Neutral Citation Number: [2020] EWHC 351 (Ch)

Case No: CR-2020-000395

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF DEEP BLACK DRILLING LLP

AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 21 February 2020

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

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OSANA MENDONÇA
AND
KPMG CORPORATE FINANCE
São Paulo, Brazil

Applicants

- -

Tony Beswetherick (instructed by **Gowling WLG (UK) LLP**) for the **Applicants**
Hearing date: 17 February 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
ICC Judge Burton
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Insolvency and Companies Court Judge Burton :

Introduction

1. On 21 January 2020, Ms Osana Mendonça and KPMG Corporate Finance LTDA applied under the Cross-Border Insolvency Regulations 2006 for the Court to recognise, as foreign main proceedings, insolvency proceedings to which Deep Black Drilling LLP became subject in Brazil on 1 March 2018.

2. As its name suggests, Deep Black Drilling LLP ("DBD") was incorporated in this jurisdiction under the Limited Liability Partnerships Act 2000. It was registered in England on 20 December 2010. The significant feature in DBD's history, for the purposes of this judgment, is that on 19 September 2017, some six months before it was the subject of a Brazilian bankruptcy order, it was dissolved with the result that all property and rights vested in, or held in trust for DPD were deemed to vest bona vacantia.

3. This morning I made the recognition order and now set out my reasons.

Background

4. Ms Mendonça's affidavit sworn in support of the recognition application explains that Deep Black Drilling LLP is part of group of companies known as the Schahin Group. The Group was founded in 1966 by Messrs Milton and Salim Schahin ("Founders"). It was initially involved in the construction of infrastructure projects but over time diversified into oil and gas prospecting.

5. In April 2015 the Founders applied, in Brazil, for twenty-eight companies within the Group to be placed into "judicial reorganisation". The Founders asserted that the companies' financial difficulties, giving rise to debt of approximately US$1.8 billion resulted, amongst other things, from the collapse of the Brazilian economy, reduction in the price of petroleum, rise in the US dollar and Group companies being investigated as part of what has arguably become the highest profile criminal investigation in Brazil involving its national oil company, Petrobas, referred to as Operation Car Wash.

6. On 4 May 2015 Judge Paulo Furtado de Oliveira Filho sitting in the São Paulo Court of Appeals' 2nd Bankruptcy and Reorganisation Court, determined that he was satisfied that the legal requirements had been met for the processing of the court supervised reorganisation of nine of the companies within the Group in respect of which application had been made. Each was placed into "judicial reorganisation". One of the nine companies was DBD. The Judge noted at paragraph 4 of his Order that he considered it to be the only foreign applicant company within the Group whose business activities were sufficiently concentrated in Brazil for the Court to accept jurisdiction. He noted in particular that: DBD was the charterer of the "Vitoria" drill operated by another Group company, Schahin Engenharia S/A; that the drill served Petrobas; that all oil prospecting occurred in Brazil; that the controlling shareholders of both DBD and Schahin Engenharia S/A were individuals domiciled in Brazil; and that although DBD was registered in England, it belonged to a Brazilian business group and its request for court-supervised reorganisation in Brazil was "admissible".

7. Unfortunately, the Group companies failed to honour their obligations under the reorganisation plan. On 1 March 2018, the Bankruptcy Court ordered the conversion of the judicial reorganisation proceedings into bankruptcy proceedings. The Court appointed KPMG Corporate Finance LTDA, represented by Ms Osana Mendonça as bankruptcy trustee of the Group companies which were formerly subject to the judicial reorganisation proceedings. On 7 May 2018, KPMG Corporate Finance LTDA, represented by Ms Mendonça, was also appointed as bankruptcy trustee of twenty-five other companies within the Group.

8. Following investigation as part of Operation Car Wash, the Founders were prosecuted, and each sentenced to nine years and ten months imprisonment for corruption. Ms Mendonça states in her affidavit that during the course of Operation Car Wash, it came to light that many of the Schahin Group companies, including some which were subject to the Court's bankruptcy order, were involved in the payment of bribes to public and private agents as well as diverting assts to the Founders and others. The Bankruptcy Trustee has continued to investigate those issues and discovered evidence that some Group bribes were paid using a bank account held in the name of Casablanca International Holdings Ltd, a BVI registered company which was formerly a 99% designated member of DBD and further, according to a criminal judgment of Judge Sergio Moro dated 19 October 2017 that bribes were also paid from off-shore accounts on behalf of Deep Black Drilling LLP. Ms Mendonça's affidavit summarises the purpose underlying the bankruptcy trustee's application for recognition:

> "In light of the fact that DBDL's registered office is in England, I believe that there may be evidence in England which would assist my investigations and/or assets to which DBDL is entitled that I could recover for the benefit of its creditors. I am therefore seeking recognition in England of the Brazil Proceedings so that I can progress my investigations in this regard."

Recognition under the Cross-Border Insolvency Regulations 2006

9. The Cross-Border Insolvency Regulations 2006 ("CBIR") provide that the UNCITRAL Model Law on Cross-Border Insolvency shall have the force of law in Great Britain in the form set out in Schedule 1 to the Regulations. Schedule 1 contains the various articles of the Model Law with certain modifications specifically tailored for application in Great Britain.

10. Articles 15 to 17 set out clearly the circumstances in which the court *shall* recognise foreign insolvency proceedings.

> ***Article 15 Application for Recognition of a Foreign Proceeding***
>
> **1** A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
>
> **2** An application for recognition shall be accompanied by—
>
> (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3 An application for recognition shall also be accompanied by a statement identifying all foreign proceedings, proceedings under British insolvency law and section 426 requests in respect of the debtor that are known to the foreign representative.

4 The foreign representative shall provide the court with a translation into English of documents supplied in support of the application for recognition.

Article 16 Presumptions Concerning Recognition

1 If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a person or body within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.

2 The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.

3 In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Article 17 Decision to Recognise a Foreign Proceeding

1 Subject to article 6, a foreign proceeding shall be recognised if—

(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2;

(b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2;

(c) the application meets the requirements of paragraphs 2 and 3 of article 15; and

(d) the application has been submitted to the court referred to in article 4.

2 The foreign proceeding shall be recognised—

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of sub-paragraph (e) of article 2 in the foreign State.

3 An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4 The provisions of articles 15 to 16, this article and article 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have fully or partially ceased to exist and in such a case, the court may, on the application of the foreign representative or a person affected by recognition, or of its own motion, modify or terminate recognition, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

Deep Black Drilling LLP

11. Whilst the Brazilian Reorganisation Order set out the basis upon which the Court considered it had jurisdiction to make the order in respect of an English-registered LLP, the exercise was not repeated, or at least was not recorded when the reorganisation proceedings were converted to bankruptcy proceedings.

12. However, Ms Mendonça's affidavit explains the basis upon which she believes that DBD has and always has had, its COMI in Brazil.

> "I can confirm that to the best of my information, knowledge and belief, the overall management of DBDL has always been carried out in Brazil. When filing for the Reorganisation Order, the First Bankrupt Entities themselves (referred to as the Claimants below) claimed (in translation) that:
>
> "*As already reported, the Claimants organize their activities based on two major divisions: (i) Engineering Division, which includes the Real Estate Division, and (ii) Oil and Gas Division. The management and financial structures are interconnected – one direction, one flow of financial resources and one strategy. For the sake of clarity, the management of all societies is exactly the same; final decisions are made by the same directors, founding partners of the group and operations have always been shared among all societies".*
>
> This demonstrates that [DBD] was operating in, and being managed through, Brazil as part of a group within which the other [Group companies] were also operating. I can further confirm that:
>
> a) Everything I have seen in my investigations to date points to [DBD's] management having taken place in Brazil and to it having its centre of main interests there; and
>
> b) As is set out above, [DBD] chartered the "Vitoria" drill which drilled for oil in Brazil.

> All of the above leads me to believe that [DBD] always had its COMI in Brazil".

The criteria for recognition

13. Putting to one side the dissolution of DBD in England, I am satisfied:

13.1 The Brazilian bankruptcy proceedings fall within the definition of "foreign proceeding" set out in Article 2(i) of Schedule 1 to the CBIR: "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court". Ms Mendonça explains that the proceedings:

> 13.1.1. are "collective" as their purpose is to collect and distribute the debtor's assets amongst its creditors;
>
> 13.1.2 are "judicial proceedings" having been commenced by orders of the Brazilian Court in proceedings where the assets and affairs of the debtor are subject to the Brazilian Court's decision;
>
> 13.1.3 were commenced by a bankruptcy order which was made pursuant to the Brazilian Bankruptcy and Judicial Reorganization Law, Law No. 11.101/2005 which is a "law relating to insolvency"; and
>
> 13.1.4 are intended to ensure that the proven claims of creditors are satisfied to the fullest extent possible in the statutory order of priorities from the debtor's assets.

13.2 The application for recognition is made by a "foreign representative" defined in Article 2(j) as including a person "authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding". The Court Order converting the reorganisation proceedings to bankruptcy proceedings in respect of DBD expressly appoints KPMG as represented by Ms Mendonça as trustee and directs the trustee to collect all assets, documents and books of the debtors "at the place where they are located". Mr Beswetherick explained to me that Ms Mendonça's appointment as representative was to be viewed as named and authorised representative of the trustee, not as its lawyer, even though she happens to be a lawyer.

13.3 For the purposes of Article 17(1) and the definition of "foreign main proceeding" in Article 2(g), for the reasons set out at paragraph [12] above, the bankruptcy proceedings are taking place in the state where the debtor has its centre of main interests and as such are a "foreign main proceeding".

13.4 The procedural requirements prescribed by Article 15(2) of Schedule 1 to the CBIR have been met: the application has, as required, been accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representatives; or a certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representatives; or any other evidence acceptable to the court. Ms Mendonça's affidavit explains that documents

produced by the Brazilian court are now certified by the Court electronically and consequently that hard copy documents are not issued. Her affidavit exhibits a copy of the Reorganisation Order dated 4 May 2015 and the Order converting the reorganisation proceedings to bankruptcy proceedings dated 1 March 2018. Ms Mendonça's affidavit confirms that they were both obtained directly from the Court file. In accordance with Article 16(2) set out above, I am entitled to presume that the documents submitted in support of the application are authentic. The Applicants have also provided a certified translation of each document.

13.5 The procedural requirements of Article 15(3) have been met: Ms Mendonça has identified all foreign proceedings known to the Trustee:

13.5.1 On 20 August 2019, the bankruptcy proceedings in relation to DBD and the appointment of KPMG represented by Ms Mendonça were recognised by the Southern District of Florida as a foreign main proceeding and foreign representatives respectively pursuant to Chapter 15 of the US Bankruptcy Code. A copy of the recognition order was exhibited to Ms Mendonça's affidavit.

13.5.2 Ms Mendonça's affidavit informs the Court that the bankruptcy proceedings have also been recognised in Canada where a Norwich Pharmacal order has also been obtained. The proceedings in Canada are under seal, preventing the relevant documents from being exhibited.

13.5.3 Ms Mendonça has confirmed that (i) she is not aware of any other proceedings under the Insolvency Act 1986 in relation to DBD in England, including section 426 requests; (ii) she is not aware of any existing or threatened proceedings or attempts to enforce security by a third party against assets of DBD in England and Wales; and (iii) she does not consider that the EU Regulation on Insolvency Proceedings applies as DBD's COMI is in Brazil.

13.5.4 The application for recognition has correctly been submitted to the High Court (as required by Articles 4 and 17(1)(d)).

The dissolution of DBD

14. Taking all of the above into account, the only factor which caused me to hesitate before making the recognition order, was the fact that DBD has been dissolved in England and Wales. Can an LLP which has been dissolved in this jurisdiction be a "debtor" for the purposes of the CBIR and in particular for each of the relevant definitions:

i) "foreign proceeding" - a "collective judicial or administrative proceeding in a foreign State… pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation"

ii) "foreign representative" authorised to "administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"

iii) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests?

15. Mr Beswetherick referred to sections 221(5) and 225 of the Insolvency Act 1986 which set out the circumstances in which this Court may wind up a company registered outside Great Britain as an unregistered company. Both sections permit the court to make a winding-up order in circumstances where the company is dissolved. Whilst not cited to me, during the hearing, I referred to *Re Eurodis Electron Ltd plc* [2011] EWHC 1025 (Ch) where the Court exercised its jurisdiction under section 221(5) in relation to one such company.

i) Mr Beswetherick referred to the first instance decision in *Re Consumer Trust and others, Rubin and others v Eurofinance and others* [2009] EWHC 2129 (Ch). The joint receivers and managers of The Consumers Trust ("TCT") applied pursuant to the CBIR for recognition of the US bankruptcy proceedings in respect of that trust. Mr Nicholas Strauss QC sitting as a deputy judge was required to consider whether the CBIR apply where the foreign bankruptcy proceedings relate to a debtor (a business trust which is treated as a separate legal entity under US bankruptcy law) which, according to English law, has no legal personality as an individual or body corporate. At paragraph 36 of his judgment, he records that counsel submitted on behalf of the respondents, that the definitions of "foreign proceeding" and "foreign representative" require the existence of "a debtor" which must be given its ordinary meaning in English law. It was said that it followed that "there is no debtor and the Model Law cannot be applied in this case or in any other case in which the insolvent estate in a foreign jurisdiction is not that of an individual or of a corporate entity recognised in English law as an independent legal entity". His judgment continues:

"[39] This seems to me unrealistic, for at least three reasons. First, the drafting origins of the relevant definitions are international, not domestic. Secondly, the definition which is principally relevant is the definition of "foreign proceeding", where the word occurs in the following phrase "in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court …". It would in my view be perverse in that context to give the word "debtor" any other meaning than that given to it by the foreign court in the foreign proceedings.

[40] Thirdly, article 8 provides that in interpreting the Law, regard is to be had to its international origin and to the need to promote uniformity in its application. Both these considerations would be disregarded, if the court were to adopt a parochial interpretation of "debtor" and as a result refuse to provide any assistance in relation to a bona fide insolvency proceeding taking place in a foreign jurisdiction. Whilst the Guide to Enactment does not specifically address this issue, it is clear from many passages in it that its object is to promote communication, co-operation and assistance in cross-border insolvencies of any kind.

[41] What has given me some pause for thought is consideration of whether the Model Law will work in practice, where the debtor is not a legal entity known to English law. For the most part, there should be no difficulty, since the

> requirement to co-operate is expressed in general terms and is mainly discretionary. However, it is worth considering how article 20 would work. This imposes an automatic stay on the commencement or continuation of proceedings "concerning the debtor's assets, rights, obligations or liabilities" and on "execution against the debtor's assets", and suspends the right to transfer, encumber or otherwise dispose of "any assets of the debtor". Nevertheless, I do not think that there would be any great difficulty in applying this to TCT. The stay and suspension would apply to proceedings involving, or assets held by, the trustees qua trustees. At all events, I do not think that the difficulty is so great as to lead me to accept the respondents' argument on this point, when it is clearly inconsistent with the object of the Model Law.
>
> [42] I therefore hold that TCT is a "debtor" for the purposes of the Regulations and the Model Law, from which it follows that I must recognise the Chapter 11 proceedings as a foreign main proceeding. It does not matter whether any other order can be made; if the conditions for recognition are met, the applicants are entitled to have the proceedings recognised.

16. Sections 221 and 225 of the Insolvency Act 1986 and the decision in *Eurodis* confirm that this Court recognises that a corporate entity's affairs can be wound up even after it has been dissolved in the jurisdiction of its registration. Whilst the facts before him were different, like Nicholas Strauss QC, I consider that it would be perverse, in the context of the purpose for which the UNCITRAL Model Law on Cross-Border Insolvency was introduced, if this Court were to refuse to recognise the foreign liquidation of DBD. The Guide to Enactment of the Model Law states that the Model Law:

> "respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency".

First among the solutions that it lists is:

> "(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency".

17. In the chapter entitled "Origin of the Model Law", the Legislative Guide notes:

> "(6.) Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, inter-connected world makes such fraud easier to conceive and carry out. The cross-border cooperation mechanisms established by the Model Law are designed to confront such international fraud.

Conclusion

18. It is in my judgment consistent with the aims and purposes for which the Model Law and CBIR were introduced, that this Court should recognise the foreign proceeding taking place in Brazil in respect of DBD. In doing so, the court gives the foreign representatives, KPMG represented by Ms Mendonça access to this Court to make such applications as are considered appropriate whereupon the Court may determine what relief is warranted.

19. However, I cannot ignore the fact that in this jurisdiction, DBD has been dissolved and its assets are *bona vacantia*. I refused therefore to make an order, as sought in the application, entrusting the administration and realisation of DBD's assets in this jurisdiction to the foreign representatives. Instead, I ordered that to the extent necessary (Mr Beswetherick having suggested that it may be necessary in light of the automatic moratorium that arises on recognition) the foreign representatives have permission to make an application to the High Court to restore DBD to the register. This seems to me to be an essential first step before the foreign representatives can purport to have any right to deal with *bona vacantia* assets.

Notice of the application

20. The application in this matter was issued on 21 January 2020 together with a request for recognition of the Brazilian bankruptcy proceedings of thirty-six other Group entities. It was initially listed for a two-hour hearing in April 2020 but at the applicants' request, was brought on for an earlier hearing. Article 17(4) requires that an application for recognition be considered at the earliest opportunity. Time is often of the essence in matters of fraud. Having made an order recognising as foreign main proceedings the bankruptcy proceedings of the other thirty-six Group companies, I was reluctant to delay recognition of the foreign proceedings in respect of DBD by requiring notice of the application for recognition to be served on the Bona Vacantia Division of the Treasury Solicitor. Had I done so, it would have been necessary for the application to be relisted to be heard once the Treasury Solicitor had been given a reasonable opportunity to consider and respond to the application and once the Court could accommodate a further hearing (I would have been prepared to direct that it be listed in this Court's urgent/interim applications list).

21. I nevertheless take this opportunity to say that if these circumstances were to arise again, and as this judgment should by then be available to the parties, absent exceptional circumstances, I would require notice of the recognition application to be served on the relevant *bona vacantia* authority (which will be determined by the location of the debtor's registered office) in good time before the hearing. As notice of this application was not given, I have directed that a copy of my Order and this judgment be served upon the Treasury Solicitor and further directed the foreign representatives to file with the court (marked for my attention) an update, with the Treasury Solicitor's response whereupon I can consider whether the matter should be relisted for any further directions or order pursuant to Article 17(4) of the CBIR.

ICC Judge Burton
21 February 2020