



## Article

### Conyers secures costs for opposing creditors: TLG Atma Ltd (Applicant) v Atlas Mara Limited (Respondent) BVIHC (COM) 0027 of 2021

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In its judgment dated 28 July 2021, the BVI Commercial Court, determined both that as matter of jurisdiction, and in the exercise of his discretion he should permit creditors who successfully opposed the making of a winding-up order to recover their costs from the applicant creditor.

Justice Adrian Jack [Ag] dismissed the application (the “**Application**”) made by TLG Atma Ltd (“**TLG**”) to appoint liquidators over Atlas Mara Limited (the “**Company**”).

The reasons for the dismissal of the Application were twofold.

Firstly, the Court determined that the evidence submitted by the Company met the required threshold in the oft cited Eastern Caribbean Court of Appeal decision *Sparkasse Bregenz Bank AG v In the Mater of Associated Capital Corporation*, Civil Appeal No.10 of 2002 (determined on 18<sup>th</sup> June 2003). Secondly, the Court was not of the opinion that it would be just and equitable for liquidators to be appointed in light of the opposition from the majority of creditors including Prudential Insurance Company of America (“**Prudential**”) and Guggenheim Partners Investment Management LLC (“**Guggenheim**”) ( together the “**Opposing Creditors**”).

#### The Opposing Creditors

Prudential and Guggenheim (both represented by Conyers) in advance of the liquidation each filed their respective notices of intention to appear, in addition to a short note setting out their reasons for opposition. As opposing creditors, and therefore interested parties entitled to be heard, they were not parties to the Application.

The Opposing Creditors opposed the Application on the basis that a winding up order would frustrate the current restructuring plans of the Company for ongoing financial viability to an orderly divestment of the Company’s assets (the “**Restructuring Plan**”). The Restructuring Plan was supported by the majority of the Company’s principal creditors all of whom had agreed to stay enforcement of their debts while the Restructuring Plan was put into effect (the “**Standstill Agreement**”). The Applicant did not support the Restructuring Plan nor did it agree to enter into the Standstill Agreement.

The Court determined that the majority of creditors including the Opposing Creditors had good reasons for opposing the Application and to support the Restructuring Plan which was projected to result in a better return to the creditors than a court ordered liquidation process.

#### Costs Order

On the dismissal of the Application, the Court granted the usual order for costs to follow the event as between the parties, that is, the Applicant to pay the costs of the Company.

Conyers also sought the costs of the Opposing Creditors.

After hearing initial submissions, the Court permitted the Opposing Creditor to file submissions on the issue. They did so, as did the Applicant.

In its judgment dated 28 July 2021, the Court decided that it had jurisdiction to award costs in favor of the Opposing Creditors relying on the Eastern Caribbean Court of Appeal decision in **Trade and Commerce Bank (through Richard Forgerty, its joint official liquidator) v Island Point Properties SA and another** [2010] ECSCJ No.217 ( “Island Point”).

In that case, the Court of Appeal was of the view that it has jurisdiction to award costs to an opposing contributory on an unsuccessful liquidating application. Now Chief Justice of the Eastern Caribbean Supreme Court, Dame Pereira at paragraph 41 of the judgment, confirmed that the decision was “... *not made by way of applying any general principle as regards entitlement to costs, or by stating any general proposition on the matter, but merely to reflect the assistance rendered by Counsel... and having regard to the unique circumstances of this case.*” (own emphasis).

For those reasons, the Court determined that if the Court has jurisdiction to award costs to a contributory, *a fortiori*, it has the power to award costs to the Opposing Creditors. The Court also considered guidance from French “Applications to Wind Up Companies”. In essence, the Court found that it was reasonable for the Opposing Creditors to appear and explain why the “Class remedy” for the appointment of liquidators was not in the best interests of the creditors as a whole. It was not generally for the Company to argue this point and more importantly significant weight was placed on the submissions made by the Opposing Creditors in the exercise of the Court’s discretion to dismiss the Application.

## Takeaways

It is now firmly established that as a matter of BVI law, there is jurisdiction to award costs to opposing creditors who successfully oppose a liquidation application. Whether such an order will be made will ultimately depend on the circumstances of each case, and is not as of right. Some of the relevant factors for the Court’s consideration include whether the opposing creditors and the respondent company have instructed different legal counsel and whether the opposing creditors have independent and distinct interests from that of the respondent company.

Nonetheless this is a welcome reminder that the Commercial Court of the BVI continues to act in accordance with modern commercial practice across the globe and a salutary reminder to applicant creditors that there costs exposure may extend to multiple parties.

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