

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO: BVIHC (COM) 0027 of 2021

IN THE MATTER OF ATLAS MARA LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

TLG ATMA LTD

Applicant

and

ATLAS MARA LIMITED

Respondent

Appearances:

Mr. David Chivers QC, with him William Hare and Mungo Lowe of Forbes Hare for the Applicant

David Allison QC, with him David Welford of Ogier for the Respondent

Mr. Richard Evans and Ms. Allana-J Joseph of Conyers for the Opposing Creditors, Prudential Insurance Company of America and Guggenheim Partners Investment Management LLC

2021 July 28

JUDGMENT: COSTS

[1] **JACK, J [Ag.]**: On Wednesday 21st July 2021 I heard an application made by the applicant for the appointment of liquidators over the respondent company. There were two major issues: (a) Did the applicant have standing to bring the application, given the dispute as to the status of the debt on which the applicant based its standing? And (b) Even if the applicant did have an undisputed debt

within the **Sparkasse Bregenz** test,¹ should I in my discretion refuse to appoint liquidators in the light of opposition from other creditors of the company? In an oral judgment delivered that day, I held on (a) that the applicant did not have standing and on (b) that, even if the applicant had had standing, I would have refused to appoint liquidators in the light of the opposition of the overwhelming majority of creditors of the company.

[2] I ordered the applicant to pay the costs of the application. Mr. Evans, who appeared for the opposing creditors, Prudential Insurance Company of America and Guggenheim Partners Investment Management LLC, asked for the costs of the opposing creditors. I stood over my decision on this in order to determine (a) whether I had jurisdiction to award costs to the opposing creditors and (b), if I did have jurisdiction, on what principles I should decide the costs application. Both the applicant and the opposing creditors made written submissions on these two points.

[3] I am satisfied that I do have jurisdiction to award costs in favour of the opposing creditors. In **Trade and Commerce Bank (through Richard Fogerty, its joint official liquidator) v Island Point Properties SA and another**,² George-Creque JA, as she then was, said (with the agreement of Rawlins CJ and Baptiste JA):

“38. The last issue remaining is that of costs... Having concluded that Mr. Ungar did have standing as a member to appear and oppose the originating application, applying the general principle that costs follows the event, I do not consider that TCB is entitled to costs. There is no good reason for ordering otherwise. The peculiar circumstances of this case, where the company felt constrained not to appear based on the decision in **Mettalloyd**,³ reinforces my view in this regard.

39. For Mr. Ungar, counsel says, in essence, that if it is found that Mr. Ungar had *locus* (and I have so found) then as an opposing contributory

¹ Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp, Civil Appeal No 10 of 2002 (determined 18th June 2003, unreported) at para [3].

² [2010] ECSCJ No 217.

³ Metallloyd Ltd v Burwill Resources Ltd (BVIHCV 2006/0083, unreported)

on an unsuccessful originating application he is entitled to costs and relies on the statement set out in **French's Treatise** which says in part that:⁴

'Creditors who appear to oppose an unsuccessful petition may be given one set of costs between them from the petitioner and so may opposing contributories, if their interest are distinct from the company's.'

It goes on further to say, in reliance on the case of **Re Times Life Assurance and Guarantee Company**,⁵ that 'a contributory whose interests are not distinct from the company's will not be awarded costs.' TCB relies on **Re Times Life Assurance** in opposing Mr. Ungar's claim for costs. In **Re Times Life Assurance**, Giffard LJ had this to say:

'It is my invariable rule not to give costs to shareholders in such a case. The company is the proper party to resist the application for a winding-up order, and the appearance of shareholders is unnecessary.'

40. Counsel for Mr. Ungar says that the circumstances of this case are quite different from **Re Times Life Assurance** in this respect: In that case the company did appear and a shareholder also intervened. In the instant case she says, in essence, that the circumstances are unique in that:

- (a) The company, normally the proper party to resist the application, was shut out from so doing given the decision in **Metalloyd**, and did not appear; and
- (b) Rather than risk the originating application going unopposed, it was necessary for Mr. Ungar to appear and be heard. As it turned out however, he was not heard. He was entitled to be heard on the originating application.

The trial judge stated at paragraph 6 of his judgment, notwithstanding that he considered Mr. Ungar not to have *locus standi*, that he was assisted by his counsel's submissions.

41. Whilst I do not consider in the circumstances of this case that Mr. Ungar's interest was distinct from that of the company, I am minded to award costs to Island Point on the dismissal of this appeal and to Mr. Ungar, on the cross appeal, not by way of applying any general principle as regards entitlement to costs, or by way of stating any general proposition on the matter, but merely to reflect the assistance rendered by counsel for Island Point and Mr. Ungar, and having regard to the unique circumstances of this case."

⁴ French on Applications to Wind Up Companies (2nd Ed, 2008) at para 4.6.5.2.

⁵ (1870) LR 5 Ch App 381.

- [4] I agree with Forbes Hare’s point that **Island Point** is on somewhat unusual facts. Nonetheless, it is in my judgment a binding decision that this Court has jurisdiction to award costs to an opposing creditor. If the Court has jurisdiction to award costs to a contributory like Mr. Ungar, *a fortiori* it has the power to award costs to an opposing creditor.
- [5] The third edition of **French** from 2015 says:
- “5.208 Creditors who appear to oppose an unsuccessful petition may be given one set of costs between them from the petitioner and so may opposing contributories if their interests are distinct from the company’s...
- 5.209 If opposing creditors and contributories instruct the same solicitors, they will be awarded only one set of costs between them.
- 5.210 Opposers who instruct the same solicitors as the company are not allowed separate costs.”
- [6] Whilst this Court is not obliged to follow the practice of the English Companies Court, this guidance is in my judgment sensible and useful. In the current case, it was desirable for the opposing creditors to appear and to express their reasons why the “class remedy” of the appointment of liquidators was not in the best interests of the body of creditors as a whole. It is not generally for the company itself to argue this point.
- [7] In the exercise of my discretion I order the applicant to pay the opposing creditors’ costs of the application.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar