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

CLAIM NO: BVIHCV2010/231

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

AND

IN THE MATTER OF GALLEA CAPITAL GROUP LIMITED (in liquidation)

BETWEEN:

SLIM MALOUCHE

Applicant

and

REGISTRAR OF CORPORATE AFFAIRS

Respondents

Appearances: Mr Francis Tregear QC and Mr Malcolm Arthurs for the Intervener,
Mr Stephen Moverley-Smith QC and Mr Kissock Laing and Ms Kimberly K Crabbe-Adams for the first Respondent
Mr Nelson Samuels for the second Respondent

JUDGMENT

[2011: 14, 22 July]

(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]:** On 11 January 2011 I gave judgment on an application by Emirates International Investment Company ('EIIC') for permission to intervene in an application made under section 233 of the Insolvency Act, 2003 ('IA 2003') by the Applicant ('M Malouche') for an order that the liquidation of Gallea Capital Group Limited ('the Company') be terminated. I refused the application on the grounds that it seemed to me that it was inevitable that the liquidation would be terminated. The Court of Appeal set aside that order, taking the view that I had been too precipitate and gave directions for the termination application itself to be dealt with in the presence of EIIC. That hearing took place on 14 July 2011.

[2] The relevant facts were set out in my earlier judgment but for ease of exposition I repeat them here.

[3] 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 on 27 August 2007. On 9 November 2009 the Company went into members voluntary liquidation under the relevant provisions of the Business Companies Act, 2004 ('the BCA'). The usual declaration was made to the effect that the Company had neither liabilities nor assets. Mr Hadley Chilton was appointed Liquidator. 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 IA 2003, that the Company was insolvent. The liquidation thereupon automatically proceeded as if the Liquidator had been appointed under IA 2003.

[4] 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 IA 2003, the fixed date claim form was amended to invoke the parallel power under section 233 of that statute.

[5] 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 was that application which I decided against EIIC in January 2011 and which the Court of Appeal subsequently decided in EIIC's favour.

EIIC's claim

[6] 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. The development was to be part residential and part for the provision of recreational space. I shall refer to it as 'the project.'

[7] 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.

[8] 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

[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

Algerian government. The SC Contract 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 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.'

[9] 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.

[10] 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.

[11] 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').

[12] 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.

[13] M Malouche exhibits to his second affidavit the Arabic original together with an English translation of a letter addressed by EIIC to the Algerian Ministry of Land Use Management and Environment dated 23 May 2007 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 are 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.

[14] 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.

[15] 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.

[16] 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.'

[17] Although I must not pre-judge the matter, it would seem 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 or granted to EIIC had been established) and the date 'when the investment agreement to be entered into between the parties comes into effect.'

[18] Article 2.1 of the MoU contains provision for the transfer to EIIC of the development plots (or the grant to EIIC of some lesser 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.

[19] 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 (outright or with some lesser form of tenure). It was expressly provided that the price once fixed was to be communicated to EIIC by Sunday 1 August 2007.

[20] Article 5 of the MoU required EIIC to form an Algerian company for the purposes of taking the project forward. There is no evidence whether that was done or not. 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.

[21] 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.

[22] 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 lesser 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').

[23] 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 Private Bank Suisse (SA) in Geneva. 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.

[24] As I have already said, on 9 November 2009 the Company went into voluntary liquidation pursuant to the provisions of the BCA. It has no creditors and the only claim which has been made against it is that of EIIC.

[25] 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.

[26] 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 a reference to mistake.

[27] The Liquidator responded by seeking 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.

[28] 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 nor 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.

[29] 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.

[30] On 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 grounds 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) of the 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.

[31] At the hearing of the intervener application in December 2010 lengthy submissions were made as to whether or not EIIC's claim was a good one. Since then, further evidence has been put in.

[32] My conclusion on the intervener application was 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 seemed 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 euros. The Liquidator should not have assumed, as he appears to have done, that EIIC's claims would inevitably succeed. I took the view that no properly run commercial concern would include a claim of the quality of that advanced by EIIC in this case as a liability in its balance sheet until it had been

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 and, for those reasons, that EIIC's claim had to be treated presently as not established.

[33] I said that it should have been obvious to the Liquidator that a restitutionary claim of this type, 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, cried out for arbitration or trial, where the apparatus of disclosure and cross examination would enable the relevant tribunal to make a properly based determination as to the truth of the matter. I should have gone further and said that the claim could not be determined without resort to the processes of trial or arbitration.

[34] I went on to say that the proper course for the Liquidator would have been to reject the claim and leave it to EIIC to apply to the Court for permission to proceed 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 as a result, there could be no reason why the Court should not give its consent to such a process[2].

[35] I added that if the claim was to be persisted in the Liquidator has no funds to fight it. He had no creditors to protect. Nothing was to be lost by terminating the liquidations and leaving it to EIIC to decide whether it wished to take the matter further in a forum appropriate to the determination of the claim.

[36] The Court of Appeal did not say that I was wrong to express the views which are summarised in paragraphs [32] to [35] above, although I think that it is implicit in the order which it made that the Court of Appeal thought that I had expressed them too soon and in any case it must be remembered that the Court of Appeal's decision did not involve consideration of the correctness of my remarks. I think that the most that can be said is that the Court of Appeal did not specifically criticise what I said on those matters.

The contentions of the parties

[37] Mr Moverley Smith QC, for M Malouche, submits that the views which I expressed on the intervener application and which I have repeated above are correct. He says that any attempt to

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

arbitrate or litigate the dispute with a liquidator remaining in the saddle would add to cost, cause duplication and delay and get in the way of the resolution of a dispute which calls for local knowledge and expert evidence of foreign law.

[38] Mr Tregear QC says that the views I expressed in January 2011 were obiter. That is strictly correct. He goes on to stress the need to discourage the use of the voluntary liquidation procedure in order to bury wrongdoing. He points out that M Malouche holds the shares as a nominee only and that he does not identify the ultimate beneficial owner. He says that the Liquidator still has the vital task of establishing what has happened to the money paid into the HSBC account and that his attempts to do that have so far been thwarted by the intervention of a firm of lawyers called Mentha & Associes, the identity of whose client has not been revealed. He says (I paraphrase) that the conduct of those behind the Company, whoever they may prove to be, is to put it at its lowest, secretive and obstructive and that against that background it cannot be just and equitable to remove the Liquidator and hand the Company back to unidentified persons against whom serious allegations of misconduct are made.

[39] Mr Tregear QC referred me to two New Zealand authorities. I did not find them particularly helpful, but one of them cited a passage from the judgment of Buckley J, as he then was, in **Re Telescriptor Syndicate Limited**[3]

> 'Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses t act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In *re Hester* (1989) 22 Q.B.D 632, at 641 some trenchant observations of Fry LJ will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interest of the creditors. It has a duty with regard to the commercial morality of the country [sic]: … I am here asked to exercise an analogous jurisdiction, and I may say that it is in my opinion desirable that so far as possible the Court should not assume a different attitude or act upon a different principle in the winding up of a company and in the bankruptcy of an individual.'

[3] [1003] 2 Ch 174,180

[40] Mr Tregear QC adds that unless control remains with the Liquidator, those behind M Malouche could procure the Company to release valuable claims which it may have against third parties. He identified these third parties as persons with whom the Company might have shared the proceeds of what EIIC claims to have been a fraud practiced upon it and that if it remained out of liquidation those claims might be released to reduce recoveries available to any one establishing a claim against the Company.

Decision

[41] It seems clear on the evidence that there is no real prospect that the Liquidator will ever obtain access to or information about the HSBC account. There is nothing to suggest that the Company was anything other than a single purpose vehicle, incorporated for the purposes of the Algerian venture. There are no creditors and no known or available assets. All that remains is for EIIC to establish its claim, if indeed it really wishes to do so, something about which there seems to me to be at any rate a question. The claim can be established, for the reasons which I have given, only by engaging in contentious proceedings. Mr Tregear QC says that EIIC does not wish to arbitrate, since it claims not to be bound by the arbitration agreement. That submission ignores the general rule that an arbitration may be valid even if embedded in a contract which is void or voidable for fraud. Assuming, however, that EIIC is entitled to avoid the arbitration agreement, its only practical alternative is to litigate. The Liquidator cannot possibly conduct such litigation on his own or unfunded. If any claim by EIIC is going to be defended, as those behind M Malouche clearly wish it to be, there are two alternatives. One is for the Liquidator to be funded and indemnified by M Malouche and for him to manage the Company's defence of the claim in proceedings brought against the Company. The other is for the Company to be taken out of liquidation and for those behind M Malouche to conduct its defence as the parties in interest.

[42] A moment's thought will reveal that the former alternative is hopelessly impractical. Even if the Liquidator was prepared to manage the defence, his involvement would obviously produce duplication and extra expense. He would no doubt be advised that, having elected to defend in the Company's name, he had fiduciary duties to see to it that every element of that defence was conducted properly and would (rightly) insist upon being involved at every step. The idea that the Liquidator could properly conduct the Company's defence as it were by proxy strikes me as unrealistic.

[43] There is a further consideration. The Liquidator is under no obligation, even if offered full funding and a complete indemnity, to defend any proceedings brought against the Company by EIIC. He would be within his rights and would be acting properly, if advised that the defence had no merit, to abandon it. Given that there is no estate for the Liquidator to protect, it does not seem to me to be just or equitable that the only persons left standing with an interest in defeating EIIC's claim, however doubtful their conduct may or may not turn out to have been, should have to bear the risk of having that opportunity denied them by the decisions of an official who has no interest, as liquidator, in the outcome.[4] In this regard I am particularly struck by the fact that after all this time and after clear indications from the bench that the way is open for them to bring proceedings against the Company, EIIC has not so far commenced proceedings. I do not think that I am unjustified in those circumstances from supposing that, rather than fight the case out in proceedings constituted for the purpose, EIIC cherishes a hope that if the Company remains in liquidation it may prevail upon the Liquidator to admit the claim. If that happened, M Malouche would appear to have no express standing to challenge the decision[5], although the Court might well consider that in such circumstances he had *locus* as a person in interest in the circumstances of this case. But even if that is right, he would still be left in the position that without a full trial of the claim there is no means of deciding whether or not it is valid. It would be a contest between the opinion of the Liquidator and the opinion of M Malouche. That does not seem to me to be a just or equitable outcome.

[44] As for **Re Telescriptor Syndicate**[6], this is not a case where the Company has any intention of going back into the marketplace. There is no public to be protected within the jurisdiction, or who would be likely to go about their business with their spirits uplifted by the refusal of this application, accompanied by round judicial condemnation of the conduct of those behind the Company. If EIIC proceeds against the Company and if the Company loses, that fact alone would be sufficient to satisfy the requirements of both justice and (if different) of commercial morality. If the Company succeeds, the point disappears.

[45] I am wholly unimpressed by the suggestion that the Company may go about forgiving claims against third parties to the detriment of the Company. When pressed to explain the possible

[4] because he has no estate to protect
[5] See subsection 209(2) of the Insolvency Act, 2003
[6] (supra)

causes of action which the Company might have against the supposed third party recipients of the money, or the machinery by which, if they exist, such claims could be validly released, Mr Tregear QC effectively changed the subject.

Conclusion

[46] I take the view that justice and equity demand that those with the interest to defend this claim, if it is ever properly brought, should have the freedom to do so without the artificial (in the circumstances) interposition of an intermediary. I shall therefore make an order terminating the liquidation. I will hear Counsel on the precise terms of the order and the Liquidator will, of course, be heard in relation to those terms. The parties are to notify Walkers of the date and time for the handing down of judgment so that he may attend and make such representations as he wishes.

Commercial Court Judge

22 July 2011