IN THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 59 OF 2014 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF THE WIMBLEDON FINANCING MASTER FUND LTD (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Appearances:	**Nick Hoffman and Lachlan Greig of Harney Westwood & Riegels for the JOLs of the SPC Fund**
	Kyle Broadhurst and Kate McClymont of Broadhurst LLC for the JOLs of the Master Fund
Before:	**The Hon. Justice Segal**
Hearing:	**28 June 2018**
Draft Judgment Circulated:	**5 July 2018**
Date of Judgment:	**9 July 2018**

HEADNOTE

Application for leave to commence proceedings under section 97(1) of the Companies Law – proceedings to be in New York - application made after the applicant had filed a proof of debt and lodged an appeal against the rejection of the proof in this Court

JUDGMENT

1. This is my judgment on the application made by the joint official liquidators (the ***JOLs***) of the Wimbledon Fund, SPC (the ***SPC Fund***) to commence proceedings against the

Wimbledon Financing Master Fund Ltd (in official liquidation) (the ***Master Fund***). The application is made pursuant to section 97(1) of the Companies Law (2018 Revision).

2. The evidence in support of the application is contained in the first affidavit of Michael Pearson (***Mr Pearson***). In this affidavit Mr Pearson explains the position as follows:

(a). the SPC Fund is a segregated portfolio company, one of whose active segregated portfolios is the Class C Segregated Portfolio (***Class C Portfolio***).

(b). the SPC Fund, prior to the commencement of its liquidation, was a party to various transactions with, and received payments from, various companies which it is alleged were controlled by the managers of the Master Fund and SPC Fund. It appears that the managers perpetrated a fraud on the Master Fund and that some of the fraudulent transactions which they entered into involved the Class C Portfolio. However, the Class C Portfolio did not participate in the alleged fraud.

(c). on 3 August 2011 the Class C Portfolio received a payment of US$700,000 (the ***Payment***). Mr Pearson says that the Payment was made by Weston Capital Partners Master Fund II Ltd (***Partners***) on behalf of Arius Libra Inc (***Arius***) in order to repay a debt owed to the Class C Portfolio by another company, Gerova Financial Group Ltd (***Gerova***). At the time the Master Fund, the SPC Fund and Partners were managed by Weston Capital Asset Management LLC (***Weston***). It appears that Partners, Weston, Arius and Gerova were used by the managers of the Master Fund to perpetrate and were involved in the fraud. Further details of the transactions giving rise to the Payment are contained in the evidence in opposition filed in this application by the Master Fund. I shall summarise this evidence shortly.

(d). the Master Fund, whose liquidation commenced in June 2014, commenced proceedings in the Supreme Court of the State of New York on 23 May 2016 seeking to recover the Payment as a fraudulent conveyance. The Master Fund brought these proceedings as the assignee of the rights of Partners. The Master Fund claimed that no consideration was given by the Class C Portfolio in return for the payment. On 22 December 2016 Judge Kornreich handed down

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judgment and held that the payment to the Class C Portfolio was a constructive fraudulent conveyance. The court's order was entered on 27 December 2016 (the ***New York Judgment***).

(e). on 1 February 2017 the SPC Fund on behalf of the Class C Portfolio filed a notice of appeal and a motion to re-argue and renew, seeking to vacate the New York Judgment. The SPC Fund/Class C Portfolio argued that new evidence had been discovered, of which it was previously unaware, which showed that the Payment was not a fraudulent conveyance. However, on 16 March 2017, the New York court denied the motion and, on 31 March 2017, ruled that the new evidence should have been submitted on the initial motion and that the court's decision would stand. The court's order was issued on 11 May 2017 (the ***Renew Order***). The Class C Portfolio then filed a notice of appeal of the Renew Order.

(f). the new evidence related to an agreement between the Master Fund, Gerova, Weston and various other parties (the ***Unwind Agreement***) governed by New York law. Mr Pearson says that the Class C Portfolio was owed US$700,000 by Gerova as a result of three loans made between February and July 2011. Gerova issued secured notes and granted a security interest to the Class C Portfolio including a pledge of interests held by Gerova in certain hedge funds (the ***Assets***). He also says that, under the Unwind Agreement, the Master Fund agreed to purchase the Assets and, as part of the consideration for doing so, agreed to pay US$700,000 to the Class C Portfolio in satisfaction of the debt owed to the Class C Portfolio by Gerova. Mr Pearson also says that the Unwind Agreement provided that the Master Fund would assume all of the liabilities associated with the Assets including the liabilities under the secured notes issued by Gerova.

(g). Mr Pearson says that the Master Fund never paid the US $700,000. Instead the payment of US$700,000 was made to the Class C Portfolio by Partners on 3 August 2011 (apparently on behalf of Arius).

(h). Mr Pearson submits that the new evidence and the terms of the Unwind Agreement establish that the Payments were made for good consideration because they were intended to discharge the obligations of the Master Fund to the Class C Portfolio. Accordingly, the Payment should not be treated as a

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fraudulent conveyance and, as I have explained, the JOLs of the SPC Fund appealed the New York Judgment and the Renew Order, thereby seeking to set aside the order requiring the SPC Fund/Class C Portfolio to pay US$700,000.

(i). the JOLs of the SPC Fund also seek to recover US$700,000 from the Master Fund. They have also received New York law advice (from Sadis & Goldberg LLP, a firm of New York attorneys) to the effect that regardless of whether the appeals are successful the Class C Portfolio has a claim for breach of the Unwind Agreement against the Master Fund (and possibly Arius) for payment of US$700,000. Redacted extracts from the advice of Sadis & Goldberg are exhibited to Mr Pearson's affidavit.

(j). in light of this advice, on 31 August 2017, the SPC Fund's JOLs filed a proof of debt for US$700,000 in the Master Fund's liquidation. The proof of debt summarises the basis on which the claim arises as follows:

> *"[The Class C Portfolio] is an intended third party beneficiary of [the Unwind Agreement] ...*
>
> *Under the Unwind Agreement the Master Fund Assumed the benefit of assets belonging to Gerova and the burden of liabilities, including Gerova's obligations under a Pledge Agreement used to secure repayments due from Gerova to [the Class C Portfolio] in accordance with Notes dated 10 February 2011, 15 June 2011and a further Note of unknown date.*
>
> *Although the obligations were thought to have been settled by payments made on Gerova's behalf on 3 August 2011, the effect of the [New York Judgment] was to declare such payments void, such that in effect none of the payments was in fact made as a matter of law.*
>
> *Consequently, as of 22 December 2016 the obligation to pay those obligations reverted to the Master Fund."*

(k). after the date on which Mr Pearson's affidavit was filed, the JOLs of the Master Fund adjudicated and rejected the proof of debt. The reasons for the rejection were set out in detail in a notice of rejection of proof dated 14 November 2017 (***Notice of Rejection***). The reasons are discussed in the evidence in opposition filed by the JOLs of the Master Fund and I deal with them in more detail below. In essence there were three reasons. First, that the Unwind Agreement is not valid or binding on the Master Fund. Second, that, even if it was, the Class C Portfolio has no enforceable rights under it. Third, any claim by the Class C Portfolio in connection with the Unwind Agreement is time-barred.

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(l). in these circumstances, the JOLs of the SPC Fund wish to commence proceedings against the Master Fund to claim under and enforce the terms of the Unwind Agreement, in particular to enforce what Mr Pearson says is the Master Fund's obligation to pay US$700,000. The JOLs of the SPC Fund submit that the appropriate forum in which to litigate this claim is New York for three main reasons:

(i). the Unwind Agreement is governed by New York law and New York is designated as the exclusive venue.

(ii). it is more cost efficient to litigate the claim in New York as doing so would avoid the need for expert evidence on New York law and be likely to avoid the possibility of any jurisdiction challenge as to the proper forum in the event of proceedings in this jurisdiction.

(iii). determining the dispute in New York would be the most convenient venue for all the interested parties including in particular any witnesses.

(m). therefore the JOLs of the SPC Fund apply for leave under section 97(1) of the Companies Law to issue proceedings in New York. Mr Pearson submits that, in the absence of leave, the Class C Portfolio will be unfairly prevented from seeking to recover sums that are properly due to it.

3. The JOLs of the Master Fund oppose the application. The evidence in support of their opposition is contained in the third affidavit of Graham Robinson (***Mr Robinson***). Mr Robinson's evidence can be summarised as follows:

(a). Mr Robinson provides much more detail concerning the relevant activities, transactions and agreements which gave rise to the fraud on the Master Fund and the Payment to the Class C Portfolio. I shall not mention all of the transactions and agreements to which Mr Robinson refers but only those that are most relevant to this application.

(b). Mr Robinson notes that the two main principals behind Weston were Mr Hallac and Mr Wellner. Mr Hallac had pleaded guilty in criminal proceedings in the

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US to securities fraud investment adviser fraud and conspiracy to commit those substantive offences with respect to the Class C Portfolio, the Master Fund and Partners and Mr Wellner was scheduled to stand trial in the US on similar charges in February of this year.

(c). Mr Robinson says that Mr Hallac and Mr Wellner, acting through Weston, caused the Master Fund to enter into various agreements the effect of which was to enable them to misappropriate the Master Fund's assets. Pursuant to these agreements the Master Fund transferred the Assets to Gerova (pursuant to an assets purchase agreement entered into in late 2009, the ***Asset Purchase Agreement***) and Gerova procured three separate payments totalling US$700,000 to the Class C Portfolio in February, June and July 2011. The agreements also included the Unwind Agreement which Mr Hallac purported to cause the Master Fund to enter into on or about 3 August 2011 (even though the agreement was dated 6 July 2011). The Unwind Agreement purports to unwind the transfer by the Master Fund of the Assets to Gerova pursuant to the Asset Purchase Agreement so that the Assets would return to the Master Fund and the Master Fund would be required to make certain payments set out in a payment schedule. The payment schedule included sums owing to the Class C Portfolio. However the Unwind Agreement was never presented to the Master Fund's board and approximately one month after it was executed Mr Hallac and Mr Wellner (together with an associate involved in the fraud, Mr Bergstein) caused a different agreement addressing the same issues to be prepared. This other document was called the settlement agreement and was also dated 6 July 2011 (the ***Settlement Agreement***). The Settlement Agreement addressed the relationship between the Master Fund and Gerova on very different terms from the Unwind Agreement. The Settlement Agreement records that the requisite investor consents required to allow completion of the Asset Purchase Agreement were not obtained and states that the Master Fund had been fraudulently induced to enter into the Asset Purchase Agreement and that the Asset Purchase Agreement was rescinded and null and void. It records that the Master Fund at all times had remained the owner of the Assets. Importantly, the Settlement Agreement did not contain the payment schedule which had been included in the Unwind Agreement and was the basis of the SPC Fund's claim against the Master Fund for payment of US$700,00 nor did it make any

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reference to a debt owed to the Class C Portfolio. The Settlement Agreement was subsequently presented to an approved by the board of the Master Fund.

(d). Mr Robinson refers to the Rejection Notice and the reasons attached thereto. It is worth setting out in full the part of the reasons that deal with why the JOLs of the Master Fund rejected the proof of debt:

> *"I. The Unwind Agreement is not a valid or binding agreement upon the Master Fund. The reasons for this include the following:*
>
> *a. The Unwind Agreement formed part of a fraud that was committed against the Master Fund. Class C cannot enforce a fraudulent agreement against the Master Fund, an innocent party and the victim of the fraud;*
>
> *b. From the information, available to the JOLs, actions required under the APA were not completed and the Assets were never transferred. The Unwind Agreement which is based upon those actions having occurred is incorrect and accordingly unenforceable on the basis of want of consideration and/or misrepresentation and/or mistake;*
>
> *c. The Unwind Agreement was never approved by the Board of Directors of the Master Fund. Instead the Board of Directors were presented and approved the Settlement Agreement. Accordingly, the Master Fund never validly executed the Unwind Agreement and cannot be bound thereby;*
>
> *d. Even, if contrary to the above, Class C's position that the Unwind Agreement was a binding agreement was established, the agreement could not be enforced as:*
>
> *i. The transactions contemplated by the Unwind Agreement never occurred. Pursuant to the terms of the Unwind Agreement various deliverables were to be provided including liability assumption instruments and transfer documents, To the best of the knowledge of the JOLs this did not occur;*
>
> *ii By § 2.4(d) of the Unwind Agreement the Master Fund was to make certain payments as a condition of the agreement closing. Those payments would have amounted to yet further sums fraudulently obtained from the Master Fund as a price for return of the Master Fund's assets the subject of a prior fraud. Payments were not made and accordingly the Unwind Agreement on its own terms never came into effect. In any event the payments would have been void;*
>
> *iii. To the extent that either the Unwind Agreement or the Settlement Agreement are enforceable agreements notwithstanding the foregoing, it is clear that the Settlement Agreement was intended to replace the Unwind Agreement.*
>
> *e. Without prejudice to the foregoing, Class C's assertion that the pursuant to the Unwind Agreement the Master Fund assumed the "burden of liabilities including Gerova's obligations under a Pledge Agreement used to secure repayments due from Gerova to Class C in accordance with Notes dated 10 February 2011, 15 June 2011 and a further Note of unknown date" is incorrect. The express terms of the*

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Unwind Agreement are to the opposite effect. By § 2.1(a) of the Unwind Agreement the Master Fund was to receive the Assets back free of any encumbrances (which included any pledge).

II. Class C has no enforceable rights under the Unwind Agreement. The reasons for this include the following:

a. Class C is not a party to the Unwind Agreement and the Unwind Agreement does not purport to give Class C any rights under the agreement;

b. There is no factual basis for attempting to imply any such right or for Class C to claim it relied upon the Unwind Agreement. The JOLs note at paragraph 23 of Mr. Pearson's Affidavit he states that Class C was aware of the Unwind Agreement and relied upon it. He states as follows: "In reliance upon the Master Fund's aforementioned contractual promises to pay Class C the US$ 700,000 loan amount, Class C allowed its secured collateral to be transferred to the Master Fund." This statement is demonstrably false. Mr. Vincent King, director of the Fund, in his Affidavit sworn on 5 July 2016 stated that neither Class C, nor its investors, had any knowledge of these transactions. Further, as Mr. Pearson confirms at paragraph 19 his Affidavit, Class C alleged on 1 February 2017 that it had not been previously aware of the Unwind Agreement and that it was "newly discovered evidence";

c. While it is not necessary for the JOLs to determine whether the secured notes referenced by Class C are valid there is strong evidence to suggest that they are not. As noted above, the Master Fund never transferred the Assets. WFM Holdings Ltd accordingly did not have ownership of the assets it purported to pledge to Class C. Further, as stated above Class C was unaware of these alleged transactions. Mr. Vincent King, director of Class C, swore in his affidavit dated 5 July 2016 that the US$700,000 received by Class C had been "stolen" from it;

III. Any claim by Class C in connection with the Unwind Agreement is time barred. If contrary to the above, the Unwind Agreement was valid and capable of enforcement any alleged breach took place in August 2011. Accordingly, any claim would be well outside the relevant limitation period.

For the foregoing reasons the claim is rejected. For the sake of completeness, the JOLs confirm that they did take into account the opinions of Sadis Goldberg which were exhibited to the Affidavit of Mr. Pearson. While heavily redacted those opinions do not appear to have considered most, if not all, of the points raised above."

(e). Mr Robinson says that, in light of these facts and circumstances, the claim of the Class C Portfolio pursuant to the Unwind Agreement is unsustainable. Furthermore he argues that:

(i). the Class C Portfolio elected to submit a proof of debt in the liquidation of the Master Fund. That proof of debt has been adjudicated upon and rejected in full. Therefore if the Class C Portfolio wishes to contest that adjudication it is required to follow

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the usual process and appeal the adjudication pursuant to Companies Winding Up Rules (***CWUR***) Order 16, rule 18.

(ii). litigation in New York is not a more appropriate method or forum for determining the claim than an appeal in the winding up and would be prejudicial to the Master Fund and its stakeholders. He relies in particular on the following points:

(a). the JOLs of the Master Fund do not accept that New York law will necessarily govern the claim or all aspects of the claim made by the SPC Fund (because the Master Fund asserts that it is not bound by the agreement or can rescind it) and say that, in any event, the New York law issues which do arise can conveniently and fairly be dealt with by expert evidence in proceedings in this Court.

(b). proceedings in New York will involve the cost of the Cayman JOLs and attorneys of both the Master Fund and the SPC Fund travelling to New York (and the costs of the New York counsel appearing in the New York proceedings) and it is likely that these costs would be greater than the cost of engaging New York law experts to give written export reports and having them come to Cayman to give evidence.

(c). the JOLs of the Master Fund do not accept that New York will be a more convenient venue for any witnesses who might be require to attend and give evidence. Mr Robinson points out that the SPC Fund has not identified the witnesses whose evidence they would be relying on and who would be required to give evidence. He notes that the directors of the Class C Portfolio have conceded that that they had no knowledge of the Unwind Agreement or the purported loan by Class C Portfolio to Gerova, while the individuals involved with the Unwind Agreement (Mr Hallac, Mr Wellner and Mr Bergstein) have either admitted the fraudulent conduct or have been or are likely to be convicted of fraud and are unlikely to be available

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to give evidence. Furthermore the directors of Master Fund who are likely to be called as witnesses are resident in the Cayman Islands.

(d). since the costs regime in New York is different from that in Cayman and the costs of the successful party are irrecoverable, the JOLs of the Master Fund are at risk of serious prejudice if, as they consider is highly likely, they are successful in defending proceedings in New York as they would be unable to recover their costs.

(e). furthermore, as Mr Broadhurst, the attorney for the JOLs of the Master Fund, submitted at the hearing, allowing the dispute to be litigated in the state court of New York would involve and introduce a new and separate appellate regime into the claims adjudication process and at a minimum reduce this Court's control of that process.

4. The submissions of Mr Hoffman, the attorney for the JOLs of the SPC Fund, can be summarised as follows:

(a). the fact that the SPC Fund has filed a proof of debt and then lodged an appeal from the rejection of the proof does not preclude it from applying for leave to commence proceedings under section 97(1) of the Companies Law.

(b). the Court should apply the jurisprudence and case law governing the exercise of the discretion under section 97(1):

(i). the essential question before the Court upon an application under section 97 of the Companies Law is whether the appropriate method to determine the proposed claim is the proof of debt process under the CWUR or a separate legal proceeding: *Re Bank of Credit and Commerce International SA (No 4)* [1994] 1 BCLC 419 at 426g; *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited and others* [2010 (1) CILR 553] (**Saad**) at paragraph 73.

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(ii). the Court's discretion is broad and unfettered. It has a free hand to do what is right and fair in the circumstances of the particular case: *Re Aro Co Ltd* (2) [1980] 1 All ER 1076a; Saad at paragraph 73.

(iii). what is right and fair is to be considered in the context of the circumstances as a whole (i.e. not from the perspective of one party or another). In *Enron Metals & Commodity Ltd v HIH Casualty & General Insurance Limited* [2005] EWHC 485 (Ch) (***Enron***) at paragraph 4, the Court observed that:

> "*... fairness in this context is fairness in the context of the provisional liquidation or liquidation as a whole, and the ascertainment of what is fair necessarily involves a consideration of the interests of the creditors as a whole and of the capacity of the provisional liquidators or liquidators to deal with the burden of the proposed litigation.*"

(iv). the Court need only be satisfied that the SPC Fund's claim as set out in the proof of debt is a claim worth entertaining. Because section 97 of the Companies Law is concerned with a choice of procedures, it follows that the Court is not required to, and indeed should not, investigate the merits of the proposed proceedings, other than to satisfy itself that there is a claim worth entertaining. Mr Hoffman relied principally on three main authorities for his formulation of the threshold test to be applied by the Court in considering the claim which is to be the subject of the relevant proceedings.

In *Re Exchange Securities & Commodities Ltd* [1983] BCLC 186, a case in which investors sought to issue legal proceedings against a company in liquidation in order to establish trust interests in their investments into the hands of the company, Mervyn Davies J held (at page 192a) (Mr Hoffman's emphasis added):

> "***It is no part of my duty to say now whether or not there subsist such trust interests as counsel for the applicants (Mr Stewart) contends for. If it were plain to me that such interests did not subsist I should say so and that would be an end of the application, but such is not plain to me.*** *There is I think an arguable case about the nature of the investors' or plaintiffs' rights.* ***It follows that I should consider further whether or not to accede to the application.*** *If I do, then* ***all questions about the nature of the investors' rights will be answered in the litigation that will ensue.***"

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In *Re Bank of Credit and Commerce International SA (No 4)* [1994] 1 BCLC 419, in response to the submission that *Re Exchange Securities* is authority for the proposition that the court is concerned to conduct some investigation into the merits of the proposed claim, Parker J observed that (at page 426) (Mr Hoffman's emphasis added):

> "*For my part, however, it does not appear to me that Mervyn Davis J was undertaking any such investigation.* ***It appears to me that the learned judge on that occasion was doing no more than acknowledging that if, on the face of the matter as it appeared to the court, there was no claim or no claim worth entertaining, then plainly the application could not proceed because to grant leave in such circumstances would be a complete waste of time and expense to all concerned.*** *But I do not take the learned judge to have gone any further than that. Indeed, it does seem to me from the way in which the learned judge expressed himself that he regarded the question to be decided on a s 130 application as essentially whether the proposed claim should more appropriately be pursued in separate proceedings or in the course of the winding up and, as the learned judge approached the matter in that case as I see it, that was the issue to which he was directing his attention.* ***Of course if, as I have said, on the face of the matter there was no arguable claim then, indeed, that would have been the end of it.***"

In *Enron Metals & Commodity Ltd v HIH Casualty & General Insurance Limited* [2005] EWHC 485 (Ch), the Court formulated the question as follows (at paragraph 4):

> "*Is the claim so bad that it would be a waste of resources to permit it to proceed to arbitration?*"

(v). the JOLs of the SPC Fund and the Class C Portfolio submitted that this low threshold is clearly met (and comfortably exceeded) in the present case. The Court was in a position to form a view of the basis and merits of the claim based on the formulation of the claim and the defences in the proof of debt and the Rejection Notice without the need for sight of a draft complaint or points of claim. The strength of Master Fund's purported defences is a matter for the litigation that, subject to grant of the Court's leave, will follow.

(vi). the JOLs of the SPC Fund and the Class C Portfolio have been advised by counsel in the US that "*there is a strong claim under New York*

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law for repayment of US$700,000 pursuant to the terms of the Unwind Agreement" (as set out in Mr Pearson's affidavit). Mr Pearson has exhibited the written advices of Sadis & Goldberg dated 23 August 2017 and 31 August 2017. This advice, in the circumstances, was of considerable weight. Mr Hoffman noted that the JOLs of the Master Fund had challenged the comprehensiveness and reliability of the Sadis & Goldberg advice in the Rejection Notice but had not in their evidence referred to, let alone provided, extracts from any New York law advice to challenge the view of Sadis & Goldberg that the Class C Portfolio had a good claim under New York law.

(c). as regards the other factors to be taken into account by the Court when exercising its discretion, Mr Hoffman relied on the following passage from the judgment of McPherson J in the Supreme Court of Queensland in *Ogilvie-Grant and anor v East* 7 ACLR 669 (***Ogilvie-Grant***):

> "*It, of course, follows that it is quite impossible to state in an exhaustive manner all the circumstances in which leave to proceed may be appropriate, but in the past they have been said to include factors such as the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage to which the proceedings, if already commenced, may have progressed.*"

(d). Mr Hoffman (basing himself on Mr Pearson's evidence in his affidavit) submitted that it would be "*right and fair*" for the SPC Fund's claim to be, and the only way that the SPC Fund's claim could be properly and fairly disposed of was if it was, determined by way of a legal proceeding in New York, rather than an appeal to this Court of the Master Fund's rejection of the proof of debt, in circumstances where:

(i) the Master Fund is balance sheet solvent;

(ii). the Master Fund is a frequent litigator in courts of New York;

(iii). the majority, if not all, of likely witnesses reside in the United States;

(iv). the SPC Fund and the Class C Portfolio's claim is based on a contract and is otherwise governed by New York law;

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(v). the defences asserted by Master Fund to the claim are complex – in particular the claimed defences of fraud and privity of contract;

(vi). it is likely to be the more cost effective course of action.

(e). the approach adopted by the Chief Justice in *Madison Niche Assets Fund Ltd (in liquidation) and Madison Niche Opportunities Fund Ltd (in liquidation)* (unreported, 30 May 2016) (***Madison***) applied and should be followed on the present application. While this decision had not been cited to me by either party in the skeleton arguments, I had drawn it to counsel's attention and the decision was relied on by Mr Hoffman.

(f). Mr Hoffman noted that the case concerned an application for retrospective leave to continue proceedings under section 97(1) of the Companies Law. Litigation had been commenced in Delaware by a party to a consulting agreement (TMC) which had been entered into with two Cayman companies that were in liquidation in the Cayman Islands. In the litigation, which had been commenced without leave from this Court, TMC claimed damages for breach of the consulting agreement. The consulting agreement had been entered into after the companies were placed into voluntary liquidation but before the JOLs' appointment was continued by way of supervision by Court order. The JOLs had obtained recognition in the United States Bankruptcy Court for the District of Delaware for the Cayman proceedings under Chapter 15 of the United States Bankruptcy Code but only after an agreement between the JOLs and TMC whereby TMC withdrew its objection on terms that TMC's proceedings would not be stayed. The Chief Justice granted leave and said the following:

> "*12. The leading authority in this jurisdiction as to when the broad discretion of section 97(1) should be exercised is the judgment of this Court in [Saad]...*
>
> *14. At paragraph 73, the SAAD Judgment goes on to state (citing the judgment of Jonathan Parker J. in Re Bank of Credit and Commerce Int'l S.A. (No. 4) [1994] 1 BCLC at 426); that in cases where there are competing claims to the assets, the essential question that a court must ask in determining whether to grant leave under the English equivalent of section 97 is "[w]hat is the most "appropriate method for determining the proposed claims — is it separate proceedings or is it the winding up process".*

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15. *The implicit premise of the question is the recognition that while claims against the Company are ordinarily to be required to be resolved in the context of the winding up process, there may be circumstances where it is appropriate to allow proceedings to take place outside of that process. An example of such circumstances which arose in [Saad], as it arises here, is where a claim must first be proven by action through the juridical process and give rise to a judgment debt before that debt itself could become the basis of a claim in the winding up process*

16. *And so, reflecting upon the circumstances of this case where TMC's Delaware Litigation does not involve a direct competing claim to the assets of the liquidation estates but a contingent claim for damages to be enforced by a judgment debt for proof in the liquidation, the essential question can be restated in terms of whether it is more appropriate to allow the Delaware Litigation to run its course or whether TMC should be required to establish its claim exclusively in the winding up process.*

17. *That question .. only has to be asked to be answered: TMC's claim cannot be resolved within the winding up process itself until it is established outside of that process and so the choice is as between separate litigation in Delaware and separate litigation in this jurisdiction.*

18. *The question therefore becomes: which is the more appropriate forum for determining TMC's claim?*

19. *I accept that the overwhelming answer is to permit the TMC Litigation to proceed in Delaware for the following reasons:*

    (a). the Companies and the JOLs have agreed to the Recognition Order permitting the TMC Litigation to continue in Delaware and this, to my mind, is a sufficient reason in and of itself to grant the relief requested;

    (b). in addition, the Consulting Agreement which is the subject matter of the dispute is governed by the laws of Delaware and the agreement designates Delaware as the exclusive venue for the resolution of disputes relating to it;

    (c). the TMC Litigation involves claims against various other Madison Niche entities other than the Companies. If TMC were not permitted to proceed with the TMC Litigation but was forced to litigate in the Grand Court, then near identical litigation would be taking place against those other entities in Delaware and so there would be different parties engaged in what is essentially the same dispute but in different jurisdictions at significant duplication and waste of costs; and,

    (d). determining the TMC Litigation in Delaware would be more convenient for the witnesses, and so permitting it to continue would ensure that there are no costs wasted by either the JOLs or TMC."

(g). Mr Hoffman submitted that even though in the present case the New

York proceedings had not already commenced and there was no question of the JOLs of the Master Fund having agreed to permit such proceedings to commence as the JOLs in *Madison* had done (so that the independent and sufficient justification for permission as set out by the Chief Justice in sub-paragraph 19(a) did not apply), nonetheless the criteria identified as reasons for granting leave in sub-paragraphs 19(b) and (d) were applicable here and sufficient to just the granting of leave. Furthermore, Mr Hoffman relied on the Chief Justice's summary of the applicable analysis and principle and submitted that in the present case, as in *Madison*, "*the essential question [was] .. whether it is more appropriate to allow the [dispute between the SPC Fund and the Master Fund] to [be resolved by proceedings in New York] or whether [the SPC Fund and the Class C Portfolio]should be required to establish its claim exclusively in the winding up process.*"

5. Mr Broadhurst's submissions, which followed the position set out in Mr Robinson's affidavit, can be summarised as follows:

(a). the fact that there has already been an adjudication upon the proof of debt is fatal to this application. Subject only to a successful appeal, the adjudication by the JOLs of the Master Fund is final (he relied on the decision of Park J in *BCCI v. Habib Bank Ltd* [1999] 1 WLR 42). The SPC Fund has filed an appeal of the proof of debt which must and will be determined by this Court in the proceedings constituted by the appeal. It was now too late for the JOLs of the SPC Fund to seek to institute litigation outside the Cayman winding up proceedings. It cannot have a second bite at the cherry.

(b). on the question as to whether the Court could, within the appeal, permit at least certain issues governed by New York law to be decided by proceedings in New York, Mr Broadhurst rejected the submission made by Mr Hoffman, in adopting my suggestion made during the hearing, that the Court could adjourn the appeal to allow the commencement of, and pending a final judgment in, the New York proceedings. Furthermore, he noted that despite inviting the JOLs of the SPC Fund to agree that the summons for directions in the appeal be heard at the same time as the present application for leave to issue the New York

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proceedings, the JOLs of the SPC Fund had refused to agree so that the question of the directions to be given as to the further conduct of the appeal was not currently before the Court.

(c). even if it was not too late for an application to be made under section 97(1) of the Companies Law, the SPC Fund and the Class C Portfolio needed to show a good arguable case before the Court could or should consider the other factors to be taken into account on such an application (he relied in particular *BCCI (No 4)* [1994] 1 BCLC 419 and *Enron* and *Saad*). They could not do so. He noted that the SPC Fund and the Class C Portfolio had only provided the most general and limited of outlines of their claim. They had not provided a draft pleading (which had been provided in many of the cases which had been cited in the parties' skeletons and which were relied on by the SPC Fund and the Class C Portfolio). The Court had to consider carefully the claim in some detail and a summary of the kind relied on in the present case was insufficient. The Court was not in a position to conclude that the SPC Fund and the Class C Portfolio had discharged the burden of proof of establishing a sufficiently strong claim to merit the JOLs of the Master Fund being put to the trouble and expense of having to engage in litigation outside the winding-up process. Even if the Court was prepared to consider the claim on the limited materials made available, the claim was unsustainable. The SPC Fund and the Class C Portfolio had not challenged any of the key parts of Mr Robinson's evidence in support of the rejection of the claim, namely that the Master Fund was the victim of several frauds which involved its assets being improperly taken and then utilized to make fraudulent payments; the Unwind Agreement formed a part of those frauds and that the schedule of payments within the Unwind Agreement, upon which the Class C Portfolio relies, was a schedule of payments to the individuals who were the facilitators of those frauds. Mr Broadhurst submitted that it was difficult to see how these facts could be challenged given the guilty pleas and convictions of the parties responsible for the frauds and that the SPC Fund had failed to put forward any credible basis that, notwithstanding the fact that the Unwind Agreement was fraudulent, it should nonetheless be capable of being enforced against the Master Fund as the victim of the fraud. Furthermore, the advice from Sadis & Goldberg should be given little weight. It was redacted and therefore incomplete and based on an analysis that was difficult to assess, based on incomplete facts and failed to consider the main points raised in the

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Rejection Notice based on the asserted fraud.

(d). even if the Court was satisfied that the SPC Fund and the Class C Portfolio had established a good arguable claim (or otherwise satisfied the threshold test), for the reasons given by Mr Robinson (which I have summarised above) litigation in New York was not a more appropriate method or forum for determining the claim and would be prejudicial to the Master Fund and its stakeholders.

(e). the decision in *Madison* was distinguishable on a number of grounds. Importantly, the claim arose after the commencement of the liquidation and was therefore not provable. Leave to bring proceedings to enforce such claims is generally allowed. Furthermore, the Delaware proceedings in that case were properly formulated in the pleadings in the action which had already commenced. It also appeared that, in light of a full understanding of the nature of the action and how it was to be litigated in Delaware, the Chief Justice was satisfied that on the facts of that case there would be witnesses who would need to give evidence in the Delaware proceedings and litigating in Delaware would be more convenient for them. The Court could not justify such a conclusion in the present case for the reasons I have already explained. Mr Broadhurst submitted that in the appeal of the Rejection Notice the Court may well need to, and decide that it was in all the circumstances just and fair, that the dispute be decided based only or largely on affidavit evidence and expert reports. There was also, in this case, no question, as there had been in *Madison*, of parallel proceedings involving other parties to the same dispute needing to continue in any event in the foreign proceedings. Even if it was right to say, which Mr Broadhurst did not accept, that the factors in sub-paragraphs 19 (b) – (d) were sufficient to justify the granting of leave independently of, rather than in addition to, the JOLs' agreement referred to in sub-paragraphs 19 (a), they did not apply at all or with the same force in this case as they did in *Madison*.

6. Accordingly, a number of issues arise:

(a). is it too late for the SPC Fund (and the Class C Portfolio) to apply for leave to commence proceedings in circumstances where it has already lodged an appeal in this Court against the rejection of its proof of debt and thereby elected to pursue an appeal and invoked the jurisdiction of the Court?

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(b). if it is not too late, should the Court grant leave in the circumstances of this case?

(c). if it is too late, and the only remedy for the SPC Fund (and the Class C Portfolio) is to proceed by way of the appeal against the rejection of its proof of debt, can the Court permit and give directions for the determination of all or some of the issues that arise on the appeal to be the subject of proceedings in New York?

(d). if the Court has the jurisdiction and power to allow some or all of the issues in dispute raised by the appeal to be determined by proceedings in New York, would it be appropriate to do so in this case?

7. Only the issues raised in sub-paragraphs 6(a) and 6(b) arise directly on this application since there is no application for directions as to the conduct of the appeal before the Court and the submissions made on this application (both in writing and orally at the hearing) have focussed mainly on the claim for leave to commence the New York proceedings. However, I do make some comments on the issues raised in sub-paragraphs 6(c) and 6(d) because there was some discussion of whether the relief sought by the SPC Fund could be granted within the appeal process and the relief available and to be granted within the appeal process is as a practical matter closely connected with the leave point (indeed it was common ground that the core issue was how the dispute over the SPC Fund's claim was to be disposed of and litigated). While I am therefore not able to reach a decision on the directions to be made as to the conduct of the appeal and the comments I make with respect to the conduct of the appeal should not be taken as decisions, I hope that such comments will assist the parties in forming a view on what directions to seek.

8. It seems to me that it would not be appropriate for the JOLs of the SPC Fund to be permitted to litigate the dispute over their claim in the winding-up in New York even if they are right that they can apply for leave at this stage (or that the Court has jurisdiction within the appeal to direct that issues in dispute be litigated in New York). Therefore the issue set out in sub-paragraph 6(a) (and sub-paragraph (c)) does not need to be decided.

9. I have so concluded for the following reasons:

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(a). I do not consider that the JOLs of the SPC Fund have established that it would be right and fair in all the circumstances for (or that, in all the circumstances, I should otherwise exercise my discretion to grant leave so as to permit) the dispute concerning their claim in the Master Fund's liquidation to be determined, in whole or part, by New York proceedings.

(b). in the present case, where the question of whether to allow foreign proceedings arises after a proof of debt has been lodged and rejected and an appeal against the rejection has been filed, the right approach is to consider what procedure is best suited to deal with the issues in dispute so as to dispose of the claim in the liquidation fairly, justly and expeditiously, taking into account the fact that the appeal process is conducted by the Court within its jurisdiction over the insolvent estate and therefore that the need for the cost effective and timely administration of the estate and the interests of creditors as a whole need to be taken into account.

(c). in order to determine the proper and most appropriate procedure to be adopted it is necessary to compare the manner in which the proceedings in this Court on the appeal will be conducted with the manner in which the New York proceedings would be conducted and to ask whether it is right and fair in all the circumstances, or necessary in order to ensure that the dispute is dealt with justly, expeditiously and economically (taking into account the need for the proper conduct of the liquidation), that the JOLs of the SPC Fund be permitted to litigate their claim in the New York court. The benefits and disadvantages of the foreign proceedings have to be compared with the alternative procedure that will be followed if leave to commence (or directions for the commencement of) the foreign proceedings is not granted.

(d). as McPherson J said in *Ogilvie-Grant*, the Court considers a wide range of factors such as the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved and the stage to which the proceedings, if already commenced have progressed. The Court will always consider the context and how the claim will be resolved in the event that leave is not granted. So where the issue is whether leave to commence ordinary proceedings outside the liquidation should be granted in a case involving an

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application for leave before a proof has been filed (rather than as here an application for leave to commence foreign proceedings when litigation on the proof has already been initiated upon the filing of the appeal against rejection) the Court can take into account evidence to suggest that the creditor's claim will be rejected and an appeal from the decision would follow to justify the granting of leave, since proceedings will be needed in any event (see McPherson & Keay *The Law of Company Liquidation* (4th ed., 2018) at paragraph 7-079, footnote 683).

(e). I also consider that the Court has the power on an appeal under CWUR O.16, r.17 and r.18 to adjust the procedure and give directions so as to ensure that the appeal is dealt with justly, expeditiously and economically having regard to the issues raised by the appeal. I take the following statement of the law, practice and procedure in Queensland in 1983 by McPherson J in *Ogilvie-Grant* (at page 672) to be applicable in the Cayman Islands and to represent the position under CWUR O.16, r.17 and r.18:

> "*As a matter of history, a winding-up by the court was and remains today an administration conducted by the court ... Both because of this and because it was before the Judicature Act an administration conducted in Chancery, it was inevitable that there should be restrictions on the bringing of proceedings whether at common law or otherwise during the course of that administration. What is substituted for litigation in the ordinary form is a procedure by which a claimant lodges a verified proof of debt with the liquidator who admits or rejects it wholly or in part and from whom an appeal lies to a judge who determines that appeal de novo primarily on affidavit material: Re Kentwood Constructions Ltd [1960] 1 WLR 646. There can be no doubt that ordinarily such a procedure is, and is designed to be, much more expeditious and less expensive than ordinary proceedings by way of action. If this means that it occasionally has the consequence that the attainment of perfect justice is sacrificed to expedience it may be justified by the circumstances that on appeal it is possible under modern rules of procedure for the judge in appropriate cases to make orders for discovery and even for the delivery of pleadings where it appears necessary or desirable to do so.*"

And I would add that the Court can make other procedural orders including directions for the filing of witness statements and for the cross-examination of witnesses in appropriate cases. The appeal process involves considerable procedural flexibility and allows the Court to adopt a procedure that fits the case in question and achieves a fair balance between the need to achieve an expeditious and inexpensive resolution of claims to prove in the liquidation and the need to resolve the dispute justly. In some cases a summary procedure can

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be adopted on appeal to resolve issues in dispute with respect to the claim. In other cases where substantial sums are at stake and complex issues of fact or law are involved, full pleadings, discovery and witness evidence with cross-examination will be needed fairly to deal with the claim. If the creditor applies for leave before filing a proof in such a case, leave to commence ordinary proceedings makes sense (as a matter of expedience and convenience) since full litigation is likely to be required in any event even if a proof and appeal against rejection are lodged. In the present case where the creditor says that foreign proceedings are required after lodging an appeal against rejection of his proof, the issue is whether, assuming that the Court has the power to permit foreign proceedings to be commenced after an appeal has been lodged, the foreign proceedings are needed either to achieve a more expeditious and inexpensive resolution of the SPC Fund's claims or to resolve the dispute justly as compared with the procedure that would be adopted in proceedings in this Court.

(f). I accept a number of the submissions made by Mr Broadhurst (and the arguments made by Mr Robinson) as to the disadvantages of proceedings in New York compared with proceedings in this Court (whether the proceedings are conducted by way of an appeal or as ordinary proceedings):

(i). it is not self-evident and the evidence in this case does not demonstrate that litigation in New York will be cheaper than litigation in this Court. Proceedings in either court will involve both the New York attorneys and the Cayman JOLs and their attorneys. In the event of proceedings in New York the Cayman JOLs and their attorneys will need to be involved and travel to New York at least for hearings. In the event of proceedings in the Cayman Islands the New York attorneys will need to be give expert evidence. It seems to me at least possible that the latter route, which will focus the involvement of New York counsel on the New York law issues in dispute, will be cheaper.

(ii). at this stage, it is only possible to form a general view of the issues and facts in dispute, the law governing those issues, the witnesses who will, or need to be, called to give evidence and the material

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documentary evidence in the case. Not only are there no draft pleadings (presumably a draft writ or complaint in the case of proceedings in state court in New York) but no evidence from New York attorneys as to the procedure that would be adopted and the manner in which the litigation would be conducted in the event that proceedings were commenced in New York.

(iii). the proof of debt asserts a claim based on the effect of the New York Judgment. It argues that the New York Judgment has the effect of setting aside and invalidating the payments made on 3 August 2011 which the Class C Portfolio asserts had been treated as discharging the liability of the Master Fund under the Unwind Agreement. The claim is supported by the advice set out in the letter dated 31 August 2017 from Sadis & Goldberg (but this is only in summary and redacted form). The SPC Fund has not responded to the reasons set out in the Rejection Notice which contain the defences, again in outline form, on which the JOLs of the Master Fund rely.

(iv). from the limited materials available it is possible to say that the dispute raises two main issues:

(A). does the Master Fund have a liability under the Unwind Agreement?

There are three defences raised by the JOLs of the Master Fund in the Rejection Notice. First, the Unwind Agreement is unenforceable against or perhaps is capable of being rescinded by the Master Fund. Second, the Class C Portfolio does not have the right to enforce the terms of the Unwind Agreement. Third, the claims are time-barred

(B). if so, what is the effect of the New York Judgment on such liability?

(v). I do not take the view that the Court can only deal with an application for leave when a draft pleading has been produced although the Court

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is obviously much better placed to form a view on the claim and the issues of law and procedure that will be involved in litigating the claim where such a pleading has been produced and, in the absence of such a pleading, the Court may have insufficient details of the claim to be able to form a view and satisfy itself that separate proceedings outside the liquidation (or special proceedings within the appeal of a rejection of a proof of debt) are needed and justified.

(vi). in the present case, the information available allows me to conclude that the dispute, as set out and formulated in the proof of debt and reasons in the Rejection Notice, will raise issues of New York law and factual disputes. But at this stage it is not possible to identify which New York law or factual issues will be in dispute and whether New York proceedings are required in order to ensure that the dispute is dealt with justly and fairly. As regards the New York law issues, it is unclear whether New York law will be substantially different from Cayman law or whether a determination of the issues will involve the consideration of points which can readily be dealt with by this Court on the basis of expert evidence (the Court is used to deciding questions of foreign law on this basis although I accept that if the points are complex and the subject of a substantial volume of conflicting authority in the foreign jurisdiction it may be that having the case heard by a New York judge is to be preferred and a better way of achieving a just outcome). As regards the factual issues, it may be the case, as Mr Robinson argued and Mr Broadhurst submitted, that it will not be possible to obtain evidence from (let alone cross-examine) many of those who caused or procured the Unwind Agreement to be entered into and generated the transactions involving or payments made to the Class C Portfolio so that the dispute will need to be dealt with (at least primarily) on the basis of affidavit evidence from the JOLs and the documents. If that is the case, there will be no need for witnesses resident in the US to attend to give evidence and be cross-examined and in fact the most likely witnesses of fact will be based in Cayman.

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(vii). it seems to me, based on the evidence filed to date, that the appeal process will provide greater procedural flexibility and allow a procedure to be adopted that will allow the SPC Fund's claim to be dealt with justly and as expeditiously and inexpensively as possible.

(viii). I also give weight to the risk of serious prejudice to the Master Fund of being unable to recover its costs in the event that it was successful in proceedings in New York. The JOLs of the SPC Fund are prepared to take the risk that as winning party they would be unable to recover their costs since the New York courts apply a different costs regime to that followed in the Cayman Islands. But the JOLs of the Master Fund are not.

(ix). I do not, however, see any risk of a jurisdictional conflict or inconsistent judgments in the event that proceedings in New York could otherwise be justified and were commenced. This Court would need to adjourn or stay further proceedings in the appeal pending a final judgment from the New York courts. I do, however, accept Mr Broadhurst's submission that the Court should take into account the loss of control of the appeal process and the risk of additional delays and expense arising from the need for any appeal to follow the procedures and timetable applicable to appeals in the New York courts.

(x). I also accept the submissions made by Mr Broadhurst as to why the Chief Justice's decision in *Madison* is distinguishable and does not require or justify the giving of leave to commence proceedings in New York in this case.

(g). It also seems to me right to take into account the amount at stake in this dispute, as I indicated to Mr Hoffman and Mr Broadhurst at the hearing. The amount in dispute is US$700,000. That, of course, is far from being an insignificant sum of money and its recovery or payment will be a significant matter for both estates. But the amount at stake must be compared with the costs involved in conducting litigation to recover or avoid having to pay that sum. I question whether the costs of a full blown ordinary action can be justified for resolving

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this dispute, between two sets of Cayman JOLs, let alone the costs of a full blown action in another jurisdiction. The need to ensure that the litigation costs are proportionate to the amounts at stake (and that a resolution is achieved as expeditiously as possible) is another reason for preferring to proceed by way of the Cayman appeal. Ideally the JOLs would be able to identify and agree the core issues of fact and law and propose a procedure for conducting the appeal, for approval by the Court that will ensure a cost effective and fair determination of the SPC Fund's claim in the Master Funds' liquidation.

(h). during the hearing I floated the possibility of granting the JOLs of the SPC Fund leave to commence (or otherwise giving directions for the commencement of) the New York proceedings on condition that they agree that this Court would retain jurisdiction to make a costs order against the losing party. It seems to me that adopting this approach (which would require further consideration as to how such a jurisdiction could be exercised) would not resolve the concerns I have and justify the granting of leave (or permission). Furthermore, at the end of the hearing Mr Hoffman invited me to direct, in the event that I was not otherwise prepared to grant leave, that the JOLs of the SPC Fund be permitted to file and serve a draft pleading and renew their application for leave based on it. That also does not seem to me to be a satisfactory course to adopt. It will involve the JOLs of the SPC Fund in further expense (perhaps material expense in the context of the sums at stake) and may well not resolve the problems I have identified with the New York proceedings.

(i). during the hearing I also noted that the claim which the SPC Fund wished to make in the proposed New York proceedings appeared to have been used as the basis for its motion to re-argue and renew and seeking to vacate the New York Judgment. It therefore seemed to me that there might be an argument under New York law that it was not now open to the SPC Fund to bring proceedings on a claim which should have been brought and which the New York court has held should have been brought in the earlier proceedings which resulted in the New York judgment. This issue had not been raised by the JOLs of the Master Fund in support of their opposition to the application of the JOLs of the SPC Fund and had not been argued before me, so I do not give the point any weight. But it does seem to me to raise an unresolved issue as to the legitimacy and viability of the proposed further New York proceedings.

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(j). I would make the following brief comments on the issues raised in sub-paragraphs 6(a) and 6(c). It seems to me that once a creditor has filed an appeal against a liquidator's rejection of the creditor's proof, the only issue for the Court to determine is the procedure to be adopted for conducting the appeal. But the creditor can still argue that in order to dispose of its claim justly it is necessary for the procedure applicable to an ordinary writ action to be adopted, with pleadings, discovery, witness evidence and cross-examination. The mere fact that the creditor has sought to have his claim in the liquidation dealt with and resolved by way of a proof without initially seeking leave to commence ordinary proceedings (perhaps in the hope that those parts of his claim that are not already established such as the quantum of a damages claim can be agreed with the liquidator) should and does not preclude him from asking the Court to adopt a procedure suitable to the issues in dispute if it turns out that agreement with the liquidator is not possible and litigation, by way of an appeal of the rejection, is necessary. If the Court considers it appropriate it can order that the appeal be conducted by way of an ordinary writ action (I do not agree that *BCCI v. Habib Bank Ltd* [1999] 1 WLR 42 requires otherwise – that was a case in which a creditor was held to be bound by the outcome of the adjudication of its proof in a liquidation and precluded from relying for the purposes of set-off on a claim which had been proved and rejected by the liquidator where the creditor had not appealed the rejection).

McPherson J in *Ogilvie-Grant* said that where an application for leave to issue proceedings is made before a proof is filed or adjudicated, the question whether a claimant should be permitted to proceed by action or should be required to submit a proof and then appeal a rejection is reduced largely to one of procedure (at page 672). In my view, the position is the same even after the creditor has lodged an appeal against rejection of his proof. The issue remains one of procedure. What is the appropriate procedure to adopt to dispose of the claim in the liquidation fairly, justly and expeditiously, taking into account the fact that the appeal process is conducted by the Court within its jurisdiction over the insolvent estate and therefore that the need for the cost effective and timely administration of the estate and the interests of creditors as a whole need to be taken into account.

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I do not see why, in principle and in an appropriate case, the Court could not direct that certain issues, and perhaps the determination of liability and quantum, arising on an appeal of a rejection of a proof be the subject of proceedings in a foreign court on the basis that further proceedings in the appeal be adjourned pending a judgment in the foreign proceedings and subject to this Court retaining jurisdiction with respect to the appeal and the conduct by the parties of the foreign proceedings. If foreign proceedings can be permitted before the creditor's proof has been filed or adjudicated and before an appeal against rejection has been lodged, as the Chief Justice held in *McPherson*, when the core question is what is the best procedure to be adopted for disposing of the dispute regarding the creditor's claim in the liquidation, then such proceedings can in principle be permitted after an appeal has been lodged when the core question is the same. However, once the creditor has lodged an appeal within the liquidation proceeding the Court will require a clear demonstration that proceedings in this Court could not justly dispose of the claim or that there would be substantial costs and timing benefits to be derived from the foreign proceedings (and that the Court's control of the appeal would not be compromised).

10. Accordingly, taking into account the various factors and matters I have identified and discussed above, I shall dismiss the SPC Fund's application for leave to commence proceedings in New York and invite the parties to list an application for directions for the future conduct of the appeal. Before such an application is listed the JOLs of the SPC Fund and the Master Fund should consider what procedure would be most appropriate, in light of the comments made in this judgment and seek to agree draft directions.

The Hon Mr Justice Segal
Judge of the Grand Court