its prior decision in **Western Union International v Reserve International Liquidity Fund Ltd**³ in which it was held that a redeeming shareholder was a creditor with locus standi under the **Insolvency Act, 2003**⁴ (“the Act”) to seek the appointment of a liquidator in respect of unpaid redemption proceeds.
- [6] The occasion was given to this Court for the first time, in **Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al**⁵ to consider the question whether a redeeming shareholder claiming redemption proceeds had locus standi under the Act to seek the appointment of a liquidator. This Court held that on the construction of sections 2, 9 and 197 of the Act such a redeeming shareholder has no locus standi.

² Redeemed Shares were defined under the Assignment as shares having a value on 30th June 2008 of \$21,404,471.02 in the Fund held by Somers for the account of Select ... in respect of which a request for redemption has been duly accepted by the Fund for redemption as of 30th June 2008 redemption date.

³ British Virgin Islands Claim No. BVIHCV 2009/322 (delivered 26th January 2010). The appeal to the Court of Appeal by Reserve was allowed by consent.

⁴ No. 5 of 2003, Laws of the Virgin Islands.

⁵ Territory of the Virgin Islands HCVAP 2010/014 (delivered 28th March 2011)

The present appeal

- [7] The sole question arising on this appeal was whether an assignee of redemption proceeds stood in a better position than the redeeming shareholder and accordingly by virtue of the assignment attained the character of a creditor with locus standi to seek liquidation of a company.
- [8] Mr. Evans argued that Xena is for all real purposes in an identical position as the redeeming shareholder in **Westford** in that it is a claim in respect of a member's entitlement to redemption proceeds and that Xena as assignee of the redemption proceeds can obtain no better title to or interest in the subject matter of the assignment than the assignor had. He relies on **Chitty**.⁶ He says therefore that if the member from whom Xena acquired the redemption claim did not have locus standi to seek liquidation of the Fund, then Xena's position could be no better. This, he says, is correct having regard to the text of the Act as well as for policy reasons.
- [9] With regard to the public policy considerations Mr. Evans says, in essence, that if an assignment of redemption proceeds clothes the assignee with locus standi to bring winding up proceedings thereby allowing redemption proceeds to be treated on an equal footing as an outside creditors' claim in a winding up, then all that would be required to circumvent section 197 of the Act, (which clearly contemplated claims to redemption proceeds being subordinated to outside creditors' claims), was a simple assignment by a redeeming shareholder to an assignee who could then seek liquidation and prove in similar fashion and on an equal footing with outside creditors. Such an approach, he says, would completely destroy the policy considerations which must be taken to have informed the framers of section 197 of the Act. We agree.
- [10] But quite apart from that and more importantly, the answer lies, in the Court's view, in the text of the Act itself. Mr. Moverley Smith, QC on behalf of Xena, and

⁶ Chitty on Contracts (30th edn. Volume 1, Sweet & Maxwell 2008) para. 19-070.

who incidentally was leading counsel in **Westford**, suggested that the starting point in a consideration of the provisions of the Act, is with the question: 'who is a creditor for the purposes of seeking a liquidation order.' Section 2(1) of the Act says that unless the context otherwise requires, 'creditor' has the meaning specified in section 9 of the Act. Section 9 of the Act states:

"9. (1) A person is a creditor of another person (the debtor) if he has a claim against the debtor, whether by assignment or otherwise, that is, or would be, **an admissible claim** in

(a) the liquidation of the debtor..." (My emphasis.)

The Court agree with Mr. Moverley Smith that this provision makes it quite clear that an assignee of an admissible claim is as much a creditor as the assignor. The focus in the Court's view must however be on the question: 'what is an admissible claim'. Section 11, which is subject to section 12, sets out the various types of liabilities which are admissible claims in a liquidation. These cover generally, the liabilities of a company at the time of commencement of the liquidation or liabilities arising after commencement of liquidation by virtue of a prior obligation, or any interest that may be claimed under the Act or the Rules. These are not germane for the purposes of this discussion. Critical in the Court's view is section 12 which sets out what are not admissible claims in liquidation. Section 12 states:

"The following liabilities are **not admissible claims** in the liquidation of a company ...

(a) an obligation arising out of a confiscation order made under

(i) the Drug Trafficking Offences Act, 1992, or

(ii) the Proceeds of Criminal Conduct Act, 1997;

(b) a liability that, under any enactment or rule of law, is of a type that is not claimable, whether on grounds of public policy or otherwise; and

(c) such other liabilities or claims **as may be prescribed.**" (My emphasis.)

[11] Counsel for Xena accepts that section 197 of the Act amounts to a prescription in respect of admissible claims for the purposes of section 12(c). Section 197 states:

“A member, and a past member, of company **may not claim** in the liquidation of the company for a sum due to him **in his character as a member**, whether by way of dividend, profits, **redemption proceeds** or otherwise, but such sum is to be taken into account for the purposes of the final adjustment of the rights of members and, if appropriate, past members between themselves.” (My emphasis.)

[12] Counsel says that section 197 creates two cumulative requirements in order for a claim to be precluded thereunder:

- (i) Firstly, as to the identity of the person making the claim. The person must be a member or past member. Xena being an assignee, he says, is neither a member nor a past member. He argues that the section could easily have included an assignee in similar manner as section 9 but does not. Thus this requirement is not satisfied.
- (ii) Secondly, as to the characteristics of the claim that a person is making. He accepts that a claim by a redeeming member to redemption proceeds is a claim by a member for a sum due to him in his character as a member but, says he, since the person making the claim (Xena) is neither a member nor past member, then it is not possible for him to be making the claim in his character as a member. Thus this requirement is also not satisfied. His argument in short is that Xena’s claim is not caught by section 197.

[13] This argument though attractive and skilfully argued is nonetheless flawed. Whilst it is accepted that Xena is not a member of the Fund, the construction placed on section 197 is not a proper one contextually. The Court is of the view that all that section 197 seeks to do is to capture those type of claims which a person may make and which arise only by virtue of that person’s membership or shareholding in a company and goes on to describe some of those types of claims such as claims to profits, dividends and redemption proceeds. It is descriptive of the characteristic of the claim. The assignment of a claim having that characteristic (and therefore a non-admissible claim) does not thereby convert it simply by virtue of having been assigned, into a claim of a different character. The claim assigned

was for redemption proceeds and on assignment remained one for redemption proceeds. Applying counsel's two-pronged test, the second requirement of section 197 has been met with the result that Xena's claim as an assignee of the redemption proceeds is nonetheless caught by the prescription contained in section 197. Xena, accordingly, does not meet the requirement of being a creditor with standing to apply for the liquidation of the Fund in accordance with sections 2, 9, 12 and 197 of the Act. Its originating application seeking the appointment of liquidators ought to have been dismissed.

Conclusion

- [14] For these reasons the appeal was allowed and the order dated 27th July 2010 appointing joint liquidators discharged. The parties were given liberty to make submissions in respect of the liquidators' remuneration and expenses and as to whom should bear ultimate liability therefore.