EASTERN CARRIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0013

BETWEEN:

KMG INTERNATIONAL NV

Appellant

and

DP HOLDING SA
(a company incorporated under the laws of Switzerland)

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Rolston Nelson	Justice of Appeal [Ag.]

Appearances:

Mr. Alain Choo Choy, QC with him, Mr. Mark Forte and Ms. Tameka Davis for the Appellant
Mr. Stephen Moverley Smith, QC for the Respondent

2017: November 22, 23;
2018: May 3.

Commercial appeal — Winding up proceedings — Application for appointment of liquidators — Application for permission to serve application for appointment of liquidators out of jurisdiction — Section 163 of BVI Insolvency Act — Forum conveniens — Whether the BVI or Switzerland is the more appropriate forum to deal with the insolvency of the respondent — Non-disclosure — Whether full and frank disclosure made by the appellant —Whether there is a risk of dissipation of DPH's assets

The appellant, KMG International NV ("KMG"), is an international oil company incorporated in the Netherlands. The respondent, DP Holding SA ("DPH") is a holding company registered and incorporated in Switzerland. KMG and DPH entered into arbitration proceedings in the Netherlands pursuant to the arbitration rules of the Netherlands Arbitration Institute ("NAI"). The dispute between the parties concerned money which KMG claimed was owed to it by DPH under a share sale and purchase transaction,

whereby KMG acquired all DPH's shares in an energy company, the Rompetrol Group NV. The arbitration tribunal made a partial final award of US$200 million in favour of KMG. DPH has not paid the award or any part thereof.

KMG subsequently became aware of certain assets owned by DPH in the BVI, and filed an originating application for the appointment of liquidators of DPH pursuant to sections 159 and 163 of the Insolvency Act ("the Act"). Following the filing of the originating application, KMG applied ex parte for an order appointing provisional liquidators over DPH, as well as for permission to serve the originating application on DPH outside of the jurisdiction.

The learned judge granted both orders, save that the provisional liquidators were to be joint provisional liquidators of DPH pending the determination of the originating application. DPH, in response, filed an application to set aside the permission to serve outside the jurisdiction and to set aside the appointment of the joint provisional liquidators. On 10th May 2017, the learned judge discharged his previous order granting KMG permission to serve outside the jurisdiction, but continued the appointment of provisional liquidators pending the determination of any appeal from his decision.

KMG, being dissatisfied with the decision of the learned judge, appealed against his order of 10th May 2017. DPH cross-appealed against the learned judge's refusal to set aside the appointment of the provisional liquidators, on the basis that KMG misled the court on the ex parte application by failing to disclose matters of relevance and importance in applying for the appointment of the provisional liquidators.

The issues for this Court's determination are, whether the learned trial judge erred in setting aside permission to serve the application for the appointment of liquidators outside of the jurisdiction, and whether the appointment of the joint provisional liquidators should be allowed to stand.

Held: allowing the appeal; dismissing the cross-appeal; reversing the order of the learned judge setting aside permission to serve the originating application out of the jurisdiction; varying the order of the learned judge appointing joint provisional liquidators of DPH; dismissing DPH's application to set aside the appointment of the joint provisional liquidators; and awarding costs of the appeal and cross-appeal to KMG to be paid by DPH, that:

1. For permission to serve out of the jurisdiction to be granted there must be a good arguable case that each of the pleaded claims falls within a relevant gateway as well as a serious issue to be tried in respect of the merits of the claims. Further, the local jurisdiction must clearly be the appropriate forum. On the facts, there is a good arguable case that the claim is covered by one of jurisdictional gateways provided by rule 7.3(10) of the **Civil Procedure Rules 2000**, as the claim is made pursuant to sections 163 and 170 of the Act as well as a serious issue to be tried on the merits of the claim as to whether DPH is liable to be liquidated. Further, as the evidence shows that more than half of the assets of DPH are held in two BVI companies, there is a sufficient connection with the BVI within the first limb of section 163(2) of the Act. DPH also falls within the second limb of section

163(1)(a) of the Act as being insolvent in the sense of being at least cash insolvent. Therefore, KMG has established jurisdiction within the terms of section 163 of the Act

Mackender v Feldia AG [1967] 2 QB 590, 598 A (CA); **Seaconsar Far East Ltd. v Bank Markazi** [1994] 1 AC 438 considered; **Spiliada Maritime Corp. v Cansulex Ltd.** [1987] AC 460 considered; **Orexim Trading Ltd. v Mahavir Port** [2017] EWHC 2663 applied; **Commercial Bank-Cameroun v Nixon Financial Group Ltd.** BVIHCMAP2011/0005 (delivered 6th June 2011, unreported) applied.

2. An appellate court should refrain from interfering with the exercise of a judicial discretion, unless satisfied that the judge erred in principle or made a significant error in the considerations taken into account and that as a result of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In the present case, the learned judge failed to consider the likely delay of 2 years to the start of the bankruptcy proceedings in Switzerland, and did not give proper weight to the fact that the two principal assets of DPH were companies registered in the BVI and that no substantial assets of DPH have been identified in Switzerland. The learned judge further failed to consider that KMG is the most substantial of DPH's creditors on the evidence and wishes to pursue a BVI liquidation. The learned judge also ought not to have treated recognition and assistance by a Swiss liquidator, in the absence of such an appointment or of bankruptcy proceedings, as the determinative factor in the exercise of his discretion under the permission application pursuant to section 163 of the Act. The issue on the application for permission to serve out under section 163 goes to whether liquidation proceedings can fairly be conducted in the BVI. Critically, as the power to wind up a foreign company was granted by the legislature despite the place of incorporation of the company being outside the BVI, this power can only be exercised by a BVI court. It follows that the learned judge ought to have found that the BVI was the more appropriate forum to deal with the insolvency of DPH and erred in setting aside his order of 11th October 2016 granting permission to serve out of the jurisdiction.

   Dufour v Helenair Corporation Ltd. (1996) 52 WIR 188 applied.

3. The general principles applicable to non-disclosure or without notice applications apply to applications for permission to serve out of the jurisdiction. The duty to make full and frank disclosure of all material facts, materiality being judged by the court extends not only to such facts known, but to additional facts that might have been known upon proper inquiry. If there is a breach of the duty to make full and frank disclosure on an application for service out, the court may discharge the order obtained even though the applicant may be able to make another application which would succeed. A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the court, and a negligent failure to state certain facts which should have been stated. If the court is satisfied that there was a deliberate intention to deceive the court, the order is likely to be discharged.

Even if there is no deliberate intention to deceive the court, the question is essentially one of degree. In the instant case, there was no deliberate or intentional breach by KMG of the duty of full and frank disclosure. Further, no reliance was placed on the documents in question to establish the risk of dissipation of DPH's assets.

Commercial Bank-Cameroun v Nixon Financial Group Ltd. BVIHCMAP2011/0005 (delivered 6th June 2011, unreported) applied.

4. Section 170(4) of the Act gives the court the power to appoint a provisional liquidator where such an appointment is necessary for the purpose of preserving the value of the assets owned or managed by the company sought to be put in liquidation. In the present case, it was not necessary to prove asset stripping. It was sufficient to show a need to preserve the value of the DPH assets pending the liquidation if ordered. The learned judge properly relied on the public documents and information advanced by KMG as evidence of the ease and rapidity with which assets within the DPH group could be moved from jurisdiction to jurisdiction. In light of DPH's continued opposition to the claim during the arbitration proceedings resulting in a partial final award that has not been challenged in the Netherlands, and its resistance to its enforcement in the Netherlands and Switzerland, the learned judge was correct in making an order for the appointment of joint provisional liquidators.

   Section 170(4) of the **Insolvency Act**, No. 5 of 2003, Revised Laws of the Virgin Islands applied; **Re a company (No. 003102 of 1991) ex parte Nyckeln Finance Co. Ltd.** [1991] BCLC 539 applied.

JUDGMENT

[1] **NELSON JA [AG.]**: This appeal arises out of an originating application filed on 11th October 2016 by KMG International NV ("the appellant" or "KMG") pursuant to sections 159 and 163 of the **Insolvency Act 2003**[1] ("the Act") for the appointment of liquidators of DP Holding SA ("DPH") the respondent, a company incorporated in Switzerland. By an interlocutory application of even date, KMG applied ex parte for:

   (1) An order pursuant to section 170 of the Act appointing provisional liquidators over DPH; and

[1] Act No. 5 of 2003, Revised Laws of the Virgin Islands.

(2) Permission to serve the originating application on the respondent outside the jurisdiction of the court.

[2] Wallbank J [Ag.] granted both orders, save that the provisional liquidators were to be joint provisional liquidators of the respondent pending the determination of the originating application. The respondent in response filed an application on 1st November 2016 to set aside the permission to serve outside the jurisdiction. The respondent also made an application on 8th February 2017 to set aside the appointment of the provisional liquidators. By order dated 10th May 2017 the learned judge, Wallbank J [Ag.], discharged his order granting permission to serve outside the jurisdiction but continued the appointment of provisional liquidators pending the determination of any appeal.

[3] On 8th June 2017, the appellant appealed with leave of the Court of Appeal against the order of Wallbank J [Ag.] setting aside his earlier ex parte order granting the appellant permission to serve outside the jurisdiction. On 28th June 2017, the respondent cross-appealed, this Court having on 20th November 2017 granted an extension of time for the filing of the cross-appeal. The cross-appeal in broad outline contends that the learned judge wrongly refused to set aside the appointment of the provisional liquidators because the appellant, KMG, misled the court on the ex parte application by failing to disclose matters of relevance and importance in applying for the appointment of the provisional liquidators. Having set out the forensic background to this appeal, it is important to place this appeal and cross-appeal in the wider context of its factual matrix.

The factual matrix

[4] The appellant is a company incorporated in the Netherlands. It is an international oil company with operations in Europe and Central Asia. The respondent is a company registered and incorporated in Switzerland. The respondent company is a holding company. Several of its subsidiaries hold real estate or operate in the area of natural resources.

[5] The appellant and the respondent entered into arbitration proceedings in the Netherlands pursuant to the arbitration rules of the Netherlands Arbitration Institute ("NAI"). The dispute between the parties concerned money which the appellant KMG claimed was owed to it by the respondent, DPH under a share sale and purchase transaction, whereby the appellant acquired all of the shares of the respondent DPH in an energy company ("the Rompetrol Group NV").

[6] On 30th April 2016, the arbitration tribunal made a partial final award in favour of the appellant of US$200 million ("the Award").

[7] The respondent DPH has to date failed, neglected or refused to pay the Award or any part thereof. The respondent unsuccessfully resisted enforcement of the Award in the courts of the Netherlands. The appellant's success in the Dutch courts was a pyrrhic victory.

[8] The appellant subsequently became aware of assets of the respondent, DPH in the BVI i.e. two wholly owned BVI registered companies, Dinu Patriciu Global Properties Limited ("DPGP") and Finite Assets Ltd. ("Finite"). The appellant therefore filed its application of 11th October 2016 and obtained the orders which led to this appeal and cross-appeal as described above.

[9] Before this Court, the parties agreed to argue first the forum conveniens point (the learned judge's decision on 10th May 2017 to reverse his previous order of 11th October 2016 granting permission to serve out) and then the cross-appeal (the impropriety of the order appointing joint-provisional liquidators). Clearly, if the judge was right to reverse his order, the point on the cross-appeal becomes largely academic.

The Judgment in the Court Below

[10] In relation to the two applications before him to set aside the permission to serve out and to set aside the appointment of the provisional liquidators, Wallbank J [Ag.] in effect delivered a composite judgment. The first part was an oral judgment of 23rd March 2017 in which he held at page 12 of the transcript:

> "I can therefore see the merits of a provisional liquidation order and I remain satisfied that the provisional liquidation order was appropriate."

[11] Later in that oral judgment Wallbank J [Ag.] said:

> "Mr. Moverley Smith submitted in his reply oral submissions that Switzerland is the appropriate forum because in particular, a Swiss liquidator of this company will not need to come to the BVI at all as it could get to those assets by changing the boards of DPH's subsidiaries, including the BVI subsidiaries and he could do that from Switzerland. If that is right, it is difficult to see how this argument can be gainsaid."

[12] The learned judge carried that thought to conclusion thus in his oral judgment:

> "If it is right that KMG has not shown that the territory is clearly or distinctly the appropriate jurisdiction for the determination of a winding up petition, the permission to serve the proceedings out of the jurisdiction must be revoked and I will so order."

[13] The learned judge was troubled by the fact that this objection to the jurisdiction on the permission to serve out application was made during the submissions in reply of Mr. Moverley Smith, QC and also by the fact that his order appointing provisional liquidators might be logically inconsistent with upholding that objection.

[14] Wallbank J [Ag.] after hearing counsel on both sides ordered the parties to submit written arguments on the following question:

> "…whether or not a liquidator appointed by a Swiss Court in a Swiss liquidation could… take control of and liquidate assets held by BVI companies merely by changing their boards and without the assistance of this Court."

[15] Ultimately, the learned judge answered this question when he delivered the second part of his composite judgment in a written decision dated 10th May 2017.

Wallbank J [Ag.] affirmed the conclusion he was tending towards in the oral judgment:

> "KMG do not succeed in showing that the BVI is clearly or distinctly the appropriate forum by raising the possibility that a foreign liquidator might in some conceivable circumstances need or want to obtain this Court's recognition and assistance."

[16] The learned judge ordered that the permission to serve the winding up proceedings out of the jurisdiction be set aside. He made the further order that "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". The refusal of permission to serve out is the subject of this appeal and the appointment of the provisional liquidators is the issue on the cross-appeal.

The principles applicable to leave to serve out

[17] The principal application before the learned judge was for permission to serve the BVI proceedings outside the jurisdiction. At this stage, the court is not called upon to determine the petition to wind up the foreign company. Further, permission to serve out of the jurisdiction is always discretionary.[2] The principles upon which that discretion is to be exercised were reiterated in **Seaconsar Far East Ltd v Bank Markazi**[3] and **Spiliada Maritime Corp. v Cansulex Ltd**.[4] In **Orexim Trading Ltd. v Mahavir Port and Terminal Private Ltd. and other companies**[5] the judge identified the three elements to be satisfied:

(1) A good arguable case that each of the pleaded claims falls within a relevant gateway.

(2) A serious issue to be tried in respect of the merits of the claims; and

[2] Mackender v Feldia AG [1967] 2 QB 590, 598 A (CA).
[3] [1994] 1 AC 438.
[4] [1987] AC 460.
[5] [2017] EWHC 2663.

(3) That [the local jurisdiction] is clearly the appropriate forum.[6]

[18] In the instant appeal, it is clear that there is a good arguable case that the claim is covered by one of the jurisdictional gateways provided by rule 7.3(10) of the **Civil Procedure Rules 2000**. The claim is made pursuant to sections 163 and 170 of the Act.

[19] Secondly, there is a serious issue to be tried on the merits of the claim as to whether DPH is liable to be liquidated. DPH contends that it is entitled to wait until enforcement proceedings are started to raise any challenges to the arbitral award and so to the existence of the debt. While this is a correct statement of principle, the Award of US$200 million has not been set aside or impugned by DPH in the Netherlands. Therefore, prima facie the Award is a debt that exists in the Netherlands. Since the BVI is a New York Convention country, 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, DPGP and Finite. 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. In support of this statement the evidence of Marnix Leitjen, a Dutch lawyer acting for the appellant, is pertinent. At paragraph 28 of his affidavit, he states that on 1st May 2016 he wrote DPH a letter demanding payment of the Award. Lawyers for DPH replied on 13th May 2016 asserting that DPH was unable to make the necessary funds available and was scrutinizing the Award. Mr. Leijten in his affidavit also mentions that a letter to the

[6] Supra n. 5 at para. 22. See also Commercial Bank–Cameroun v Nixon Financial Group Ltd. BVIHCMAP2011/0005 (delivered 6th June 2011, unreported) at para. 11 per Bennett JA [Ag.].

arbitral tribunal copied to his firm admitted that DPH did not have the necessary liquidity to pay the judgment debt (the Award) and that its assets would have to be sold in order to realise the required sums.

[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.

[22] In the instant appeal, the judge treated the appointment of a hypothetical liquidator in Switzerland as affecting his decision to grant permission to serve out, when the evidence was clear that Swiss winding-up proceedings were at least two years away. In our view, that was an erroneous exercise of his discretion.

[23] As matters stood at the time of the application to serve out, there were no liquidation proceedings in Switzerland. The nature of the proceedings in Switzerland is described in the evidence of Ms. Anya George, a Swiss Lawyer who is also a solicitor of England and Wales. She states that the appellant is seeking to enforce the Award by way of ordinary debt collection proceedings in Switzerland against DPH. That process was initiated on 27th May 2016 by filing a claim with the Debt Collection Office. DPH has resisted that claim on the basis that the Award cannot be enforced in Switzerland for four reasons: improper arbitral procedure; composition of the tribunal; violation of the right to be heard; and Swiss public policy. Ms. George stated:

> "[19] From my experience, it could potentially take up to a maximum of two years from now until there is a final decision in this matter if the lower court's judgment is in fact appealed all the way to the Swiss Supreme Court and depending on further applications made during the course of the proceedings.
>
> [20] Once there is a final decision on these proceedings, the next stage would be to seek to wind up DPH and liquidate it in order to seek to realise the amounts awarded under the NAI Award."

[24] Ms. Ana Patriciu, a director of DPH, deposed on affidavit as follows:

> "[27] Under Swiss law, only if it is determined in the Swiss Insolvency Proceedings that the debt is enforceable, will DPH have to pay the debt asserted by KMG. It is only at this point, and not before, that DPH be (sic) in a position to be declared bankrupt and a liquidator could be appointed. As is noted in the opinion of Mr. Le Houelleur, it is clear that in Switzerland a liquidator could not yet be appointed over DPH because it 'has not been declared bankrupt."

[25] In short, there were no Swiss bankruptcy proceedings on foot at the time of the permission application. Concerns about hypothetical parallel Swiss liquidation proceedings which might remove BVI assets out of the reach of a BVI liquidator were factors which the learned judge did not properly take into account in exercising his discretion to grant permission to serve out. The learned judge should have based his decision on facts existing at the date on which the order granting permission was made.[7]

[26] Counsel for the respondent persuaded the learned judge that a Swiss liquidator could dispose of the BVI assets of DPH, the shares of DPGP and Finite, by remote control from Switzerland merely by changing their boards without the assistance of the BVI courts. For that reason, Switzerland was a more appropriate forum than the BVI. However, the argument fails to recognise that the power to wind up a foreign company was granted by the legislature despite the place of incorporation of the company being outside the BVI and can only be exercised by a BVI court. The issue on the application for permission to serve out under section 163 goes to whether liquidation proceedings can fairly be conducted in this jurisdiction. Relevant considerations might be the availability of witnesses, the languages of the witnesses or the law governing the transactions central to the winding-up.

[27] The argument that a Swiss liquidator could dispose of the BVI assets of the DPH, the shares of DPGP and Finite from an armchair in Switzerland, so to speak, without the assistance of the BVI courts is flawed. In the first place, any change of

[7] ISC Technologies Ltd. v Guerin [1992] 2 Lloyd's Rep 430, 434-435.

ownership of the BVI assets, by a foreign liquidator would need the assistance of the BVI courts to complete the registration of the transfer at the office of the registered agent of the companies in the BVI.

[28] Secondly, the contention of DPH does not take account of the reality of the existence of creditors who might take alternative enforcement measures against the BVI assets of DPH by means such as charging orders, garnishee orders in respect of sums payable by the BVI subsidiaries to DPH, or receivership orders against the shares of the subsidiaries. In such cases, a foreign liquidator would need the assistance of the local courts.

[29] Thirdly, at common law recognition of a foreign liquidator often carries with it assistance of the home jurisdiction subject to any conditions that the home court may prescribe. This proposition is expressed in the dicta of Lord Collins in **Rubin v Eurofinance SA**[8] as follows:

> "[29] Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: "recognition…carries with it the active assistance of the court": In re African Farms Ltd [1906] TS 373, 377…"

[30] In **Re C (a bankrupt)**[9] Bannister J adopts the dicta of Lord Collins and the dicta of Innes CJ in **Re African Farms**[10] where the learned Chief Justice stated that the recognition of the English liquidator of an English company with assets in the Transvaal for him meant recognition which carried with it the active assistance of the court.

[31] What these cases suggested is that issues of whether a Swiss liquidator would need the assistance of the BVI court are matters which go to the mechanics of the liquidation, which the evidence indicates may be some two years away. This is

[8] [2013] 1 AC 236, para. 29.
[9] BVIHC(COM)2010/0140 (delivered on 31st July 2013, unreported).
[10] [1906] TS 373, p. 377.

not a forum conveniens issue, as the judge put it, and is not determinative of an application for permission to serve out. Similarly, the question whether a BVI court would be recognised abroad is a matter for speculation about the conduct of the liquidation. In any event, a BVI liquidation is principally concerned with winding up the company in the BVI in relation to the BVI assets. However, it is clear from the evidence of Mark McDonald on behalf of the joint provisional liquidators that they have received recognition and assistance from the High Court of England and Wales pursuant to section 426 of the **Insolvency Act 1986 (UK)** in the form of an order of the Chief Registrar dated 21st October 2016. DPH's set aside applications in respect of this order were dismissed on 24th February 2017. Thus, the learned judge erred in treating recognition and assistance of a BVI liquidator as a determinative factor on the permission to serve out application.

[32] Mr. Moverley Smith, QC contended that since the application for permission to serve out related to matters within the discretion of the learned judge, an appellate court should refrain from interfering, unless satisfied that the judge made a significant error of principle or a significant error in the considerations taken into account.

[33] The principles upon which this Court is entitled to interfere with the exercise of a discretion by a judge were stated by Sir Vincent Floissac CJ in **Dufour v Helenair Corporation Ltd.**[11] as follows:

> "[1]We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and
>
> [2] that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which

[11] (1996) 52 WIR 188, pp. 190-191.

reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[34] In the instant appeal, we are satisfied that the judge erred in principle as follows:

(1) By failing to consider the likely delay of 2 years to the start of bankruptcy proceedings;

(2) By not giving proper weight to the fact that DPGP and Finite were the principal assets of DPH and that no substantial assets of DPH have been identified in Switzerland;

(3) By failing to consider that the appellant is the most substantial of DPH's creditors on the available evidence and wishes to pursue a BVI liquidation; and

(4) By treating recognition and assistance by a Swiss liquidator in the absence of such appointment or of bankruptcy proceedings as the determinative factor in the exercise of his discretion under the permission application under section 163 of the Act.

[35] For these reasons, this Court will set aside the learned judge's order of 10th May 2017 setting aside the permission to serve out granted on 11th October 2016.

The cross-appeal

[36] Since the learned judge should have held that the BVI was the most appropriate forum, there remains the question as to whether the appointment of joint provisional liquidators should be allowed to stand.

[37] At the outset, an applicant for the appointment of provisional liquidators pursuant to section 170 of the Act can succeed only if the court has jurisdiction. Thus, Mr. Moverley Smith, QC contended that since there was a bona fide dispute on substantial grounds as to the enforceability of the Award and so of the debt, there

was no jurisdiction to appoint provisional liquidators. He contended that there was a bona fide substantial dispute whether the arbitrators appointed under article 14 of the NAI Rules were properly appointed thus making the arbitration unenforceable. He relied on the judgment of this Court in **Pacific China Holdings Ltd. v Grand Pacific Holdings Ltd**.[12] He also based this submission on section 36(2)(e) of the **Arbitration Ordinance**[13] which provides that enforcement of a Convention award may be refused if the person against whom the Award is invoked proves that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

[38] The partial final award of the arbitral tribunal states definitively at paragraph 16 that the law applicable to the arbitration was Dutch law. The arbitral tribunal ruled as follows on the very point raised by the respondent:

> "[104] In sum, the Arbitral Tribunal concludes that is (sic) has been properly constituted in accordance with the applicable rules. Accordingly, the Tribunal rejects Respondents' jurisdictional objection based on the constitution of the Tribunal."

[39] Therefore, the correctness of the arbitral tribunal's ruling is egregiously a matter of Dutch law. In these proceedings, Dutch law is a matter of expert evidence. The learned judge accepted, as we do, the expert opinion of Alexandra Schluep contained in her expert report dated 10th October 2016 on Dutch arbitration law. She stated at paragraph 6.2:

> "[6.2] The second question relates to the allegedly irregular composition of the Arbitral Tribunal. As the Arbitral Tribunal was appointed in accordance with the NAI Arbitration Rules agreed upon by the Parties in the SPA and the Corporate Guarantee, the argument based on the irregular composition of the Arbitral Tribunal must fall."

[40] The learned Dutch lawyer concludes at paragraphs 6.2.12 and 6.2.13 as follows:

> "[6.2.12] DPH has not and could not successfully argue that it did not and could not anticipate that the Arbitral Tribunal would be appointed in accordance with the list procedure at the time it entered into the SPA and

[12] BVIHCVAP2010/0039 (delivered on 14th May 2012, unreported).
[13] Cap. 6, Revised Laws of the Virgin Islands 1991.

> the Corporate Guarantee. As set out in paragraph 6.2.11 above under the 2010 NAI Rules, the list procedure would also have applied as a fall-back solution if the Respondents had not appointed a joint arbitrator within certain deadline.
>
> [6.2.13] The Arbitral Tribunal therefore correctly held that it was properly constituted under the applicable NAI Rules and that it had jurisdiction to hear KMG's claims. A claim for setting aside the NAI Award on the ground that the Arbitral Tribunal was composed in violation of the applicable rules would have been dismissed by the Amsterdam Court of Appeal or the District Court of Amsterdam."

[41] It is not necessary for this Court to rehearse the details of the argument on the composition of the arbitral tribunal. Suffice it to say that, the learned judge was right to rule on this point that no bona fide dispute on substantial grounds was raised as to the enforceability of the Award. He correctly accepted the evidence of Alexandra Schluep on this point.

[42] The effect of a New York Convention award is that it creates an enforceable debt unless and until the Award is held to be unenforceable by a court of a Convention country. One can therefore treat the appellant as a creditor of a cash insolvent company, DPH.

[43] Section 159(1)(b) of the Act empowers the court to appoint an eligible insolvency practitioner as a liquidator of a foreign company on a section 163 application and section 170 provides for the appointment of a provisional liquidator on such an application.

[44] Before the learned judge, the appellant sought and obtained an order for the joint provisional liquidators with power to take control of the BVI subsidiaries and to gather information whilst ensuring that there would be no further dealing with the BVI assets pending a formal winding up of DPH. Any further steps would require the sanction of the court.[14] One of the objectives of the appointment of joint

[14] See para 5 of the order of Wallbank J [Ag.].

provisional liquidators was to enable the provisional liquidators to take control by being able to appoint directors to the Board of the BVI subsidiaries. The scope of the order sought was indeed limited.

[45] The respondent DPH also sought to attack the order on the basis that it was an ex parte order and that the appellant did not make full and frank disclosure to the judge.

Non-disclosure

[46] DPH relied principally on two items of alleged non-disclosure:

(1) The existence of article 190 of the **Swiss Debt Enforcement and Bankruptcy Act** which provides a summary procedure by which a creditor could seek the immediate bankruptcy of a debtor company without the need to go through ordinary debt collection proceedings; and

(2) The alleged failure of the appellant to disclose that a considerable amount of the evidence relied on by the appellant had been obtained by data theft contrary to section 125 of the **Evidence Act**.[15] In the absence of permission by the judge such evidence was inadmissible.

[47] With regard to the Swiss emergency procedure, the appellant adduced evidence of Anya George, a Swiss lawyer, whose evidence was unchallenged, that the Swiss debt procedure might take up to two years before the winding up process began that would allow for the appointment of a liquidator. The availability of the emergency procedure would be more problematic in the light of DPH's refusal to regard the appellant as a creditor as part of its challenge to the enforceability of the Award. We find it difficult to disagree with the learned judge that the availability of the Swiss emergency procedure under article 190 was at best theoretical on the facts of the case and so was not a material non-disclosure.

[15] Act No. 15 of 2006, Revised Laws of the Virgin Islands.

[48] We turn now to the documents said to be provided by Mr. Imre, a former employee of a company within the DPH group of companies, retained as a consultant by KMG after he left the employment of DPH. These documents are referred to as "the Imre documents".

[49] At the ex parte hearing, the appellant placed before Wallbank J [Ag.] an affidavit of O'Sullivan which at paragraph 145 stated, "DPH might argue that the DPH documents may have been obtained illegally and therefore no account should be taken of them". During the submissions to the judge, counsel did not make any reference to paragraph 145 of the affidavit or the anticipated argument on unlawfully obtained evidence.

[50] Leading counsel for the respondent, Mr. Moverley Smith, QC contends that since the judge's attention was not specifically drawn to paragraph 145 of the O'Sullivan affidavit, there was a clear breach of the duty of full and frank disclosure on the ex parte or without notice hearing. Mr. Choo-Choy, QC in response submitted that there was no intention by the appellant to mislead or conceal any material facts.

[51] The law relating to non-disclosure on applications for permission to serve out was comprehensively laid down by Bennett JA [Ag.] as he then was, in **Commercial Bank-Cameroun v Nixon Financial Group Ltd.**[16] The learned judge propounded that the general principles applicable to non-disclosure or without notice applications applied to applications for permission to serve out of the jurisdiction. The learned judge emphasized the duty to make full and frank disclosure of all material facts, materiality being judged by the court. The duty extended not only to material facts known, but to additional facts that might have been known upon proper inquiry. The learned judge then laid down guidelines for the application of these principles to applications for permission to serve out. We refer to four of the guidelines:

[16] BVIHCMAP2011/0005 (delivered on 6th June 2011, unreported) at paras. 17-20.

(1) If there is a breach of the duty to make full and frank disclosure on an application for service out, the court may discharge the order obtained even though the applicant may be able to make another application which would succeed.

(2) A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the court, and a negligent failure to state certain facts which should have been stated.

(3) If the court is satisfied that there was a deliberate intention to deceive the court, the order is likely to be discharged.

(4) Even if there is no deliberate intention to deceive the court "…the question, as I see it, is essentially one of degree…".

[52] The appellant does not admit to any complicity in the obtaining of evidence improperly but contends that the evidence of the risk of dissipation, critical to the application for joint provisional liquidators, was not based on the Imre documents. The asset dissipation evidence was garnered from corporate accounts and records at public registries. Accordingly, it was argued, the alleged improperly obtained evidence was neither material not relevant. There was no intention to mislead or conceal material facts.

[53] Mr. Choo-Choy, QC for the appellant expressly disavowed at the inter-partes hearing any reliance on the allegedly improperly obtained evidence. Counsel demonstrated that the evidence of the four instances of alleged asset stripping, which he relied upon as instances of dissipation of assets, had been obtained independently of the Imre documents from searching public registries.

[54] Counsel for the appellant contended that the Imre documents were in fact dated, going back to 2011 and 2013. All the documents with regard to dissipation of assets dated from the second half of 2015.

[55] We are satisfied after careful scrutiny of the learned judge's oral ruling that he was satisfied there was no deliberate intentional breach of the duty of full and frank disclosure. The learned judge accepted the submission that no reliance was being placed on the Imre documents to establish the risk of dissipation of DPH's assets. He said:

> "…Counsel for KMG has very persuasively argued, and I believe, shown that the key aspect of that application for a provisional liquidation order, that is the evidence of risk of dissipation of assets, was covered not by these impugned documents, but by documents obtained from public searches and independent sources…"

[56] In conclusion, counsel for the respondent has not shown that the judge misdirected himself in law or that he took into account irrelevant factors or failed to take into account relevant considerations. We accept the findings of the learned judge.

The risk of dissipation

[57] Leading counsel for the appellant, Mr. Choo-Choy, QC contended that the evidence obtained from public searches and other sources independent of the Imre documents was "clear evidence of actual dissipation of assets". Leading counsel for the respondent submitted in reply that there was no evidence that DPH was dissipating, or attempting to dissipate, its assets in anticipation of, or subsequent to the making of the Award. The issue of the impact of the alleged non-disclosure at the end of the day depends on an analysis of the evidence of the risk of dissipation and the meaning of that phrase in law.

[58] In our view, the judge was correct in concluding:

> "I am also satisfied that taken in the round, KMG has evidence, indeed strong evidence, that DPH is capable of using complex offshore structures to put assets beyond the reach of creditors…"

[59] The appellant dissected four instances of alleged asset-stripping as evidence of dissipation of assets to justify the appointment of provisional liquidators. Mr. Moverley Smith, QC considered that the evidence of Ms. Patriciu sufficiently

explained some of the transactions and that the appellant was speculating about the motive behind the transactions. In the view which we take of the evidence, it is not necessary to decide the nature of the transactions or the motive behind them. We examine aspects of two of the transactions cited by the appellant: the disposal of the interest of Novero GMBH and the disposal of the German real estate.

[60] After the initial transfer on 19th June 2015, Novero Lux was registered. On 13th August 2015, the shares of Novero Lux were transferred to a Barbados registered company, Geranium International Limited. Subsequently, there were three other transfers of Novero shares between 26th November 2015 and 3rd December 2015 including being transferred twice within a period of 35 minutes on 3rd December 2015.

[61] As regards the disposal of German real estate shares within the DPH group, for example the shares in a Luxembourg company, ("DPEE") wholly owned by DPGP, were moved three times – from DPGP to an administrative stichting, thence back to DPGP and on the same day from DPGP to an administrative stiching. The true import of the evidence obtained from public searches and other independent sources was to establish the speed at which assets could be transferred from jurisdiction to jurisdiction.

[62] In **Re a company (No. 003102 of 1991) ex parte Nyckeln Finance Co. Ltd**.[17] Harman J explained what was sufficient to justify the appointment of a provisional liquidator:

> "It is not a dissipation in the Mareva sense of simply deliberately making away with the assets but any serious risk that the assets may not continue to be available to the company."

[17] [1991] BCLC 539, 542.

[63] Against the background of the dogged resistance of DPH to enforcement of the Award, which it neither sought to impugn nor annul in the Dutch courts, it was reasonable for the judge to conclude that there was a serious risk that the DPH assets might not continue to be available to the company.

[64] Indeed, section 170(4) of the Act gives the court power to appoint a provisional liquidator where such appointment is necessary for the purpose of preserving the value of the assets owned or managed by the company sought to be put in liquidation. On the facts of this case, it was not necessary to prove asset-stripping. It was enough to show a need to preserve the value of the DPH assets pending the liquidation if ordered.

[65] In the result, we uphold the learned judge's finding that there was no reliance on the DPH documents said to have been stolen. The judge properly relied on the public documents and information advanced by the appellant, not so much as evidence of asset-stripping, but as evidence of the ease and rapidity with which assets within the DPH group could be moved from jurisdiction to jurisdiction. In light of DPH's continued opposition to the claim during the arbitration proceedings resulting in a partial final award that has not been challenged in the Netherlands and its resistance to its enforcement in the Netherlands and Switzerland, the learned judge was justified in making an order for appointment of joint provisional liquidators.

Conclusion

[66] In the result, this Court allows the appeal and dismisses the cross-appeal with costs of the appeal and cross-appeal to be paid by the respondent to the appellant.

[67] The learned judge's order setting aside the permission to serve the originating application filed on 11th October 2016 and ordering the applicant to pay the costs

of the application filed on 1st November 2016 to set aside the said order is reversed.

[68] The learned judge's order of 11th October 2016 appointing joint provisional liquidators of the respondent company, DPH, is varied by extending their appointment up to the determination of the originating application.

[69] The respondent's further application filed on 8th February 2017 to set aside the appointment of the joint provisional liquidators is dismissed with costs.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar