

THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

Claim No: BVIHC (COM) 229 OF 2017

IN THE MATTER OF DP HOLDING SA

AND IN THE MATTER OF SECTIONS 159(1)(b) AND 163 OF THE INSOLVENCY ACT
2003

BETWEEN:

KMG INTERNATIONAL NV

Applicant

and

DP HOLDING SA

(a company incorporated under the laws of Switzerland)

Respondent

Appearances:

None: the application was considered *ex parte* on the papers

2019: December 19

JUDGMENT

- [1] **JACK, J [Ag.]**: This is an application for permission to serve the originating application for the appointment of a liquidator outside the jurisdiction.

The facts

- [2] The applicant ("KMG") is an international oil company. It is incorporated in the Netherlands. The respondent ("DPH") is a Swiss holding company. A dispute arose between KMG and DPH in respect of a sale and purchase agreement of shares in an energy company, Rompetrol Group NV. The dispute was arbitrated in the Netherlands under the rules of the Netherlands Arbitration Institute. On 30th

April 2016, the arbitration panel made a partial final award in favour of KMG for US\$200 million.

[3] DPH did not pay. KMG discovered that DPH had potentially valuable assets in the BVI, namely two BVI companies, Finite Assets Ltd and Dinu Patriciu Global Properties Ltd.

[4] On 26th July 2017 Wallbank J gave leave to enforce the partial final award as if it were an order of this Court. Subsequently, KMG issued an application for the appointment of a liquidator of DPH and sought, in the meantime, the appointment of provisional liquidators. Wallbank J granted the application for the appointment of provisional liquidators and gave permission to serve the application for the appointment of a liquidator outside the jurisdiction.

[5] After service on DPH in Switzerland, DPH applied to Wallbank J to set aside the grant of permission to serve outside the jurisdiction. DPH's case was that the BVI was not the appropriate forum in which to apply to liquidate DPH; KMG should register the arbitration award in Switzerland and then apply to wind up DPH there. KMG argued that registration of the award would take two years in Switzerland and that there were valuable assets against which they would wish to enforce here in this Territory.

[6] On 10th May 2017, Wallbank J heard the application to set aside the grant of permission to serve outside the jurisdiction. On 23rd May 2017 he delivered judgment and set aside the grant of permission to serve outside the jurisdiction with the consequence that DPH had not been properly served with the application for the appointment of a liquidator, but he continued the order appointing provisional liquidators.

[7] On appeal¹ the Court of Appeal reversed Wallbank J's decision in respect of service out of the jurisdiction. It held:

¹ BVIHCMAP2017/0013

“18. ...[I]t is clear that there is a good arguable case that the claim in covered by one of the jurisdiction gateways provided by rule 7.2(10) of the Civil Procedure Rules 2000. The claim is made pursuant to sections 163 and 170 of the [Insolvency] Act.

19. Secondly, ...the award must be treated as valid until it is set aside in the BVI. It is significant that DPH has not sought to challenge the Award in the BVI.

20. The third requirement led the learned judge to reverse his order of 11th October 2016 on the basis of what has been called in this appeal ‘the forum point’. The evidence shows that more than half of the assets of DPH are held in two BVI companies... Thus, there is a sufficient connection with the BVI within the first limb of section 163(2) of the Act. As regards the second limb on the facts of this case, DPH falls within section 163(1)(a) of the Act as being insolvent in the sense of being at least cash insolvent....

21. It was therefore clear that the appellant had established jurisdiction within the terms of section 163 of the Act. The section gives the court a discretion if the necessary requirements are fulfilled. On a permission application, the judge may consider as one of the factors to be considered in the exercise of his discretion whether the BVI is the most appropriate forum.”

The Court proceeded to hold that this territory was the *forum conveniens*.

The current application to serve out of the jurisdiction

- [8] How is it then that I come be considering whether to permit service out of the jurisdiction again? The answer is that section 168 of the Insolvency Act provides that applications for the appointment of a liquidator must be determined within six months or stand to be dismissed automatically. There is provision for the Court to extend the life of such an application for a further three months at a time. In the application which went to the Court of Appeal, however, the need to make repeated applications for an extension was overlooked while the case was proceeding through the appeal stages. As a result, one of the issues which the Court of Appeal had to determine was whether it should deliver its judgment at all, given that the issue before it had become academic. In the event the Court of Appeal did deliver its judgment on 3rd May 2018.

- [9] Following the Eastern Caribbean Court of Appeal judgment, winding up proceedings were brought in Switzerland by another creditor. This amounts to a major change in circumstances, which means that I cannot simply apply the Court of Appeal's decision blindly. Instead I have to consider the case on service outside the jurisdiction afresh.
- [10] KMG, as a major creditor, objected to two aspects of the Swiss bankruptcy proceedings: firstly the appointment of Revex SA as a member of the supervisory committee and secondly the appointment of Mr. Desfayes as a private bankruptcy administrator. The particular concern raised as regards Mr. Desfayes was that he lacked the necessary qualifications and expertise to deal with a complex liquidation, such as that of DPH. KMG raised its concerns with the Swiss courts, but lost in all three instances. The final determination of the Swiss Supreme Court was handed down on 19th January 2019.
- [11] KMG's Swiss lawyers then attempted to agree a way forward as regards the BVI proceedings with Mr. Desfayes. This resulted in a meeting on 3rd April 2019. KMG say in their application to me:

"During that meeting Mr. Desfayes made it clear that he would only consider (without promising anything) to support the appointment of the [BVI joint provisional liquidators] and to work together with them (and to formalize such a potential cooperation by way of a protocol or similar document) if KMG would submit an opinion letter to him setting out the situation in the BVI, the options for Mr. Desfayes as Swiss bankruptcy administrator etc and if he, the creditors' committee and possibly all creditors of DPH would agree to the way forward in the BVI according to the opinion letter. Absent such an opinion letter, which may then have to be confirmed by BVI counsel appointed by Mr. Desfayes, Mr. Desfayes would not agree to any steps being undertaken by the [joint provision liquidators] in the BVI on his behalf. Consequently, Mr. Desfayes also refused to accept service of the New Claim [i.e. the current proceedings] on him by email or through DPH's lawyers in the BVI. Moreover, Mr. Desfayes made it clear that any action of himself in relation to the BVI proceedings presupposes that the creditors advance the necessary funds."

[12] If that is an accurate account of the meeting, I regret to say I find it quite inappropriate behaviour on the part of a bankruptcy administrator. It should be standard practice for cross-border insolvency practitioners to agree protocols so that they can work together. If Mr. Desfayes wanted legal advice as to the BVI proceedings, then he should have obtained that himself. The result of his approach appears to have been to stymie enforcement steps in this jurisdiction. He himself has done nothing to have his appointment recognized by this Court.

[13] In my judgment, in the light of Mr. Desfayes' alleged failings, I can properly consider this Territory a more appropriate forum for winding up DPH's BVI assets than Switzerland. I am satisfied:

- (a) that there is a good arguable case that the claim comes within the jurisdiction gateway provided by CPR 7.2(10), read in conjunction with sections 163 and 170 of the Insolvency Act 2003.
- (b) that the partial final award is binding and enforceable in this Territory;
and
- (c) that the BVI is a more appropriate forum for the liquidation of the BVI assets than Switzerland.

Conclusion

[14] Accordingly, I grant permission to serve outside the jurisdiction the application for the appointment of a liquidator. There is, however, a technical matter, in that the evidence about Mr. Desfayes has not been verified on oath; it is solely in the application. I shall therefore direct that the order permitting service out be sealed, only once an affidavit verifying those facts has been made.

Adrian Jack [Ag.]
Commercial Court Judge

By the Court

Registrar