IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 7

Court of Appeal / Civil Appeal No 4 of 2023

Between

(1) Kyen Resources Pte Ltd (in compulsory liquidation)
(2) Chan Kheng Tek
(3) Goh Thien Phong

… *Appellants*

And

Feima International (Hongkong) Ltd (In Liquidation)

… *Respondent*

Court of Appeal / Civil Appeal No 4 of 2024 (Summons 22 of 2023)

Between

Feima International (Hongkong) Ltd (In Liquidation)

… *Applicant*

And

(1) Kyen Resources Pte Ltd (in compulsory liquidation)
(2) Chan Kheng Tek
(3) Goh Thien Phong

… *Respondents*

In the matter of Originating Summons No 858 of 2021

Between

Feima International (Hongkong) Ltd (In Liquidation)

… *Plaintiff*

And

(1) Kyen Resources Pte Ltd (in compulsory liquidation)
(2) Chan Kheng Tek
(3) Goh Thien Pong

… *Defendants*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Proof of debt — Liquidators seeking to set-off crossclaims as a basis for rejecting proof of debt — Whether liquidators generally entitled to set-off all crossclaims in the proof of debt process]
[Res Judicata — Applicable principles — Creditor seeking a stay of the appeal in Singapore — Whether res judicata arose in the decision of a liquidator of a foreign company which was pending an appeal in another jurisdiction]

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v
Feima International (Hongkong) Ltd (In Liquidation) and another matter

[2024] SGCA 7

Court of Appeal — Civil Appeal No 4 of 2023 and Summons No 22 of 2023
Sundaresh Menon CJ, Kannan Ramesh JAD, Judith Prakash SJ
9 November 2023

5 March 2024

Kannan Ramesh JAD (delivering the grounds of decision of the court):

1 Can a crossclaim by a company in liquidation be accounted for in the adjudication of an unsecured creditor's proof of debt in circumstances where a set-off is not available? Is the company in liquidation precluded from exercising a set-off if it concurrently pursues the crossclaim by lodging a proof of debt in the liquidation of the creditor in another jurisdiction? These questions arose in the present appeal and raised squarely the distinction between a set-off and a crossclaim by a company in liquidation. These questions also highlighted the difference between a company exercising a set-off against a creditor, and lodging a proof of debt in the creditor's liquidation, each of which engage different considerations and serve distinct purposes.

2 Having considered the parties submissions, we answered these questions in the negative, and dismissed both the appeal and the respondent's application to stay the appeal, with costs to the respondent. We set out our reasons below.

Background

The parties

3 The first appellant, Kyen Resources Pte Ltd ("Kyen"), is a company incorporated in Singapore principally involved in the trading of commodities and foreign currency derivative instruments. It was wound up by the court on 5 August 2019 and Mr Chan Kheng Teck and Mr Goh Thien Phong, the second and third appellants (the "Kyen Liquidators") respectively, were appointed joint and several liquidators. The appellants are collectively referred to hereinafter as the "Kyen Appellants".

4 The respondent, Feima International (Hongkong) Ltd ("Feima"), is a company incorporated in the Hong Kong Special Administrative Region ("Hong Kong") principally involved in the trading of coal and copper cathodes. Feima was wound up by the Hong Kong Court of First Instance on 31 July 2019. Ms Yu Tak Yee, Beryl and Mr Choi Tze Kit, Sammy were appointed joint and several liquidators (the "Feima Liquidators").

5 Kyen and Feima were members of a group of companies. Feima owned 86% of the shares in Kyen and shared common directors with Kyen, namely Mr Chen Xi and Mr Huang Zhuangmian. Also, under a Management and Administrative Services Agreement, Feima agreed to provide Kyen certain management and administrative support services. Such services included assisting Kyen to procure financing and to supervise the sale and purchase of its assets.

Feima's proof of debt in Kyen's liquidation

6 On 26 June 2020, the Feima Liquidators notified the Kyen Liquidators that Feima intended to lodge a proof of debt for about HK$385m in Kyen's liquidation. To facilitate this, the Feima Liquidators requested a copy of Kyen's statement of affairs. This, along with a proof of debt form, was provided to the Feima Liquidators on 21 July 2020.

7 On 2 September 2020, the Feima Liquidators lodged a proof of debt for US$49,355,996.30 which comprised various sums allegedly due from Kyen to Feima for goods sold and delivered by Feima to Kyen; and payments made by Feima on Kyen's behalf. The proof of debt enclosed an extract of Feima's audited financial statements as at 31 December 2018, which reflected these transactions as debts owed by Kyen to Feima, and a copy of the winding up order made by the Hong Kong Court of First Instance.

8 Between September 2020 and June 2021, solicitors for the Kyen Liquidators and the Feima Liquidators exchanged correspondence. A key issue in the correspondence related to requests for evidence and information by the Kyen Liquidators on two matters. First, the sum claimed in Feima's proof of debt. Second, a series of significant transactions between Kyen and various companies which were not members of the group (the "Third-Party Transactions"). On 18 March 2021, a list of questions was sent by the Kyen Liquidators to the Feima Liquidators concerning the Third-Party Transactions. The Feima Liquidators declined to answer those questions.

9 On 23 July 2021, the Kyen Liquidators rejected Feima's proof of debt on alternative grounds. First, that Kyen's alleged crossclaims (the "Crossclaims") against Feima on the basis of the Third-Party Transactions exceeded the claim in Feima's proof of debt. The Kyen Liquidators alleged that

the Crossclaims were for "losses suffered by [Kyen] in [*sic*] certain transactions … between [Kyen], on the one hand, and [third-party companies], on the other, which ha[d] been caused and/or occasioned by [Feima]". This was the primary ground. Second, that there was insufficient evidence to support the claim in Feima's proof of debt to the extent of US$44,900,112.83. This was the secondary ground.

10 On 13 August 2021, Feima appealed the rejection of its proof of debt by Kyen to the General Division of the High Court in HC/OS 828/2021 ("OS 828").

The decision below

11 OS 828 was heard by the Judge below (the "Judge") on 6 October 2022 and judgment was delivered on 6 December 2022. The judgment (the "Judgment") is reported at *Feima International (Hongkong) Ltd (in liquidation) v Kyen Resources Pte Ltd (in liquidation) and others* [2022] SGHC 304.

12 Before the Judge, as regards the Kyen Liquidators' argument on primary ground that the Crossclaims exceeded the claim in its proof of debt (see [9] above), Feima argued that the Crossclaims did not provide Kyen with a legal basis to reject its proof of debt. Three arguments were advanced, that: (a) the proof of debt process only applied to resolve claims *against* a company in liquidation, and not crossclaims *by* the company (see the Judgment at [37]); (b) the Crossclaims did not satisfy the requirements for an insolvency set-off (see the Judgment at [39]–[40]); and (c) it was incumbent upon the Kyen Liquidators to show that they had attempted to pursue the Crossclaims in separate proceedings (see the Judgment at [41]). As regards the Kyen Liquidators' argument on secondary ground that there was insufficient evidence to support Feima's proof of debt (see [9] above), Feima conceded that of the

US$49,355,996.30 claimed in Feima's proof of debt, only the sum of US$32,079,540.97 was being pursued (see the Judgment at [2]).

13 Before the Judge, the Kyen Appellants expanded on the two grounds for rejecting Feima's proof of debt. On the primary ground, the Kyen Appellants contended that a liquidator was entitled to "account for" *all* crossclaims against a creditor when adjudicating the creditor's proof of debt in order to determine the company's "true liabilities" (see the Judgment at [30]). They clarified that the Crossclaims were for US$159m and comprised: (a) a claim for dishonest assistance arising from the Third-Party Transactions; and (b) a claim for knowing receipt based on monies received by Feima from a third-party company which the Kyen Appellants believed were traceable to certain contracts (see the Judgment at [16(a)]–[16(b)]). On the secondary ground, the Kyen Appellants' broad contention was that there was insufficient evidence to support the debt claimed in Feima's proof of debt (see the Judgment at [16(c)]). They also argued that a heightened level of scrutiny of Feima's proof of debt was warranted because Feima was the parent company of Kyen (see the Judgment at [76]).

14 The Judge rejected the Kyen Appellants' arguments. He allowed OS 828 in part and admitted Feima's proof of debt to the extent of US$32,079,540.97, being the sum pursued by Feima before the Judge. On the primary ground, the Judge held that the Kyen Liquidators were not justified in rejecting Feima's proof of debt as the Crossclaims involved complex disputes of fact (see the Judgment at [62]). The Judge was of the view that (see the Judgment at [56]):

> …
>
> (a) First, while a liquidator is entitled to account from the proof of debt any counterclaim/cross-claim, this can only be allowed where the factual matrix is not complex such that it

> remains a matter of simple arithmetic, ie, it is a straightforward matter of identifying the net balance of claims.
>
> (b) However, if there are substantial disputes as to the existence and amounts of the counterclaim/cross-claim which do require a complex web of facts and issues to be untangled, then these must usually be resolved by way of a full trial (or other mode of trial necessary for fairly disposing of the issues) before the arithmetic can resume.
>
> [emphasis in original omitted]

The Judge further held that the Crossclaims did not satisfy the requirements for an insolvency set-off (see the Judgment at [65]). Finally, the Judge was of the view that it was inappropriate to determine whether the Crossclaims were made out as there was no basis in the first place for a set-off (see the Judgment at [74]).

15 On the secondary ground, the Judge held that there was no need for "heightened scrutiny" of Feima's proof of debt as there was nothing to trigger suspicion: the evidence presented by Feima supported the claim in its proof of debt to the extent of US$32,079,540.97 (see the Judgment at [102]–[103] and [133]). In addition, the Judge rejected the Kyen Appellants' attempt to cast doubt on the financial statements of Feima and Kyen, and the statement of affairs provided by Kyen's directors.

16 Dissatisfied, the Kyen Appellants brought the appeal.

The HK Proceedings and SUM 22

17 The appeal was initially scheduled to be heard in August 2023. On 13 July 2023, Feima notified the court that it intended to file an application to stay the appeal because of certain developments that had taken place after the Judge's decision. The next day, Feima filed CA/SUM 22/2023 ("SUM 22")

seeking the following orders: (a) a stay of the appeal in so far as it related to the Crossclaims; (b) that Kyen be restrained from commencing or pursuing proceedings anywhere else in the world in relation to the Crossclaims except in the HK Proceedings (as defined below at [18]); and (c) further or alternatively, that Kyen be required to elect between pursuing the appeal and the HK Proceedings.

18 As things transpired, on 16 January 2023, following the Judge's decision, the Kyen Liquidators lodged a proof of debt in Feima's liquidation for the sum of US$159,308,190.27 based on the Crossclaims. Kyen's proof of debt was rejected by the Feima Liquidators on 25 May 2023. In the explanatory letter accompanying the Notice of Rejection of Proof of Debt, the Feima Liquidators stated that Kyen's proof of debt was "not substantiated", the Crossclaims were "founded on a list of questions that the [Kyen Liquidators] had tendered to Feima" (see [8] above), and "all that [Kyen] ha[d] established from that list of questions [was] their own suspicions". Kyen challenged the rejection in the Hong Kong Court of First Instance (the "HK Proceedings") in HCCW 309/2018 filed on 28 June 2023. Feima's principal argument in support of the stay was that as a result of Kyen placing the Crossclaims before the Hong Kong courts by lodging the proof of debt and challenging its rejection in the HK Proceedings, it was inappropriate for the same issue to also be considered in the appeal.

Stay of the HK Proceedings and parties' agreement to proceed with the appeal

19 However, in what was a reversal of Feima's position that the appeal should be stayed, the parties informed the court on 10 October 2023 that they had consented to the HK Proceedings being heard on or after 11 December 2023. According to Feima, the parties' intention was for the HK Proceedings to be heard only "after the resolution of the Singapore Court of Appeal's decision

on SUM 22 and/or the hearing of [the appeal]". Consequently, on 29 August 2023, the parties jointly filed a Consent Summons in the HK Proceedings for the hearing, which was initially scheduled for 7 September 2023, to be vacated. The application was granted by the Hong Kong Court of First Instance on 30 August 2023.

20 The parties' position made it unnecessary to deal with SUM 22. That said, it was relevant to understand the implications, if any, of the Crossclaims being an issue in both the appeal and the HK Proceedings. In the circumstances, we directed that: (a) SUM 22 and the appeal be heard together on 9 November 2023, and (b) the parties address us on the relevance, if any, of the Crossclaims being an issue in both the appeal and the HK Proceedings.

Parties' cases

The Kyen Appellants' arguments

21 On appeal, two grounds were advanced by the Kyen Appellants. First, the Kyen Liquidators were entitled to account for the Crossclaims when adjudicating Feima's proof of debt, regardless of whether there was factual complexity. Second, the Kyen Liquidators were entitled to apply a heightened level of scrutiny when adjudicating Feima's proof of debt.

22 On the first ground, the Kyen Appellants argued that an account was necessary in order to arrive at a net position on Feima's claim. Two arguments were advanced. First, as the Crossclaims gave rise to "circumstances tending to show fraud or collusion or miscarriage of justice", a liquidator was entitled to account for them when adjudicating the proof of debt. The Kyen Appellants submitted that precedent supported a liquidator's right to account for crossclaims *generally* and that such an account was consistent with the policy

that "adjudication is intended to be a comprehensive means of discharging all debts and liabilities involving the insolvent company". Second, the Kyen Liquidators only needed to show the merits of the Crossclaims on a *prima facie* basis as the "standard applicable to the Court's determination of whether rejection [of a proof of debt] should be allowed on grounds of fraud or collusion is different". The Kyen Appellants repeated their submission before the Judge that the Kyen Liquidators had established the merits of the Crossclaims on a *prima facie* basis.

23 On the second ground, the Kyen Appellants argued that a heightened level of scrutiny was warranted because of the close relationship between Feima and Kyen. Also, the documents presented by Feima did not support the claim in Feima's proof of debt. However, counsel for the Kyen Appellants, Mr David Chan ("Mr Chan"), abandoned this ground at the hearing of the appeal, conceding instead that the documents did indeed evidence the claim in Feima's proof of debt to the extent of US$32,079,740.97. This issue was therefore no longer relevant.

24 Therefore, the sole ground relied upon by the Kyen Appellants in the appeal to reject Feima's proof of debt was that the Kyen Liquidators were entitled to account for the Crossclaims when adjudicating the proof of debt.

25 The Kyen Appellants resisted SUM 22 on two grounds.

26 First, it was not vexatious, oppressive or an abuse of process for Kyen to have lodged its proof of debt and challenged its rejection in the HK Proceedings, while the appeal was pending. Doing so was necessary to preserve Kyen's rights in respect of the Crossclaims and obtain a determination on whether Kyen was entitled to participate as an unsecured creditor in Feima's

liquidation. This was a separate issue from whether the Kyen Liquidators were entitled to account for the Crossclaims when adjudicating Feima's proof of debt. Accordingly, the HK Proceedings and the appeal were not duplicate proceedings as the subject matters, statutory provisions, reliefs sought, positions of parties, and material issues were different.

27 Second, the Singapore courts were the correct forum for resolving the issues in OS 828 as Kyen was in liquidation here. The applicable statutory provisions were found in Singapore legislation. It was therefore plain that the Hong Kong courts could not determine whether the Kyen Liquidators were entitled to account for the Crossclaims when adjudicating Feima's proof of debt. It was also for this reason that *forum non conveniens* could not be a basis to stay the appeal. Lastly, the Kyen Appellants submitted that, where the Hong Kong courts were not in a position to determine OS 828, Kyen and its creditors would be prejudiced if the Kyen was compelled to elect to proceed in one jurisdiction only.

Feima's arguments

28 Feima submitted that the appeal should be dismissed for five reasons:

(a) First, the Judge correctly concluded that the Kyen Liquidators were not entitled to account for the Crossclaims when adjudicating Feima's proof of debt. This was because the proof of debt process only served to resolve claims *against* a company in liquidation and not claims *by* the company.

(b) Second, the Judge correctly concluded that insolvency set-off did not apply to the Crossclaims. Additionally, the Kyen Liquidators

were not entitled to rely on any other forms of set-off in derogation from the *pari passu* principle.

(c) Third, even if it was assumed that the Crossclaims could be taken into account, the Kyen Liquidators had not proven the Crossclaims on a balance of probabilities. The Crossclaims were based solely on an unanswered list of questions posed by the Kyen Liquidators to the Feima Liquidators (see [8] above).

(d) Fourth, the claim in Feima's proof of debt had been sufficiently proved, and the Kyen Liquidators did not have any basis for a heightened level of scrutiny.

(e) Fifth, *res judicata* arose in respect of the Crossclaims. This argument was initially made in relation to SUM 22. However, at the hearing of the appeal, counsel for Feima, Mr Alexander Lawrence Yeo ("Mr Yeo"), raised it as a substantive point in the appeal. As we understood it, his argument was that the Kyen Appellants were estopped from asserting the Crossclaims as a set-off against Feima's proof of debt because the rejection of Kyen's proof of debt by the Feima Liquidators rendered the Crossclaims *res judicata*.

29 On SUM 22, Feima argued, among other things, that the doctrines of *res judicata* and election supported a stay of the appeal. We note, however, that these arguments were not pursued by Mr Yeo at the hearing of the appeal. This was unsurprising given the parties had earlier informed the court that the HK Proceedings would be heard "after the resolution of the Singapore Court of Appeal's decision on SUM 22 and/or the hearing of [the appeal]" (see [19] above).

Issues on appeal

30 In view of the evolution of the parties' positions in respect of SUM 22 and the appeal, we considered the following issues:

(a) Whether the Kyen Liquidators were permitted to account for the Crossclaims when adjudicating Feima's proof of debt. In addressing this issue, we considered the following sub-issues:

(i) whether any and all crossclaims may be set-off when adjudicating a proof of debt; and

(ii) whether a crossclaim may generally be taken into account if it is a matter of simple arithmetic.

(b) Whether *res judicata* and election precluded the Kyen Appellants from pursuing the Crossclaims in these proceedings.

The Kyen Liquidators were not entitled to account for the Crossclaims when adjudicating Feima's proof of debt

31 We were of the view that the Kyen Liquidators were not entitled to account for the Crossclaims when adjudicating Feima's proof of debt. To understand the point, it is helpful to begin with an explanation of the proof of debt process and its interaction with claims *by* (as opposed to claims *against*) a company in liquidation.

The proof of debt process and the availability of set-offs

32 The proof of debt process primarily serves as a means of enforcing claims *against* a company in liquidation. It is the "substituted means of enforcing debts *against* the company" [emphasis added] (see the Court of Appeal decision of *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official*

liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414 at [51]). Similarly, the process has also been said to be the "exclusive procedure whereby a person claiming to be a creditor of the company and wishing to recover his debt in whole or in part must ... submit his claim in writing to the liquidator" (see *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis Singapore, 2023) ("*Woon's Corporations Law*") at para 6353). This represents a shift from a grab race in which the swiftest creditors gain satisfaction at the expense of the not-so-swift, to a "collective enforcement procedure that results in *pari passu* distribution of the company's assets" (see *Woon's Corporations Law* at para 6353; see also Andrew R Keay, *McPherson and Keay, the Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) ("*McPherson and Keay*") at para 13-002). Seen in this light, the proof of debt process is properly understood as a process by which unsecured creditors enforce their claims against the *company*. Subject to any permissible set-off, it is not a process meant for the company to pursue claims against *the creditor*.

33 Some crossclaims may be taken into account in the proof of debt process if they qualify as permissible set-offs. On a general level, a set-off is "the setting of money cross-claims against each other to produce a balance"; the "essence of set-off … is the existence of cross-demands" (see Rory Derham, *Derham on the Law of Set-Off* (Oxford University Press, 4th Ed, 2010) ("*Derham*") at para 1.01). However, not all crossclaims qualify as set-offs (see *Derham* at para 1.05), and certain requirements must be met for a set-off to be permissible. As observed in *American International Assurance Co Ltd v Wong Cherng Yaw and others* [2009] SGHC 89 (at [24]), set-offs have a "narrower meaning than cross-claim[s]" and "[a]ll set-offs are cross-claims but not all cross-claims are set-offs".

34 An example of a crossclaim that is a set-off is an insolvency set-off. An insolvency set-off is statutorily provided for and presently applies where the company is in judicial management or is insolvent and is being wound up, if the statutory requirements are satisfied. The salient provisions are presently found in s 218 and s 219 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"), which came into force on 30 July 2020. Prior to this, s 327(2) of the Companies Act (Cap 50, 2006 Rev Ed) (the "Companies Act 2006") and s 88(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "Bankruptcy Act") were the operative provisions. These provisions were *in pari materia* with s 218 and s 219 of the IRDA, save that the insolvency set-off provided therein applied only to the winding-up of an insolvent company that was being wound up. As Kyen was wound up before 30 July 2020 (see [4] above), these provisions were relevant for the purpose of OS 828 and the appeal.

35 An insolvency set-off is an exception to the *pari passu* rule. To illustrate, suppose an unsecured creditor lodges a proof of debt for the sum of $1,000 and the company has a crossclaim against the creditor for the sum of $500 that satisfies the requirements for an insolvency set-off. The crossclaim for $500 must be set-off against the creditor's proof of debt for $1,000. In this way, the creditor gets satisfaction of its claim to the full extent of the set-off, thereby illustrating the exception to the *pari passu* rule. This contrasts with how, ordinarily, the unsecured creditor is only entitled to a *pro rata* distribution of dividend based on the claim that has been admitted. As the insolvency set-off is an exception to the *pari passu* rule, its ambit is narrowly circumscribed by statute.

36 The policy justification for the insolvency set-off is explained by the authors of *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) at para 9-01, as follows:

> … where parties have been giving credit to each other in reliance on their ability to secure payment by withholding what is due from them, it would be unjust, on the advent of liquidation, to deprive the solvent party of his security by compelling him to pay what he owes in full and be left to prove for his own claim. This has traditionally been the policy justification for what is a clear exception to the *pari passu* principle, in that it allows the solvent party to collect payment ahead of other creditors to the extent of the set-off and thus puts him in a position analogous to that of a secured creditor.

Similarly, it is stated in Edward Bailey and Hugo Groves, *Corporate Insolvency: Law and Practice* (LexisNexis, 5th Ed, 2017) at para 26.44 that:

> … Insolvency set-off is founded on the premise that a person who engages in mutual dealings with another is entitled to rely on his debts due to that other being a form of security covering the other's debts due to him. Any credit one trader may extend to the other is the less because of the debts he himself owes. The law proceeds on the basis that it would be unreasonable in these circumstances if, on insolvency, debts due to the insolvent had to be paid in full, whereas debts due from the insolvent received only the dividend payable on unsecured debts. …

37 Parenthetically, we also note that, besides the insolvency set-off, it has been suggested in some Singapore decisions that other forms of set-off, such as equitable set-off, are not excluded just because they are not provided for in statute (see the observations of the General Division of the High Court in *Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others v BP Singapore Pte Ltd and another matter* [2018] SGHC 215 at [141]). Indeed, we note that there has been some academic commentary to this effect (see *Derham* at paras 6.25–6.32). While we did see merit in this view, we decline to express a firm view as the Kyen Appellants did not rely on equitable set-off. The issue is best left for consideration in a more appropriate case.

38 With this in mind, we turn to the Kyen Appellants' submission that the Crossclaims may be accounted for in the adjudication of Kyen's proof of debt.

The Kyen Appellants were careful not to characterise this as a set-off. They instead described it as an account of the Crossclaims to arrive at a net position on Feima's claim. However, in substance, what they sought was to set-off the Crossclaims against Feima's claim in order to reject Feima's proof of debt. The Kyen Appellants' argument that an "accounting" in the proof of debt process is permissible should be correctly understood in this sense.

39 We were not persuaded by the Kyen Appellants' submission. The only set-off that was raised was an insolvency set-off under s 327(2) of the Companies Act 2006 read with s 88(1) of the Bankruptcy Act (see [12] above). However, it was clear that the Crossclaims could not be the subject of an insolvency set-off.

40 For an insolvency set-off to be available, there must be mutual credits, mutual debts or other mutual dealings. This is set out in s 88 of the Bankruptcy Act, which provides as follows:

> **Mutual credit and set-off**
>
> **88.**—(1) Where there have been any *mutual credits, mutual debts or other mutual dealings* between a bankrupt and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings shall be set-off against each other and only the balance shall be a debt provable in bankruptcy.
>
> [emphasis added]

41 There were no mutual credits, mutual debts or other mutual dealings as regards the claim in Feima's proof of debt and the Crossclaims. The Crossclaims were, in essence, independent claims by Kyen against Feima. We agreed with the Judge that the Crossclaims did not satisfy the requirements for an insolvency set-off, and Mr Chan rightly did not challenge this finding at the hearing of the appeal. Accordingly, the Kyen Liquidators were not entitled to account for the

Crossclaims by way of an insolvency set-off in the adjudication of Feima's proof of debt.

42 That left the question of whether there was precedent or policy that supported the Kyen Appellants' argument that liquidators had a general entitlement to account for the company's crossclaims against its creditor when adjudicating the creditor's proof of debt. We were of the view that there was neither precedent nor policy that supported this position. To account for the company's crossclaims in the proof of debt process, the liquidator must establish permissible set-offs.

Precedent did not suggest that the Crossclaims could be set-off

Whether all crossclaims may be set-off

43 The Kyen Appellants cited a number of authorities for the proposition that liquidators were under a duty to ascertain the true liabilities of the company and that a general account was necessary for this purpose. However, we were not persuaded that these authorities supported this proposition. It suffices for us to address the two most pertinent authorities.

44 The first is the decision of the High Court of Australia in *Tanning Research v O'Brien* [1990] 91 ALR 180 ("*Tanning Research*"). The Kyen Appellants relied on the following passage (at 185):

> … The occasions when it is right to reject a proof of debt in respect of what is not a true liability of the company may not be susceptible of exhaustive definition. Perhaps some guidance may be found in the terms employed by Barwick CJ in *Wren v Mahony* (1972) 126 CLR 212 at 223, in reference to the grounds on which a court of bankruptcy will go behind a judgment:
>
> > ***Circumstances tending to show fraud or collusion or miscarriage of justice*** or that a compromise was

> not a fair and reasonable one, in the sense that even if not fraudulent it was foolish, absurd and improper, or resulted from an unequal position of the parties (see *Re Hawkins*; *Ex parte Troup* [[1895] 1 QB 404, at p 409]) offer occasions for the exercise by the Court of Bankruptcy of its power to inquire into the consideration for the judgment.
>
> It is not necessary in this case to determine the scope of this qualification. It suffices to note that it qualifies the principles governing the admission or rejection of a proof of debt by arming the liquidator with grounds for rejecting a proof of debt additional to any grounds available under the general law. …
>
> [emphasis added]

As the Crossclaims were based on allegations of fraud, collusion or miscarriage of justice, the Kyen Appellants submitted that the Kyen Liquidators were entitled and, indeed, required to account for the Crossclaims when adjudicating Feima's proof of debt.

45 It should be first noted that *Tanning Research* was not about a *general* right to account. The proposition in *Tanning Research* was limited to circumstances tending to show *fraud, collusion or a miscarriage of justice* (at [185]). More importantly, *Tanning Research* was not about a crossclaim by a company. The passage above concerned the question of when a liquidator could go behind a judgment relied upon by the creditor as evidence of the debt. The context was thus of a liquidator assessing claims *against* the company in the proof of debt process. At its highest, *Tanning Research* stands for the proposition that, in order to ascertain the company's true *liabilities*, a liquidator may "go behind a judgment" in certain circumstances, such as where there has been fraud committed. Indeed, there is good reason why "circumstances tending to show fraud or collusion or miscarriage of justice" are relevant to a liquidator's duty to ascertain a company's true liabilities: they indicate that the claim *against the company* in the proof of debt is false and that there is in fact no debt. However, this does not mean that the company's crossclaims against a creditor

that arise from circumstances tending to show fraud, collusion or miscarriage of justice may be resolved in the proof of debt process.

46 The Kyen Appellants also relied on *Re National Wholemeal Bread and Biscuit Co* [1892] 2 Ch 457 ("*Re National Wholemeal*"), a decision of the Court of Appeal of England and Wales. In that case, the applicant employee sought to prove a sum of approximately £23 alleged to have been advanced by him on account of the company. The liquidator rejected the applicant's proof of debt on the ground that he was indebted to the company in the sum of £64 for salary that had been overpaid. The applicant raised two objections. First, that "the liquidator has only jurisdiction to examine the proof of the creditor" and "[i]f the liquidator has a disputed claim to a set-off, he cannot examine that with a view to reducing the amount of the proof, but must give notice and have the question properly tried" (at 459). Second, that although the liquidator had disallowed the amount claimed by setting-off on the ground of a fraudulent preference, the liquidator should instead have simply admitted the proof "subject to such proceedings as the Judge might direct for the trial of the question of the alleged set-off" (at 460). The liquidator argued that "[i]ndependently of fraudulent preference, there is a good set-off to the claim" (at 460).

47 Vaughan Williams J rejected the applicant's objections. He was "against [the applicant] on the question of fraudulent preference being a matter of set-off", and opined that "[the liquidator] may allow anything as a set-off which is a matter of account; but he must not avoid or rescind an agreement". Williams J further stated that "[w]hen a company is being wound up, whether an action is brought by the company or a proof is carried in by a creditor, a set-off of a liquidated sum is always admissible". The liquidator was entitled to set-off the company's crossclaims and "[t]he position of the liquidator is very like that of

a trustee in bankruptcy. He may allow anything as a set-off which is a matter of account; but he must not avoid or rescind an agreement" (at 460).

48 The Kyen Appellants argued that Williams J's decision supported the position that liquidators were entitled to account for the company's crossclaims even if there was a dispute in respect of those claims. They submitted that the Judge erred in taking the view that *Re National Wholemeal* did not apply to the Crossclaims as that case was limited to a situation where the crossclaims were a "matter of simple arithmetic", which the Crossclaims were not (we consider this below at [52]–[53]).

49 We did not agree with the Kyen Appellants' reading of *Re National Wholemeal*. In our view, the case did not stand for the proposition that a liquidator was entitled to account for the company's crossclaims against the creditor's claim when adjudicating the creditor's proof of debt, regardless of whether a set-off was available. It is apparent from the passages cited above that the case was about a set-off. The liquidator had rejected the amount claimed by the employee on "[t]he principal ground of [a] *set-off*" [emphasis added] (at 458). Further, counsel for the applicant in *Re National Wholemeal* had also described the liquidator's rejection of the amount claimed on the ground that "the company has a right of *set-off* for a larger amount" [emphasis added] (at 459). The headnote of the decision further describes the case as one concerning the "Jurisdiction of Liquidator to consider Set-off". Thus, the assumption of the court and the parties in *Re National Wholemeal* was that the crossclaim operated as a set-off with the issue being whether the disputed crossclaim ought to have been tried, instead of the liquidator setting-off the same when adjudicating the proof of debt. Significantly, the issue of the permissibility of the set-off was neither raised by the parties nor considered by the court.

50 It was also pertinent that subsequent decisions and commentary have not considered *Re National Wholemeal* as authority for the proposition that the liquidator had a general entitlement to account for all crossclaims when adjudicating a proof of debt. Instead, the decisions that relied on *Re National Wholemeal* cited it as authority for the principles governing the *costs* of appealing against a liquidator's decision in the adjudication of a proof of debt (see *Re Burnden Group Ltd; Fielding and another v Hunt (acting as Liquidator of the Burnden Group Ltd)* [2017] EWHC 406 (Ch)) at [20]; *Re Mendarma Pty Ltd (in liq) (No 2)* (2007) 61 ACSR 601 at [31]; *Re Kenworth Engineering Ltd V* [2005] HKCU 162 at [30(1)]). Similarly, in *McPherson and Keay*, the decision of *Re National Wholemeal* is cited for the principle that a liquidator is bound to examine every proof of debt lodged; in particular, the liquidator is to examine if there is any possible right of *set-off* (at para 12-062).

51 Accordingly, we were not persuaded that the cases relied on by the Kyen Appellants supported the proposition that all crossclaims may be accounted for in the proof of debt process.

Whether the fact that the crossclaim is complex or a matter of simple arithmetic is relevant

52 We briefly address the Judge's view that a liquidator might account for a crossclaim where it was a matter of simple arithmetic; on the other hand, where the crossclaim was factually complex and substantially disputed they ought to be resolved at trial (or such other modes for fairly disposing of the issues) before the arithmetic could resume (see [14] above). As stated above (at [48]), the Judge distinguished *Re National Wholemeal* on this basis as the facts underlying the Crossclaims were in dispute and complex.

53 We agree with the Judge that, if the claim and crossclaim are not disputed and a set-off is available, it is then a matter of simple arithmetic in setting-off the crossclaim against the claim to arrive at a net position on the claim. We also agree with the Judge that where the crossclaim is substantially disputed and factually complex, it may be inappropriate for the liquidator to summarily deal with it in the adjudication process. In such circumstances, the liquidator ought to seek directions from the court on the manner or mode by which the crossclaim should be resolved.

There was no policy reason in support of permitting the Crossclaims to be set-off from Feima's proof of debt

54 The Kyen Appellants submitted that allowing the Kyen Liquidators to account for the Crossclaims would be consistent with policy. The Kyen Appellants argued that the purpose of the proof of debt process was to ensure that all claims against the insolvent company were comprehensively determined and discharged, as long as the liquidators were capable of making a "just estimate" of the quantum of the claims. The same policy should apply to the company's crossclaims, as the legislative policy of comprehensively determining claims involving the insolvent company can only be achieved if the company's own claims can also be accounted for in the adjudication process.

55 We did not accept this argument. Even if the policy of the proof of debt process was to comprehensively determine and discharge claims *against* the company, it did not follow that the same policy applied to resolving claims *by* the company. Such an approach ignores the fact that the adjudication process is primarily designed to resolve claims *against* the company (see [32] above).

56 On the contrary, it is plain that only a limited class of crossclaims may be accounted for in the proof of debt process (see [32]–[33] above). We have

specifically discussed earlier a type of set-off, namely insolvency set-off, which requires certain statutory requirements to be satisfied. For reasons we have already explained, as a set-off is an exception to the general regime which treats the claims of unsecured creditors *pari passu* (see [35]–[36] above), to allow a liquidator to set-off all crossclaims in the proof of debt process would undermine the *pari passu* regime and erode existing safeguards. Accordingly, there was no basis for the policy that the Kyen Appellants contended for.

Concluding remarks on the first issue

57 For the reasons above, there was no basis in precedent or policy for the Kyen Liquidators to account for the Crossclaims when adjudicating Feima's proof of debt.

58 We make two further points. First, we reiterate that we do not express a conclusive view on whether insolvency set-off is the only form of set-off permitted in the proof of debt process, to the exclusion of other forms of set-off such as equitable set-off. For present purposes, we need only emphasise that should this issue arise for determination in the future, any set-off should be justified in principle as it is likely to have a significant impact on the judicial management regime and insolvent liquidations. For example, in cases where the crossclaim exceeds the claim in the proof of debt, a set-off may result in the rejection of a creditor's proof of debt.

59 Second, we emphasise that in dismissing the appeal, we do not express a view on the merits of the Crossclaims. It is unnecessary for us to do so given that the Kyen Liquidators were not entitled, in the first place, to set-off the Crossclaims when adjudicating Feima's proof of debt.

Res judicata and election did not prevent the Crossclaims from being litigated in Singapore

60 In view of our conclusion that the Kyen Liquidators were not entitled to exercise a set-off on the basis of the Crossclaims, it was not necessary for us to decide whether the doctrines of *res judicata* and election prevented the Crossclaims from being pursued here. We nonetheless express our views to assist in the event that such issues arise in future.

61 Feima argued that the Kyen Appellants were estopped by the doctrine of *res judicata* (whether by issue estoppel, cause of action estoppel, or the rule in *Henderson v Henderson* (1843) 3 Hare 100) from pursuing the Crossclaims as Kyen's proof of debt was rejected by the Feima Liquidators. It cited four decisions in support of that argument:

(a) The primary case that Feima relied on was the decision of the High Court of England and Wales in *Bank of Credit and Commerce International (Overseas*) *Ltd (in liquidation) v Habib Bank Ltd* [1999] 1 WLR 42 ("*Habib Bank*"), The court held there that "if a person who claims to be a creditor has his proof rejected but does not exercise his right to apply to the court, he cannot have a second bite at the cherry by submitting another proof to the liquidator for the same debt" (at 50). The court further held that the creditor also "cannot have a second go by some other procedure instead" and that "[t]his conclusion could be justified on the basis that there is an issue estoppel" (at 50).

(b) The second was the Court of Appeal of England and Wales decision in *Brandon v McHenry* (1891) 1 QB 538, which was cited in *Habib Bank* as standing for the proposition that where the creditor did not challenge the rejection of the proof of debt in court when entitled to

do so, the creditor cannot subsequently seek to recover the debt by other means (see *Habib Bank* at 50F).

(c) The third was the Hong Kong Court of First Instance decision in *Dayang (HK) Marine Shipping Co, Ltd v Asia Master Logistics Ltd* [2020] HKCU 494 where *Habib Bank* was cited for the proposition that "[u]nless and until set aside by way of an appeal, the decisions of the liquidator in rejecting a proof of debt are binding for all purposes" (at [77]).

(d) The fourth was the decision of the Supreme Court of New South Wales in *Deluxe Developments Pty Ltd (in liq) v Downer EDI Engineering Pty Ltd* [2017] NSWSC 894 where the court expressed the view "that [the] right of set-off may be the subject of a *res judicata* estoppel in Deluxe's favour as a result of the Liquidators' rejection of the Proof of Debt" (at [28]).

62 These decisions were not relevant to the present case. They concerned a single estate in liquidation and were about the consequences of a creditor's failure to challenge the rejection of the proof of debt lodged in that liquidation in court. Importantly, none of the cases concerned a situation like the present involving the liquidation of two estates based in different jurisdictions. This point is significant as the Crossclaims were asserted for different purposes in relation to each liquidation. We explain.

63 In Kyen's liquidation, the Crossclaims were asserted by the Kyen Liquidators as a set-off, albeit without basis, as we have found, in the adjudication of Feima's proof of debt. Feima challenged the Kyen Liquidators' decision. As Singapore was the seat of Kyen's liquidation, it was for the courts here to determine whether the set-off was permissible. As regards Feima's

liquidation, the Crossclaims were asserted by Kyen as Feima's creditor in the proof of debt process in Hong Kong. The proof of debt was lodged to preserve Kyen's right to participate in the *pari passu* distribution of the proceeds of liquidation to Feima's unsecured creditors. As Hong Kong was the seat of Feima's liquidation, it was for the courts there to determine whether the rejection of Kyen's proof of debt by the Feima Liquidators was correct. Understood this way, the doctrine of *res judicata* was not engaged. The Crossclaims were properly asserted before the Singapore and Hong Kong courts for different purposes and the proceedings were distinct in nature. For the same reason, the doctrine of election also did not arise.

64 The *transnational* nature of this dispute brings an added dimension to the analysis. The HK Proceedings involved an appeal against the decision of the Feima Liquidators in a liquidation governed by Hong Kong law, which contrasted with this appeal which concerned the decision of the Kyen Liquidators in a liquidation governed by Singapore law. This was an important point. In *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 ("*Merck*"), this court considered the appropriate control or gatekeeping mechanisms to define the outer boundaries of transnational issue estoppel. One of the identified limitations was that transnational issue estoppel would not arise in respect of any issue which the court ought to determine under its own law. This is consistent also with the rule about questions of public policy being reserved to the forum court (*Merck* at [55]). In our view, the Kyen Liquidators' decision to set-off the Crossclaims was a matter of Singapore's law and public policy. We were therefore of the view that any decision of the Hong Kong courts on the merits of the Crossclaims could not bind the court in these proceedings.

65 Finally, in any event, the cases cited by Feima did not support its own position that *res judicata* arises in respect of a creditor's claim by reason of a liquidator's rejection of the creditor's proof of debt based on that claim. Instead, the cases stand for the proposition that, where a creditor has failed to prove its claims in the proof of debt process and has exhausted the proof of debt process (by, for instance, failing to take the liquidator's decision to court after the liquidator has rejected the proof of debt), the creditor cannot enforce that claim by taking a different route. The rationale for this proposition appears to be that an adjudication by the liquidator is final and binding on the merits unless it is reversed by the court. We do not express a view on this proposition as the issue did not arise on the facts. Unlike the cases cited by Feima, the Kyen Appellants contested the decision of the Feima Liquidators to reject Kyen's proof of debt in the HK Proceedings, which were pending. Thus, the present case was distinguishable from the precedents cited by the Kyen Appellants.

Conclusion

66 For these reasons, we dismissed the appeal and SUM 22. In respect of the appeal, there was no basis to challenge the claim in Feima's proof of debt, and no reason to allow the Kyen Liquidators to account for the Crossclaims and reject Feima's proof of debt on this basis. Accordingly, the Judge correctly allowed Feima's application to set aside the Kyen Liquidators' decision to reject Feima's proof of debt and did not err in allowing the proof to be admitted in the sum of US$32,079,540.97. We also dismissed SUM 22 as it was otiose in view of the parties' indication following the filing of the application that they were content with proceeding with the appeal ahead of the HK Proceedings. In any case, we see no merit in SUM 22.

67 We also fixed costs in favour of Feima at $50,000 inclusive of disbursements.

Sundaresh Menon
Chief Justice

Kannan Ramesh
Judge of the Appellate Division

Judith Prakash
Senior Judge

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