BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCOM2010/231

IN THE MATTER OF SECTION 207A OF THE BVI BUSINESS COMPANIES ACT, 2004

AND

IN THE MATTER OF SECTION 233 OF THE INSOLVENCY ACT, 2003

BETWEEN:

EMIRATES INTERNATIONAL INVESTMENT COMPANY

Applicant

and

(1) SLIM MALOUCHE
(2) REGISTRAR OF CORPORATE AFFAIRS

Respondents

Appearances: Mr Maclom Arthurs and Mr Andrew Gilliland for the Intervener,
Mr Kissock Laing for the first Respondent
The second Respondent was not represented and did not appear

JUDGMENT

[2010: 29 November; 3, 21 December;

2011: 11 January]

(Company going into members voluntary liquidation – liquidator subsequently receiving claim from person claiming to be entitled to restitution of sum previously paid to company – liquidator informally admitting claim and forming opinion on that basis that company insolvent in consequence – liquidator notifying Official Receiver accordingly pursuant to s 209(2) Business Companies Act, 2004 ('BCA) – sole member of company issuing application for liquidation to be terminated under s 199 BCA (subsequently amended to s 233 Insolvency Act, 2003 ('IA')) – claimant applying for permission to intervene as a creditor to oppose termination application – whether claimant entitled to oppose member's application for termination – whether liquidation to be terminated)

[1] **Bannister J [ag]:** This is an opposed application in the liquidation of a BVI registered company called Gallea Capital Group Limited ('the company). It is made by a company called Emirates International Investment Company LLC ('EIIC') and is for permission to intervene in the liquidation of the company as a creditor so as to enable EIIC to oppose the application of the company's sole member, a M Malouche, that the liquidation of the company be terminated pursuant to section 233 of the Insolvency Act, 2003 ('IA 2003').

Summary

[2] The company was incorporated in the BVI on 10 May 2006. In May 2007 it entered into an agreement with EIIC for the provision of services in relation to a proposed investment by EIIC in a residential and recreational development being promoted in or near Algiers by the Algerian authorities. The fee for the provision of these services was agreed at 12.5 million euros. This sum, together with an additional 2.25 euros, was paid by EIIC into an account of the company with HSBC Private Bank Suisse (SA) in Geneva ('HSBC') on 27 August 2007. On 9 November 2009 the company went into members voluntary liquidation under the relevant provisions of the BCA. On 12 May 2010 solicitors acting for EIIC wrote to the Liquidator making a claim to be entitled to recovery of the money which had been paid to the company on 27 August 2007. The Liquidator plainly took the view, after he had been supplied with some further information, that the claim was a good one, because on 21 September 2010 he notified the Official Receiver, as he considered that he was obliged to do by the terms of section 209(2) of the IA, that the company was insolvent. The liquidation thereupon automatically proceeded as if the Liquidator had been appointed under the IA.

[3] On 28 September 2010 EIIC lodged a formal claim pursuant to Insolvency Rule 184 ('IR' and 'IR 184'). On the following day and apparently in response to the claims being made by EIIC, M Malouche issued a fixed date claim form under section 199 of the BCA for the liquidation to be terminated, so that, as he says, the company could be put back into good standing and its directors could contest the claims made by EIIC, as he puts it, on an equal footing. It having been appreciated that section 199 of the BCA had no application once the company's liquidation was proceeding under the IA, the fixed date claim form was amended to invoke the parallel power under section 233 of the IA.

[4] On 18 November 2010 EIIC issued an application for permission to intervene in and oppose M Malouche's application for the termination of the company's liquidation. It is that application which is formally before me, although I shall have to return later to consider what are the proper steps to be taken in relation to Mr Malouche's application which, so far as I can see from the papers, had a return date of 2 November 2010, but which, so far as I am aware, has yet to come formally before the Court.

EIIC's claim

[5] It is common ground that sometime in May 2007, but before 23 May 2007, the company (acting by one Reinhard Kurtz) entered into an agreement in writing with EIIC[1]. The agreement is described as a Service and Consultations Contract ('the SC Contract') and according to the English translation before the Court it provided for the company to 'assist [EIIC] in the study and preparation' of a development project in Algiers which, as I have said, was being promoted under the auspices of the Algerian authorities. I shall refer to it as 'the project.'

[6] The company's obligations under the SC contract included obligations to provide a full legal study for the project; to provide accurate information as to the value of the real estate element of the project; to assist EIIC in the preparation of EIIC's offer to go to the Algerian authorities; to assist on presentation of the offer; to assist EIIC in negotiations with the Algerian authorities; to attend all meetings and to assist in the choice of the most beneficial structure for the carrying forward of the project.

[7] Article 3 of the SC Contract described the company as being subject to a 'result obligation', such that payment under it was exclusively linked to the success of obtaining the project to EIIC's satisfaction, such satisfaction to include the price of the land and written authorisation by the Algerian government. The SC agreement went on to express the expectation that the 'first selection' would come in the form of approval in principle from the Algerian authorities of EIIC's offer and that once this had been obtained the 'applicant' [sic] should negotiate the conditions of the project (expanded to include 'general contract, specifications, purchase price of the land'). Once EIIC had reached an agreement with the Algerian authorities, EIIC was to sign a written

[1] although the agreement names EIIC as party it is actually signed on behalf an entity named as EIIC Group Ltd, but no-one has suggested that anything turns on that

contract with the Algerian authorities giving EIIC the exclusive and final right to realise the project, including the price of the land and the most significant conditions. This latter contract is defined in the SC Contract as 'the Definitive Agreement.'

[8] Article 3 then provided that once the Definitive Agreement (or any document having the same effects, including a mere notification in which EIIC's rights in the project are secured (especially as to the price of the land where the part is situated)) had been signed with the Algerian authorities, then the company's contractual obligations should be treated as fully performed and the company would thereupon be entitled to the price under Article 4.

[9] Article 4 provided that once the Article 3 conditions were satisfied, and the Definitive Agreement signed, EIIC would pay the company 12.5 million euros within fifteen business days following signature by the Algerian authorities of the Definitive Agreement.

[10] Article 5 provided for the SC Contract to run for two years unless renewed by mutual agreement. It was to terminate automatically upon the insolvency of either party. The SC contract was governed by Algerian law and all disputes were to be settled under the rules of the European Court of Arbitration. It was executed on behalf of EIIC Group Ltd by Mr Jawaan Al Khaili ('Mr Al Khaili').

[11] In summarising the provisions of the SC Contract above I have adopted a fairly free hand with the text of the translation which is before the Court in an effort to improve fluency without (I hope) departing from the essential meaning, so far as that can be discerned from a translation.

[12] M Malouche exhibits to his second affidavit the Arabic original together with an English translation of a letter dated 23 May 2007 addressed by EIIC to the Algerian Ministry of Land Use Management and Environment, in which EIIC stresses its commitment to funding the project and evidences its ability to do so. The letter concludes by saying that EIIC is ready to deliver the final forms and the various financial guarantees that were to be implemented for the project as soon as acceptance of the project and agreement in principle were announced prior to signing the project. As may be seen from the recitals to the next document to which it is necessary to refer, it appears that the Algerian National Investment Council approved the project at a meeting held on the same day.

[13] On 17 July 2007, a matter of some one and a half to two months after execution of the SC Contract, what is described as an 'Agreement Protocol' was entered into between EIIC and the

Algerian Government, acting by the Ministry of Industry and Investment Promotion. It was referred to at the hearing as the 'Memorandum of Understanding' and I shall adopt the same expression, abbreviated to 'MoU', in this judgment.

[14] The MoU appears to be concerned with the same piece of land and the same project as is the SC Contract, although the name and dimensions of the project and the area to be covered are not precisely identical. It recites (in the English translation with which the Court has been provided) that an offer has been received from EIIC by the National Investment Council 'for an investment project for completion of the preparation Project' and that the National Investment Council had decided to approve the project at a meeting on 23 May 2007. The MoU goes on to recite that it represents the main legal, economical and technical terms agreed between the parties for completion of the project.

[15] Article 1 of the MoU is in the following terms:

> '1. Exclusivity
>
> The present Agreement Protocol aims from one aspect at the determination of the principals [sic] and the early stages on which the Parties agree for completion of the Project; and from another aspect at framing the discussion between the Parties in order to be able to fulfill the terms of completion of the Project as soon as possible, and all the contractual documents relating thereto.
>
> During the negotiation stage, the Algerian Party undertakes not to open any discussion or negotiation, and to refrain from entering into contract with third parties concerning transfer and/or preparation of the relevant plots.
>
> The term of this paragraph shall commence on the effective date of the present Agreement Protocol and shall end when the investment agreement to be entered into between the Parties comes into effect.'

[16] It seems clear from this provision that the parties to the MoU envisaged (a) a further period of negotiation intended to fructify into a complete set of contractual documentation for the purposes of fulfilling the terms of completion of the project during which (b) EIIC would be granted exclusivity; and (c) that the MoU would govern the relationship between the parties between the effective date of the MoU (defined by Article 8 as the later of the dates upon which the MoU was executed and the date upon which the price at which the development land would be transferred to be granted to

EIIC had been established) and the date 'when the investment agreement to be entered into between the parties comes into effect.'

[17] Article 2.1 of the MoU contains provision for the transfer to EIIC of the development plots (or the grant to EIIC of some inferior interest in them). Article 2.1 deals with the park areas and Article 3 appears to have imposed upon EIIC responsibility for landscaping, etc, work on that area and for that purpose EIIC was to submit a 'preparation of its plans' for the park 'for certification by the Algerian government.' Certification was to crystallise EIIC's obligation in respect of the park area of the site.

[18] Article 4 provided for further negotiation as to the price at which the plots on the area of the site to be developed were to be transferred. It was provided that the price once fixed was to be communicated to EIIC by Sunday 1 August 2007.

[19] Article 5 of the MoU required EIIC to form an Algerian company for the purposes of taking the project forward. By article 7 both parties agreed to use best endeavours to enter into an investment agreement in accordance with the provisions of 'order no. 01-03' concerning the development of investment. Article 9.1 provided that the MoU was governed by Algerian law and disputes were to go to arbitration under ICC Rules.

[20] As with the SC Contract, I have taken a rather free hand with the available translation for the sake of clarity of expression. The signature for EIIC on the Arabic version of the MoU appears to resemble that of Mr Al Khaili on the SC Contract.

[21] On 8 August 2007 (a week later than as provided by the MoU) a document described as 'Annexure to the [MoU]' was signed by the Algerian Government and EIIC ('the Annexe'). The Annexe provided that the price to be paid for the transfer of (or grant of inferior interests in) the plots was to be a nominal one dinar per hectare. The Annexe went on to stipulate that the Algerian company, set up or to be set up under Article 5 of the MoU, was to pay the Algerian Government 10% of its dividends in accordance with the applicable laws, despite the fact that the Algerian government held (or was intended to hold) no shares in that company. The Annexe was signed on behalf of EIIC by a Mr Mohammed Khayam Al Turki ('Mr Al Turki').

[22] On 27 August 2007, just within the period of fifteen business days specified by Article 4 of the SC Contract and without, so far as the evidence before the Court goes, any further event intervening, EIIC, as I have said, transferred 14.75 million euros to an account of the company at HSBC. The fee agreed under the SC Contract, it will be recalled, was 12.5 million euros, so that the payment comprised a sum of 2.25 million euros over and above that.

[23] On 9 November 2009, it will be recalled, the company went into voluntary liquidation pursuant to the provisions of the BCA. With the exception of EIIC's claim, it has no creditors. There are no identified assets available for distribution.

[24] On 12 May 2010 Martin Kenney & Co wrote to the Liquidator setting out EIIC's claim at some length. Although the letter was described as a formal claim, it was not, in fact, made on Insolvency Form R184. Martin Kenney & Co's letter challenged the choice of law and arbitration clause in the SC Contract; alleged that no entitlement to payment under that document had arisen and stated that EIIC itself, which appears still to be interested in the project, had not then achieved a binding and final agreement with the Algerian authorities to carry out the work or purchase the land relative to the project. The letter went on to say that EIIC 'suspected' that the beneficial owners of the company had entered into a corrupt agreement with certain EIIC employees and indicated that it was EIIC's preliminary view that there had been a conspiracy, to which the company had been a party, to defraud EIIC.

[25] Martin Kenney & Co then went on to set out the legal basis for EIIC's claim, while reserving the right to refine it at a later date. The first head of claim relied upon was negligent and/or [sic] fraudulent misrepresentation; the second, money had and received, with reference to mistake.

[26] The Liquidator sought further clarification, but Martin Kenney & Co (or rather their clients) were not prepared to provide the Liquidator with further documents unless he first entered into an Non Disclosure Agreement ('NDA'). June and July passed during which the terms of the NDA 'and other pertinent matters including whether or not the documents could be disclosed to our legal counsel' were negotiated between the Liquidator and Martin Kenney & Co.

[27] The NDA was executed, according to the Liquidator, on 5 August 2010 and on 17 August 2010 he says that he received from Martin Kenney & Co the documents listed at Appendix 1 to the NDA. Neither the NDA not the documents sent to the Liquidator on 17 August 2010 were in evidence at

the first hearing of this application on 29 November 2010. I issued an interim ruling indicating that I required to hear the parties about this omission.

[28] That hearing took place on 21 December 2010, by which time the NDA together with all the documents covered by it had sensibly been made available to all parties and to the Court. I am quite satisfied that the Liquidator acted in what he conceived to be the proper performance of his statutory duties, one of which is, under pain of a fine, to inform the Official Receiver as soon as he reaches the opinion that a company in voluntary liquidation is insolvent. However, should such a situation arise in the future, where a voluntary liquidator is confronted by a party claiming to be a creditor, but on the basis of material which he declines to make available to others interested in the winding up, then the liquidator should inform the party making the claim that it cannot be considered unless the materials upon which it is based are made materials in the liquidation. Apart from general considerations of transparency, it is a specific requirement of IR 188 (which will apply if a liquidator decides that a company is insolvent as a result of a claim submitted) that claims (which expression must include all material relied upon in support of claims – see the terms of Form R 184) must be available for inspection by creditors and contributories. A liquidator runs no risk of finding himself in breach of section 209(2) of the BCA if he takes this stance, because unless the claiming party makes the material available upon the only basis upon which the liquidator may properly consider it, the liquidator will not have material before him on the basis of which he can form the opinion that the company is insolvent.

[29] Be that as it may, upon the basis of the information provided to him by Martin Kenney & Co in May and August 2010 the Liquidator formed the view that there was substance to EIIC's claim, on the basis that the trigger event for the 12.5 million euro payment to the company had not arisen when the payment was made. Accordingly, on 21 September 2010 he gave notice to the Official Receiver (he says the Registrar of Corporate Affairs, but this is simply an error – the notice was in fact given to the Official Receiver) under section 209(2) BCA that in his opinion the company was insolvent. The Liquidator thereupon became obliged to and did call a meeting of creditors under section 210(1) and the liquidation of the company proceeded as if the Liquidator had been appointed under the IA. Only EIIC was given notice of the creditors' meeting and, unsurprisingly, EIIC was the only person to attend on 29 September 2010. The Liquidator's appointment was confirmed by EIIC at that meeting.

[30] I have summarized in the earlier part of this judgment the subsequent events which have given rise to this hearing.

The contentions of the parties

[31] Mr Arthurs, who has appeared for EIIC, says that payment of the success fee was conditional upon a Definitive Agreement within the meaning of Article 3 of the SC Contract. He submits that Article 3 requires several steps towards the achievement of the Definitive Agreement. First, the company must have assisted EIIC during all steps in the selection of EIIC by the Algerian authorities, expected to consist of a written approval in principle of the offer presented by EIIC to the Algerian authorities. Next, 'the applicant' is to negotiate the 'conditions of realization of the project' (defined as including 'general contract, specifications, purchase price of the land). Finally the Definitive Agreement itself must have been concluded, being an agreement giving EIIC the exclusive and final right to realize the project, including agreement on the price 'and the most significant conditions.'

[32] Mr Arthurs says that the MoU is no more than an exclusivity agreement under cover of which the Algerian Government was to work with EIIC to establish the terms upon which the development is to be carried out. He relies upon the term providing that the MoU shall apply 'during the negotiation stage' and the fact that it is expressed to govern the parties' relationship until 'the investment agreement to be entered into between the parties comes into effect.' He relies upon a letter dated 9 December 2009 from EIIC to the Algerian Ministry of Environment and Development, which specifically refers to the MoU and to the Annexe and goes on to say that EIIC 'is pleased to address . . . the outstanding points which must be secured as a requirement for the project to be established and to realize its objectives by both parties.' He points to the remainder of the letter, dealing with points such as plot identification, rights of disposal, exemptions from various provisions of Algerian laws, tax privileges, customs exemptions for the developer and contractors, dispute resolution and other detailed matters. Mr Arthurs says, in effect, that the MoU was no more than an agreement to agree and that only when the matters detailed in the letter of 9 December 2009 had been agreed would it have been possible for the company to claim that a 'Definitive Agreement' had been concluded, entitling it to payment of the 12.5 million euro success fee.

[33] On this basis, Mr Arthurs contends that there has been a total failure of consideration on the part of the company. It had not earned the fee and EIIC is thus (I think that that is the case made by EIIC on this point) entitled without more to have it refunded.

[34] Mr Arthurs further contends that the payment was induced by fraudulent or negligent misrepresentations 'made to officers of EIIC'. At first blush, this looks like an allegation that it was the company which misled senior officers of EIIC, but an examination of the evidence relied upon shows that the allegation is in fact that senior management at EIIC were misled by other officers or employees of EIIC. There is no evidence of any contact between the company and EIIC prompting the making of the payment on 27 August 2007.

[35] Mr Arthurs boldly contends, however, that the company was 'on balance' aware of the intention to mislead and defraud EIIC (the identity of the person having the intention is not specified, but if the company was 'aware' of the intention it must, I suppose, be the intention of some third party – presumably the officers or employees of EIIC by whom it says it was misled) and therefore must have held the payment on constructive trust for EIIC on the basis either of knowing receipt or knowing assistance (i.e. as a conspirator with the relevant officers or employees of EIIC). In support of this serious allegation, Mr Arthurs submits that 'it is unlikely that [the company] was not aware' of the fact that no Definitive Agreement existed between EIIC and the Algerian Government when the payment was made. On the basis only of the allegation that (as EIIC has claimed in other proceedings) one of the employees concerned had defrauded EIIC in relation to another matter, Mr Arthurs submits that 'there is a substantial inference that [the company] was aware of the improper nature of the payment and knowingly assisted in the fraud or at the very least knowing received the funds.'

[36] Mr Kissock Laing, who appeared for the company on this application, contends that once the price had been fixed by the Annexe, the company had successfully obtained a Definitive Agreement for EIIC within the meaning of the SC Contract and thus became entitled to the 12.5 million euros. He points to recital (e) to the MoU, stating that 'the parties agreed under this document . . . on the main legal, economical and technical terms agreed between them for completion of the project.' He says that the terms of the MoU give EIIC the exclusive and final right to realize the project and that the Annexe fixed the price. The matters listed in EIIC's letter of 9 December 2009 are the details of the 'investment agreement to be entered into between the parties', which the MoU

envisages as matter for subsequent negotiation and agreement. He says that EIIC in its letter of 9 December 2009 recognised that the foundation of the relationship was the MoU and the Annexe together and that those two documents comply with the definition of 'Definitive Agreement' in the SC contract. So, Mr Laing submits, the condition for payment of the 12.5 million euros was fulfilled. The additional 2.25 million euros were by way of bonus and in any event no separate point is taken by EIIC as to the latter sum.

[37] Additionally, Mr Laing relies upon a document described as an affidavit of Dr Abdelkareem Al Kadomi ('Dr Al Kadomi'). The document is in English and is dated 13 June 2010. It is not a sworn document and is not intituled in any proceedings. Despite its title, it appears to be no more than a signed statement and would appear to have been made for the purposes of persuading the Liquidator to admit EIIC as a creditor of the company – although that cannot be said for certain. Dr Al Kadomi describes himself as Legal Consultant to EIIC. He says that at some time unspecified, he was provided by Kayam Turki (said to have been CEO of EIIC Algiers and presumably the same person as the Mr Al Turki mentioned earlier in this judgment) and/or by Mehdi Dazi (said to have been CEO of Investments at EIIC Abu Dhabi) ('Mr Dazi') with a copy of the MoU and some other documents related to the project. He says that he was told by Mr Al Turki and Mr Dazi that the project was 'secured' but that, looking back, they 'verbalised scenarios by which EIIC's upper management felt obligated to pay the money earlier than the contract had called for, in fear of losing out on the entire project.' Dr Al Kadomi concludes by saying that EIIC is now facing difficulties since no contract has been secured and 'several issues have ar[isen] since then.'

[38] There is a similar 'affidavit' from Mr Merie Jabary, CFO at EIIC ('Mr Jabary'), dated 17 June 2010. He describes how on around 21 August 2007 Mr Al Turki came to him with the SC Contract showing the obligation to pay the 12.5 million euros on conclusion of a Definitive Agreement' and that Mr Turki had written a further figure of US$3 million (the equivalent of 2.25 million euros) on the SC Contract which he described as additional fees for certain individuals who had 'helped secure the Contract (sic).' Mr Jabary goes on to say that this project had already been approved by EIIC's upper management, so that he (Mr Jabary) had no reason to believe that the US$3 million/2.25 million euros was anything other than a legitimate addition to the contract. Mr Jabary says he checked with Mr Al Turki and Mr Dazi and was assured by them that the project would be secured if the money was paid. He suggests that his role, once a payment had been authorized by

higher management, was a purely ministerial one of seeing to it that the appropriate payment was made.

[39] What appears from the statements of Dr Al Kadomi and Mr Jabary is that the 12.5 million euro payment was made either in the belief that it was due under the MoU or in the belief that it was commercially essential to make the payment in order to secure the project. The additional US$3 million/2.25 million euros is not touched upon by Dr Al Kadomi, but Mr Jabary seems to have accepted assurances that it was what is impolitely known as a backhander which had been approved by upper management. He appears to have raised no objections to its payment on that score.

[40] Mr Laing submits that this evidence shows that whether or not he is right in contending that a Definitive Agreement within the meaning of the SC Contract had been delivered by the entry into the MoU and the fixing of the price per hectare by the Annexe, EIIC made the payment of 27 August 2007 with its eyes wide open. EIIC had the necessary documents (and later relied upon them in its letter of 9 December 2009). There is no record that it ever called upon the company to do any further work under the SC Contract or that it complained until some three years after the event that the company's obligations had not been fully performed. In any case, whether or not as a matter of law the company's right to payment had accrued by 27 August 2007, Mr Laing submits that EIIC had received substantial consideration from the company, which had procured the MoU and the Annexe, together with an exclusivity period – benefits which, so far as the evidence shows, have been built upon and exploited subsequently by EIIC.

[41] So far as the constructive trust claims are concerned, Mr Laing says shortly that there is no evidence of any complicity by the company in any fraud practiced upon EIIC and, for the matter of that, only insinuation based upon alleged other misconduct on the part of a particular individual to support the suggestion that the payment was made as a result of any fraud at all. Indeed, as the passages from EIIC's submissions which I have set out in paragraph [35] above demonstrate, serious allegations of fraud are being made on the basis that the company was 'on balance' aware of an intention to mislead and that there is ' a substantial inference' that the company received the funds in the knowledge that EIIC had been cheated into parting with them. That, if I may say so, is not a proper foundation for a serious allegation of fraudulent conspiracy.

[42] Finally, Mr Laing says that EIIC's restitution claims give it no standing as a creditor until it has obtained judgment entitling it to recover. Mr Laing relies upon the decision of the Court of Appeal in **Trade and Commerce Bank v Island Point Properties SA**[2] in support of this proposition. In my judgment, the submission involves a misunderstanding. What was at issue in that case was whether a party claiming restitution (but who had not obtained judgment on his claim) could be said to be a creditor to whom a debt was presently due and payable for the purposes of the statutory demand provisions of the IA. It was held that he could not. It does not follow that a person with a restitution claim will not be admitted as a creditor in the winding up of a BVI company on the grounds that he has not established his claim by judgment. Section 10 of the IA expressly envisages that he may be admitted to proof. Persons with money claims in a liquidation are regularly referred to generally as creditors, to distinguish them from contributories, but that does not mean that the company has to have been *indebted* to them before they can claim in its winding up. It is sufficient that the company has some liability towards them falling within section 10 of the !A, which, as the Court of Appeal in **Island Point** made clear, may, but will not necessarily, be in the nature of a debt. A person with a properly admitted claim in restitution is a creditor for the purposes of a company's winding up.

[43] For reasons which will become apparent in a moment, I do not think that it would be right for me to express any conclusions as to the relative merits of the parties' respective positions. I have set them out above purely for the purpose of giving some indication of the nature of the dispute and of the issues which it raises.

Conclusions on the application

[44] I have come to the conclusion that the Liquidator was wrong to admit the claim of EIIC and wrong, accordingly, to notify the Official Receiver that the company was insolvent. It seems to me that the Liquidator was in no position to say, on the basis of the material with which he had been supplied, that the company was liable to pay EIIC 14.475 million euros. The Liquidator should not have assumed, as he appears to have done, that EIIC's claims gave rise to ascertained liabilities rendering the company insolvent. All manner of companies are constantly the target of claims of various degrees of strength. If sufficiently serious, a company may note them in its financial statements, but no properly run commercial concern would include a claim of the quality of that

[2] HCVAP 2009/12, 13 August 2010

advanced by EIIC in this case as a liability in its balance sheet until it had been established and quantified by arbitration (in the broad sense) or agreement, nor would it treat it as being presently (or at any particular point in the future) due and payable.

[45] I think that the right position for the Liquidator to have taken was that a restitutionary claim of this nature, involving allegations of conspiracy and fraud and questions about the state of mind of those causing the payment of 27 August 2007 to be made, called for arbitration or trial, where the apparatus of disclosure and cross examination would assist the relevant tribunal to make a properly based determination as to the truth of the matter.

[46] The Liquidator should, in my judgment, have rejected the claim and left it to EIIC to apply to the Court for permission to proceed against the company by way of arbitration pursuant to Article 7 of the SC Contract or in court proceedings. There being no other creditors the settlement of whose claims would be delayed by such process, there could be no reason why the Court should not give its consent[3].

[47] There is a further consideration. If this claim is to be persisted in, the Liquidator has no funds to fight it. He has no creditors to protect. Nothing is to be lost by terminating the liquidation and leaving it to EIIC to decide whether it wishes to take the matter further in the forum appropriate to the nature of the claim. Mr Arthurs complains (rather late, considering that the payment was made in August 2007) that if that course is taken the owners of the company may dissipate its assets. That may be true, but there are means by which claimants may obtain the assistance of the appropriate courts in order to prevent that from happening, so that if the liquidation is terminated, EIIC will not be without the potential for protection. The likelihood that EIIC, even if its proof was admitted in full, would make any recovery in the company's winding up appears to be remote, to put it at its lowest: see paragraph 29 of the Liquidator's affidavit of 1 November 2010, where he deposes to the failure of HSBC to co-operate with him to date. There is no evidence to suggest that that stance is going to change No other assets of the company beyond the funds (if any) remaining in the HSBC bank account have been identified in the evidence before me.

[48] I wish to make it absolutely clear that nothing in this judgment should be taken as any sort of indication by the Court that the Liquidator has acted otherwise than in the diligent pursuit of his

[3] see the commentary and authorities referred to at **Gore Browne on Companies**, Update 63, para 59[26A]

duties and in good faith. What I have said above is not intended to be critical of his performance as a professional – quite the contrary - but of what, as I see it, was a wrong conclusion of law.

[49] In the light of my conclusions there is, in my judgment, no ground upon which EIIC can realistically oppose termination of the company's liquidation. I therefore propose to dismiss EIIC's application to intervene. I will hear the parties on the question of costs, on the form of the order and on the future conduct of this matter.

Commercial Court Judge

11 January 2011