IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 144 of 2016

BETWEEN:

KMG INTERNATIONAL NV

Claimant/Respondent

and

DP HOLDING SA

(a company incorporated under the laws of Switzerland)

Defendant/Applicant

Appearances:

Mr Stephen Moverley Smith, Q.C. instructed by Messrs Mourant Ozannes for the Defendant/Applicant;
Mr Alain Choo-Choy, Q.C., Mr Mark Forte, Ms Tameka Davis, instructed by Messrs Conyers Dill & Pearman for the Claimant/Respondent

JUDGMENT

On Written Submissions

[1] **Wallbank J. [Ag]:** This is a Judgment following written submissions filed on 5 April 2017 by the Claimant/Respondent ("KMG") and 19 April 2017 by the Defendant/Applicant ("DPH") respectively. The parties were permitted and directed to file such submissions on the following limited issue: ***"…****whether or not a liquidator appointed by a Swiss Court in a Swiss liquidation could… take control of, and liquidate assets held by TVI companies*

*merely by changing their boards and without the assistance of this Court.***"** This is the ruling on that issue.

The Claimant/Respondent's Arguments

[2] KMG argues that the TVI (or BVI) is the appropriate forum because a Swiss liquidator cannot exercise DPH's property rights situated here (such as by exercising its rights as sole shareholder to replace the boards of the BVI subsidiaries and cause the liquidation of their assets and/or the subsidiaries themselves) without the assistance of the BVI Court. KMG gave seven reasons. They are, in summary, as follows.

[3] First, the contemplated exercise of DPH's property rights in the BVI necessarily raises a question under BVI law as to whether a foreign (i.e. non-BVI) liquidator can deal with property located in the BVI as if it were property within the jurisdiction where the foreign liquidator has been appointed. KMG submits that as a matter of BVI law, a foreign liquidator can only engage in such dealing if and to the extent that the proposed dealing by the foreign liquidator has been validated by the BVI Court.

[4] KMG accepts that an obvious consequence of the appointment of a Swiss liquidator over DPH would be that the Swiss liquidator would become the new representative of DPH under Swiss law, with his authority displacing that of the board of directors of DPH. The Swiss law position in this respect is not disputed by KMG; and KMG accepts that the Swiss liquidator would have "*basic recognition*" (as KMG's Learned Counsel aptly refers to it) here in the BVI, in the sense meant by Bannister J in **Re C (a bankrupt)**[1], as a matter of BVI law.

[5] KMG argues however that a Swiss liquidator could not validly engage in any dealing with property located within the jurisdiction of the BVI Court unless the BVI Court were, on application by the Swiss liquidator, willing to recognise and/or declare the validity of the liquidator's proposed dealing. In other words, a Swiss liquidator would need to obtain

[1] BVIHCV 0140 of 2010

more than basic recognition from this Court, and would need recognition in an extended sense, of a recognition which carries with it the active assistance of the Court.

[6] KMG submits that review of the case law referred to in **Re C** demonstrates that the system of statutory and/or common law recognition and assistance (in the sense of extended recognition) that may be afforded to foreign liquidators is fundamentally premised on the notion that, in order for a foreign liquidator appointed in one country to be entitled to deal with property located in another country, there must be a relevant legal rule of assistance in the second country that entitles the foreign liquidator to deal with the company's property situated in the second country. This, says KMG, is the notion that lies at the heart of all cross-border insolvency regimes, which have as their aim the harmonisation of the rules whereby a liquidator in one country may, in the discharge of his duties to realize and collect the assets of the company in liquidation, be permitted to deal in some way with the assets of the company situated in another country with the assistance of the Courts of the latter country.

[7] KMG argues that it is because there is a fundamental need for a foreign liquidator to seek the recognition and assistance of the Courts of the jurisdiction where the property in question is located that the case law in this area, as surveyed by Bannister J in **Re C**, has invariably involved applications by foreign liquidators or bankruptcy/insolvency office-holders to the Courts of the jurisdiction where the property was located. KMG cites **Re C** itself, the United Kingdom Supreme Court decision in **Rubin v. Eurofinance**[2], **In re African Farms Ltd**[3], **In re SwissAir Scheweizerische Luftverkehr-Aktiengesellschaft**[4], and **Singularis Holdings Ltd v PricewaterhouseCoopers**[5].

[8] KMG submits that it is only as and when the recognition and assistance of the Court where the property in question is situated is formally sought that that Court is in a position to balance the relevant discretionary factors and assess the appropriateness (or not) of

[2] [2013] 1 A.C. 236
[3] [1906] TS 373
[4] [2010] BCC 667
[5] [2015] AC 1675

affording recognition and assistance to the foreign liquidator and, if appropriate, the terms upon which such recognition and assistance will be afforded.

[9] As a matter of BVI law, therefore, argues KMG, a Swiss liquidator could not validly deal with DPH's shares in its BVI subsidiaries, including by exercising the voting rights attaching to those shares so as to replace the boards of the BVI subsidiaries, without seeking the recognition and assistance of the BVI Court. A Swiss liquidator would have to seek a declaration from the BVI Court that, in all the circumstances of the case, it ought to be entitled to vote the rights in question in order to replace the boards of the BVI subsidiaries, with the purpose of thereafter enabling the directors to liquidate the BVI subsidiaries and their assets as part of the Swiss liquidator's liquidation programme. When determining whether to accede to the Swiss liquidator's application in this connection, the BVI Court would be concerned not merely with the replacement of the directors of the BVI subsidiaries but also with the reasons for the replacement and their intended role in implementing the Swiss liquidator's liquidation programme.

[10] KMG gives as its second reason that if DPH's reasoning were right, it would follow that a foreign liquidator, as the representative of the company in liquidation, would always be able to appoint an agent (indeed, any agent, whether or not a director of a subsidiary of the company in liquidation) to deal with assets of the company situated abroad and to instruct the agent to liquidate the assets in accordance with the foreign liquidator's instructions, including by transferring them to the foreign liquidation, without ever having to seek the recognition and assistance of the Courts where the foreign assets are located. On this approach, therefore, all of the cases where the assistance of the Courts where the foreign property was situated was sought proceeded on the fundamentally flawed premise that the issue of recognition and assistance was entirely superfluous because the foreign liquidator would have been entitled to appoint a third party agent to undertake the proposed dealing without having to seek recognition and assistance from the local Court.

[11] KMG gives as its third reason that it would be no answer for DPH to contend in this connection that the proposed exercise of DPH's voting rights as sole shareholder of the

BVI subsidiaries would not involve any dealing (or any relevant dealing) with DPH's property in the BVI. The exercise of voting rights attaching to DPH's shares in BVI subsidiaries would clearly amount to a form of dealing with those shares.

[12] KMG gives as its fourth reason that it is critical to appreciate that, on DPH's argument, the appointment of new directors to the boards of the BVI subsidiaries would not be an end in itself, but a means to an end – the end being the ultimate realization of the assets of the BVI subsidiaries and their ultimate liquidation (with the new directors acting on the Swiss liquidator's instructions for that purpose) so that DPH can thereby realize the value of its shares in the subsidiaries and repatriate surplus funds to the Swiss liquidation.

[13] That being so, it would be wrong to consider the putative appointment of new boards in isolation from the role envisaged for the new boards; in other words, it is relevant to consider not only whether the assistance of the BVI Court might be required in connection with the appointment of new directors to the boards of the subsidiaries, but also whether the BVI Court's assistance might be required in connection with all likely subsequent steps in the implementation of a Swiss liquidator's programme of liquidation of the BVI assets (whether through the new boards or otherwise).

[14] Thus, the BVI Court's assistance would be required not only to validate the Swiss liquidator's purported exercise of voting rights to appoint new directors to the boards of the BVI subsidiaries, but also with regard to the subsequent steps that would likely result in the event that KMG were confined to a Swiss liquidation of DPH. The exclusive focus that DPH seeks to create on the appointment of new directors to the boards of the BVI subsidiaries, with those directors then being left to implement the Swiss liquidator's liquidation programme in the BVI, is accordingly a simplistic and inaccurate characterisation of what is likely to occur in the event that a Swiss liquidator were appointed and no BVI liquidation order made in respect of DPH.

[15] KMG gives as its fifth reason that a Swiss liquidator of DPH case would not be entitled to extended recognition under Part XIX of the Insolvency Act 2003 ("IA 2003") (which

contains the BVI statutory regime for the grant of recognition and assistance to certain foreign office-holders) because Switzerland is not a "*relevant foreign country*" within the definition of section 466(1) of the IA 2003. So, there would be no statutory recognition and assistance available to a Swiss liquidator pursuant to the IA 2003.

[16] KMG gives as its sixth reason that the liquidation of the assets of the BVI companies would presuppose the liquidation of the BVI companies because:

(i) only a wholesale liquidation of the assets of the BVI companies could produce a surplus of assets over liabilities available for distribution up the corporate chain to DPH as parent of the BVI companies; and

(ii) it would be unrealistic for there to be a wholesale liquidation of the assets of the BVI companies without a liquidation of the BVI companies themselves if there is to be a surplus available for distribution to DPH as parent (obviously after payment of all the creditors of the subsidiaries).

[17] The liquidation of the BVI companies, whether as a solvent liquidation pursuant to Part XII of the Business Companies Act 2004 ("BCA 2004") or an insolvent liquidation pursuant to Part VI of the IA 2003, would naturally take place under the supervision of, and require assistance from, the BVI Court.

[18] KMG gives as its seventh reason that it is important for the issue to be considered in the context of *forum conveniens* considerations as a whole. Specifically:

(i) Even if (contrary to KMG's foregoing submissions) one were to take the view that a Swiss liquidator could proceed to replace the boards of the BVI subsidiaries without the assistance of the BVI Court, for the reasons already set out under the fourth and sixth points above, such assistance would be required in connection with the subsequent stages of the Swiss

liquidator's programme of liquidation of the BVI assets culminating in a remittal of surplus assets to the Swiss liquidation.

(ii) In light of the Court's previous findings (i) that without an asset preservation mechanism in place, there is a palpable risk that DPH would put its BVI assets in jeopardy, and (ii) that the emergency bankruptcy procedure in Switzerland was at best a theoretical possibility on the facts of the case and therefore irrelevant, KMG would suffer a serious disadvantage and injustice as a result of being unable to pursue a liquidation in the BVI, and by way of ancillary asset preservation in the interim by the appointment of the joint provisional liquidators.

(iii) The preceding injustice is made worse by the fact that, as the Court has previously also accepted, KMG will experience substantial delay (which can be up to two years) before it can secure an enforceable liquidation order in Switzerland, whilst meanwhile, as I previously observed orally "*it would be fair and arguably also just, seen from the perspective of our insolvency law, for KMG to have a provisional liquidation order in place to preserve assets and the prospect of a liquidation of BVI assets sooner, and indeed, possibly much sooner than is likely to occur under Swiss law*".

The Applicant/Defendant's arguments

[19] DPH's starting point is to note KMG's concession that the obvious consequence of the appointment `of a Swiss liquidator over DPH would be that the Swiss liquidator would become the new representative of DPH under Swiss law (this being the law of the country of incorporation of DPH), with his authority displacing that of the board of directors of DPH and that, further, it is accepted by KMG that the position under BVI law is that the Swiss liquidator would have "basic recognition" under BVI law, i.e. it would be recognized under BVI law that he was the representative of DPH.

[20] In the light of that concession, the issue resolves itself into the question: if the Swiss liquidator can act as the representative of DPH, is there anything that prevents him dealing, as that representative, with DPH's assets in the BVI, namely the shares registered in DPH's name ("the Shares") in two wholly-owned BVI subsidiary companies, in particular exercising the voting rights attached to the Shares to change the boards of those companies and thereby gain control of and cause the underlying assets to be realized?

[21] DPH argues that it is obvious that there is no impediment preventing a Swiss liquidator from taking such a course. DPH gives a number of reasons for its view.

[22] First, in exercising the voting rights attached to the Shares the Swiss liquidator will not be acting *qua* liquidator, exercising, for example, statutory powers vested in a liquidator, he will acting in the name of, and as a representative of DPH, exercising voting rights vested in DPH.

[23] Secondly, there is no legislative or common law prohibition preventing a Swiss liquidator (or indeed any other foreign liquidator) from exercising voting rights attached to shares that belong to the company in liquidation.

[24] Thirdly, the Articles of Association of each of the BVI subsidiaries contain regulations which provide that "*the right of any individual to speak for or represent a Shareholder shall be determined by the law of the jurisdiction where, and by the documents by which, the* [individual's authority as an] *Eligible Person is constituted or derives its existence."* In this case that would be Swiss law.

[25] The Articles also provide that any action that may be taken by shareholders at a meeting may also be taken by a Resolution of Shareholders consented to in writing, and that, in the usual way, directors can by removed and appointed by a resolution of shareholders.

[26] DPH argues that a Swiss liquidator could therefore cause DPH to change the boards of the BVI subsidiaries simply by serving a written resolution of DPH on those companies. The new directors will then be able to realize the assets of the BVI subsidiaries as the Swiss liquidator may direct, the proceeds being distributed, in accordance with BVI law and after taking proper account of each subsidiary's creditors, by way of lawful dividend (assuming, in relation to each company, that it satisfies the solvency test under section 56 of BCA 2004) to the Swiss liquidator to be dealt with in accordance with Swiss insolvency law.

[27] Fourthly, DPH observes that there is no obligation imposed on a foreign liquidator to seek recognition from the BVI Court. The only reason that he might do so is if he wanted to obtain the active assistance of the BVI Court, i.e. he wants to obtain an order that will assist him in carrying out his functions. As explained above, a Swiss liquidator would not require any assistance to exercise the voting rights attached to the Shares.

[28] DPH distinguishes the cases referred to by KMG. DPH remarks that the cases where recognition has been sought have all involved situations where the foreign office-holder sought both recognition and assistance from the local court, that is, with recognition being part and parcel of the application to obtain assistance. None of the cases impose a requirement for a foreign liquidator to obtain "extended recognition" in a case such as this.

[29] DPH addresses each of KMG's seven reasons. Not all DPH's arguments require mention.

[30] DPH's submissions summarized above addressed the first and second of the seven reasons put forward by KMG. DPH argues that KMG's third reason is answered in that there is no prohibition on the Swiss liquidator dealing, on behalf of the company in liquidation, with any assets in the BVI, and that that is a right he enjoys under private international law.

[31] As to the suggestion that the BVI subsidiaries will need to be liquidated in the BVI, DPH argues that there is no reason to suppose that this would be required. Their assets will simply be realized, their own creditors paid, and thereafter the net proceeds distributed in accordance with BVI law by way of lawful dividend to DPH, leaving them as empty shells. Once that exercise is complete the companies can, if necessary, simply be put into voluntary liquidation and dissolved under Part XII Division 1 of the IA, without the involvement of the Court. If that happened at that stage it would simply be a paper exercise, involving the filing of the appropriate documentation.

Discussion

[32] The flaw, in my respectful view, in KMG's argumentation is that it is not the eventual Swiss liquidator who would be dealing with assets located in the BVI, but the company DPH. The Swiss liquidator would supplant and exercise the powers of DPH's Board of Directors. In that capacity the liquidator would cause DPH to vote DPH's shares in its BVI subsidiaries to change their Boards of Directors if their incumbent Boards do not wish to comply with DPH's requirements. The new Boards of Directors of the BVI subsidiaries could then realize their assets and arrange appropriate distributions of the proceeds to DPH, which is their sole owner. In voting the shares DPH holds in its subsidiaries, the actor is DPH notwithstanding that it acts through its liquidator. DPH does not need this Court's recognition or approval to use its shareholder voting power.

[33] The question is one of agency. A liquidator would control DPH by dint of his powers as a liquidator conferred by law. In that sense it could be said that the liquidator is DPH's principal. However, DPH is a corporation, and as such it can only act through human agents[6], usually its officers. DPH would be acting through its liquidator, who would be the corporation's agent. DPH, the corporation, would be the principal.

[34] Issues concerning the liquidator's powers over, and his capacity to bind DPH, are matters for Swiss law. If the registered agent, or incumbent Board of Directors of one of the BVI

[6] See e.g. **Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd** [1964] 2 QB 480 per Diplock LJ

subsidiaries, were to query the propriety of the liquidator's acts purportedly done by him on behalf of DPH, then it would be Swiss law and not BVI law that would govern the position.

[35] There may be situations in which the liquidator might find it desirable to obtain this Court's assistance, or he might be forced to do so through some misconceived position taken by persons connected with the BVI subsidiaries. But such a possibility does not translate into necessity or inevitability. It is an important question to ask in what circumstances a foreign liquidator would need to obtain the recognition and assistance of this Court. In my respectful view, for a foreign liquidator to vote shares held by the foreign corporation over which he is a liquidator, in accordance with the foreign law governing the corporation and his appointment, is not one of those circumstances. He would not be seeking to exercise his remit in a jurisdiction to which it does not extend.

[36] For completeness, I agree with the other arguments of DPH summarized above. There would be no absolute requirement for the BVI subsidiaries to be liquidated. Even if that were to be required, it is not a Swiss liquidator, *qua* foreign liquidator, that would have to do this. KMG do not succeed in showing that the BVI is clearly or distinctly the appropriate forum by raising the possibility that a foreign appointed liquidator might in some conceivable circumstances need or want to obtain this Court's recognition and assistance.

Disposition

[37] The order of the Court is therefore that the permission to serve the winding up proceedings out of the jurisdiction is set aside. The provisional liquidation order remains in place, but will fall away upon the expiry of any period for appeal or if the revocation of permission is upheld upon any appeal.

[38] The order as to costs will be as I have previously indicated, namely that DPH shall have its costs of the application to set aside the permission to serve out, to be assessed if not agreed within 28 days, but not its costs of applying to discharge the provisional liquidation order. The Court makes no order as to costs in relation to the application to discharge the

appointment of provisional liquidators. Although KMG technically succeeded in defeating DPH's application to discharge the appointment of provisional liquidators, the fate of that appointment will turn on whether the revocation of permission for service out will stand or be overturned on appeal.

[39] I thank both sides' Learned Counsel for their assistance.

Commercial Court Judge

10 May 2017