

**EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE  
COMMERCIAL DIVISION**

**CLAIM NO. BVIHCM 2023/0192**

**IN THE MATTER OF WATERFRONT PROPERTY INVESTMENT LIMITED (Company  
Number 1033362) AND**

**IN THE MATTER OF SECTION 156 OF THE INSOLVENCY ACT 2003**

**BETWEEN:**

**WATERFRONT PROPERTY INVESTMENT LIMITED**

Applicant

**-and-**

**ARIUS LITIGATION FUNDING LIMITED**

Respondent

**Appearances:**

Christopher McCarthy and Richard Brown for the Applicant  
Ryan Hocking, Olwyn Barry and Grainne Hussey for the Respondent

---

2023: December 5;  
2024: March 27.

---

## JUDGMENT

- [1] **MANGATAL, J:** Waterfront Property Investment Limited ("**WPIL**") is, a company incorporated under the laws of the British Virgin Islands ("**the BVI**"). It is engaged in the business of property investment and development in the United Arab Emirates ("**the U.A.E.** ")
- [2] Arius Liitgation Funding LLC ("**Arius**") is a Delaware Corporation which is a vehicle for the provision of third party litigation funding. Arius provided funding to WPIL in respect of certain matters.
- [3] Arius served a statutory demand ("**the Statutory Demand**") on WPIL on 29 September 2023, in respect of an alleged debt that Arius claims is not substantially or genuinely disputed.
- [4] By Originating Application dated 12 October 2023 ("**the Originating Application**"), WPIL seeks under section 156 of the *Insolvency Act 2003* ("**the Insolvency Act**") to set aside the Statutory Demand served on it by Arius. In summary, WPIL seeks to set aside the Statutory Demand on the following grounds:
- (1) The alleged debt is disputed on substantial grounds. In particular:
- a. There is no debt due from WPIL to Arius whether arising under the Funding Agreement referred to in the Statutory Demand, or otherwise;

- b. The relevance of any judgment between WPIL, Nakhael PJSC and Dubai Waterfront LLC (in which proceedings Arius was neither a party or a representative, i.e. played no part at all and was not involved in any way) in the Dubai Court of First Instance relied upon by Arius, is expressly denied by WPIL. WPIL's clear position, which it has made abundantly clear to Arius in correspondence, is that such judgment or judgments do not trigger any obligation to pay Arius under the Funding Agreement nor is Arius otherwise entitled to payment in accordance with the terms of the Funding Agreement. Accordingly, WPIL denies that it is indebted to Arius, whether under the Funding Agreement or otherwise.

- (2) The Funding Agreement contains a governing law and jurisdiction clause as follows:

"19. GOVERNING CLAUSE AND JURISDICTION

19.1 This Agreement and any non-contractual obligations arising out of or in connection with this Agreement, are entered into in the Dubai International Financial Centre (DIFC) in Dubai, United Arab Emirates and is to be construed in accordance with and governed by the law of the UAE as applicable in the Emirate of Dubai.

19.2 **Any dispute** arising out of the formation, performance, interpretation, nullification, termination or invalidation of this Agreement **or arising therefrom or related thereto in any manner whatsoever, shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules ("the Rules")**, by one arbitrator appointed in compliance with the Rules, the arbitration shall be conducted in English and shall be seated in Dubai."

(my emphasis)

- (3) On 26 March 2023, Arius initiated arbitration proceedings with DIAC with case number 23-065, pursuant to which Arius seeks

relief including declarations as to its alleged entitlement to the sums said to be due to it under the Funding Agreement (“the Arbitration”), which sums are now claimed in the Statutory Demand. The Arbitration asks the Arbitral Tribunal to determine whether certain sums are payable to Arius under the Funding Agreement, and if they are, in what amount.

- (4) The Arbitration remains at an early stage and according to WPIL, Arius is yet to commit to paying its share of fees to the DIAC, under the purported guise of trying to reach an amicable resolution of the dispute. WPIL claims that it has made it clear that it refutes the allegations in the Notice of Arbitration in the strongest terms and has indicated as much to the DIAC.
- (5) In all the circumstances, argues WPIL:
  - a. The Statutory Demand is a clear abuse of process, as it relates to a debt that is not only contested by WPIL, but is also subject to determination by the DIAC, in the Arbitration, which has exclusive jurisdiction to resolve any and all disputes between the parties;
  - b. The Statutory Demand has been brought in bad faith and for the improper purpose of pressuring WPIL into paying a disputed debt; and
  - c. There would be a substantial injustice if the Statutory Demand is not set aside and WPIL were to be deemed insolvent, as that would undermine the due process of the Arbitration and bar WPIL from advancing its defence to Arius’ claims in the proper forum.

#### **WPIL’S Position**

- [5] WPIL argued that the Statutory Demand is an abuse of process and oppressive. It is not an appropriate use of the Court’s procedures for Arius to pursue parallel

proceedings: on the one hand, insolvency proceedings in the BVI, and, on the other hand, an arbitration in Dubai, in respect of precisely the same subject matter.

- [6] Further, the Statutory Demand has been served in respect of a debt that Arius knows is disputed, and in breach of a clear and binding arbitration clause.
- [7] Accordingly, Arius has made its election; it requested and notified the Arbitration.
- [8] WPIL further takes the position that Arius is using the insolvency regime not for the benefit of WPIL's creditors as a whole, but for a collateral advantage and improper purpose for itself.
- [9] Having submitted that it is a substantial injustice for Arius to bring inconsistent proceedings in two jurisdictions at the same time, WPIL argues that that alone is a sufficient basis for the Court to dispose of the Application. However, it was submitted that there were also other grounds of genuine dispute in relation to termination, and interpretation, of the Funding Agreement, which is governed by the law of the UAE, such that the Statutory Demand must be set aside. It was submitted that the dispute between the parties is more than merely frivolous and that WPIL's defence to the allegations is not 'thoroughly bad'.

#### **There are substantial grounds on which the debt is disputed**

- [10] Reference was made to the leading case in this jurisdiction, that sets out the threshold for whether a debt is disputed on substantial and genuine grounds, i.e. the decision of the ECSC Court of Appeal in ***Sparkasse Bregenz AG v Associated Capital Corporation***.<sup>1</sup>
- [11] On behalf of WPIL, Mr. McCarthy submitted that the dispute in this case clearly meets the threshold.

---

<sup>1</sup> (Civil Appeal No. 10 of 2002, unrep. 18 June 2003).

## The question of termination

[12] Counsel submitted that there is a clear dispute as to whether the Funding Agreement was validly terminated as follows:

- a. On February 8, 2023, WPIL sent the following in an email: *“We have noticed that You have repeatedly raised concerns about the risks involved due to investing/funding this Project, despite the fact that you are a Funder as you have always said. Without prejudice, in order to keep you feel [sic] safe and confident in respect of the funds invested, you are kindly requested to inform us, if you would like to return all the amounts paid by you back in any time. If you wish to collect the same, you can coordinate with Dr. Baha Khair Al Eddin, who is the authorized legal representative of Waterfront Property Investment Ltd.”*
- b. On February 13, 2023, Arius responded in an email including the following *“Arius may accept any advance settlement of any part of Arius’s Entitlements, this is conditional to Arius being entitled to any unpaid part of Arius’ Entitlements if any advance payment is made that falls short of such entitlement.”*
- c. On February 14, 2023, WPIL sent a cheque to Dr. Hafez on behalf of Arius for AED 655,000. Dr. Hafez, on receipt of the cheque, signed the following statement *“I, [Dr. Hafez], in my personal capacity and on behalf of [Arius] do hereby declare that I have received the cheque no.766909 in the amount of AED 655,000... dated 8/2/2023. I do declare that the cheque is against the amount paid by Arius to DIAC. By this I do confirm that I have returned back paid by Arius from [WPIL]. In handwriting it was then added, “for DAC fees.”*

[13] In its supporting affidavit, WPIL stated that, thereafter, *“as far as WPIL was concerned, the above payment and associated declaration constituted the*

*termination of the relationship under the Funding Agreement by WPIL. WPIL ensured Arius was not prejudiced by repaying the arbitration fees it had expended, but otherwise considered the Funding Agreement was at an end and all the parties' financial obligations were thereby concluded. After this point, WPIL considered that it owed no further financial liability to Arius under the Funding Agreement or otherwise. Arius' presentation of the cheque for payment was acceptance the Funding Agreement had concluded."*

- [14] There is therefore, the submission continued, a dispute as to whether Arius' actions in the acceptance and presentation of the cheque was termination of the relationship, notwithstanding any express terms of the contract on termination and in any event in accordance with them. It was argued that this is an issue of UAE law and fact.
- [15] Counsel referred to Arius' reliance on an expert report of UAE law which concludes, on the basis of the limited information provided to it by Arius itself, that the Funding Agreement was not validly terminated. However, the point was made that the report does not deal with the question of repudiatory breach or the full ways in which an agreement may be terminated by operation of law, and cannot form the basis for a decision, by the BVI Court, on issues of fact and UAE law that are disputed between the parties, and subject to an Arbitration. The point was forcefully made that it is quite properly for the DIAC arbitral tribunal to resolve these issues.
- [16] Counsel goes on to aver that WPIL does not consider it appropriate to engage in a mini-trial as to the legal or factual merits of the Arbitration claim in any detail. Further, that the proper course is for it to do so in the Arbitration, rather than for the BVI Court to pre-judge the outcome of processes that are already subject to determination in another forum, under a system of foreign law. However, Mr. McCarthy goes on to indicate that, in the unlikely event that the Court does consider it appropriate to conduct a mini-trial on its merits, and to take into consideration issues of UAE law

in so doing, WPIL should be afforded an opportunity to serve responsive evidence of its own.

### **Construction of the Funding Agreement**

[17] In addition to the issue of termination by Arius' own admissions, it was argued on behalf of WPIL that there were suspensions in the operation of the Funding Agreement for the purposes of WPIL to negotiate settlement without Arius' involvement. Moreover, it was submitted that it is beyond serious argument that the Dubai Court Proceedings, and work in relation to those proceedings, do not fall within the terms of the Funding Agreement. Arius was not appointed to act in relation to those proceedings. The argument was made that accordingly, references to the Dubai Court Proceedings being 'inextricably linked' or 'relating to the same subject matter', as the DWLLC Arbitration claims, or that Dr. Hafez also assisted in WPIL's settlement discussions, is beside the point in the absence of a contractual agreement so to act.

[18] In sum, the terms of the Funding Agreement and Settlement Agreement, and what is or is not within the scope of the contract, are therefore all matters of fact, UAE law, and to be ventilated in the Arbitration.

### ***Family Mart***

[19] During the course of the hearing on 5 December 2023, I asked Counsel whether they were familiar with the fairly recent decision of the Judicial Committee of the Privy Council in ***Family Mart China Holding Ltd. v Ting Chuan (Cayman)***.<sup>2</sup> Although that case was concerned with a winding up petition under Cayman Law on just and equitable grounds, in my view the decision made some very powerful pronouncements about the paramountcy of parties' agreement to arbitrate, and I therefore thought it would be useful to have the parties here comment on that case. So, for example, at paragraph 25 of the Privy Council judgment, it was proclaimed

---

<sup>2</sup> [2023] UKPC, 33, delivered 20 September 2023.



that “*it is uncontested now that, as a general rule, the law of the Cayman Islands, like English law and the law of many other jurisdictions, **respects the rights of parties to agree to have their disputes determined by a private arbitral tribunal.***” (my emphasis) I asked for brief two-page submissions to be provided by 7 December 2023.

- [20] On WPIL’s behalf it was submitted, amongst other matters, that ***Family Mart*** requires the Court to place significant emphasis on the fact that there is no dispute or disagreement between the parties as to whether the issues raised fell well within the generous ambits of the arbitration agreement. Waterfront relies on the fact that there is a genuine dispute (Section 157(1)) but submits that it also relies separately, and firmly on other grounds; abuse of process, substantial injustice under section 157(2) as set out in the Notice of Application and supporting evidence, its skeleton and oral arguments.

### **Arius’ Position**

- [21] Interestingly, one of the first revelations made by Mr. Hocking in his oral submissions on behalf of Arius was that if this Setting Aside Application is dismissed, his client is prepared to give an undertaking to procure a dismissal of the Arbitration. That oral undertaking was subsequently converted to a written one. This occurred to the consternation and under objection, and stern comment, understandably in my view, from WPIL. This given its 11<sup>th</sup> hour appearance and its offer obviously flying in the face of Arius having made the statutory demand in the first place.

- [22] In its Skeleton Arguments, Arius has set out a substantial amount of what it considers to be the background. However, most of it is not relevant to the questions that I have to decide since it arises before Arius itself submitted the dispute to arbitration. I have therefore set out the parts that I consider relevant as follows:

- (1) Arius states that on 16 March 2023, it became aware that a settlement had been concluded between WPIL and DWLLC from public filings in the Dubai

Court system but says that it remained ignorant of the terms of the Settlement Agreement. Arius commenced an arbitration against WPIL in the DIAC on 26 March 2023. In the Arbitration, Arius sought a variety of forms of relief, including declarations as to sums due to it from WPIL, as well as production of all documents related to the settlement between WPIL and DWLLC;

- (2) On 7 August 2023, the shareholders of WPIL, who had been named as second and third respondents in the Arbitration, made a preliminary objection to the jurisdiction of the DIAC against them in the arbitration. Arius claims that as part of that preliminary objection, WPIL reserved the right to make a full application objecting to the jurisdiction of the DIAC over it in the arbitration;
- (3) On 18 September 2023, the DIAC requested that the parties pay their respective share of the arbitration costs by 9 October 2023 in accordance with the DIAC Rules of Arbitration. WPIL responded by an email dated 6 October 2023 stating that it had no intention to do so; and
- (4) Meanwhile, on 15 September 2023, Arius obtained a copy of the Settlement Agreement and became aware of its terms for the first time. Consequently, says Arius, the Statutory Demand was served on 29 September 2023.

[23] Arius has also referred to a number of decisions which I discuss later in this judgment.

[24] In relation to the **Family Mart** decision, Arius' position is as stated in paragraphs 4 and 5 of its Supplemental Written Submissions, as follows:

*"4. In reality, **Family Mart** concerned two questions: were the disputed matters arbitrable, and was the relief sought arbitrable? For this reason, it is respectfully submitted that the decision of **Family Mart** is of little assistance in the present case. The Privy Council itself made plain that the question of whether a company ought to be wound up is one solely for the court (at [75]), and clearly distinguished the context of a just and equitable*

winding up from a creditor's petition (at [86]). Nothing in **Family Mart** disrupts the analysis in **C-Mobile, Jinpeng**, and **BPGIC Holdings Ltd**: the debtor must show a genuine and substantial dispute for its application to succeed under s.157(1) notwithstanding an arbitration or agreement to arbitrate.

5. If there is no substantial dispute, the Court may consider whether to set the statutory demand aside as an exercise of its discretion under s.157(2). In reality, Waterfront have not sought this relief in their application. Nevertheless, Waterfront seeks a ruling from the Court that Arius must arbitrate the question of whether the debt in the statutory demand is due and owing. If the Court has already found that there is no genuine and substantial dispute to be ventilated in such an arbitration, the telling question is, 'why should they?'

## DISCUSSION AND ANALYSIS

### The Court's Power to set aside a Statutory Demand

[25] The Court's power to set aside a Statutory Demand is contained within section 156 and the basis on which the power is to be exercised is set out in section 157 of the Insolvency Act which provides (in relevant part):

#### ***"Hearing to set aside statutory demand***

*(1) the Court **shall** set aside a statutory demand if it is satisfied that –(a) there is a substantial dispute as to whether (i) the debt or (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum is owing or due.*

*(2) The Court **may** set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused (a)... or (b) for some other reason."*

(my emphasis)

- [26] Without going into the granular aspects of this application, it is plain to me that Arius cannot be permitted to on the one hand issue an Arbitration seeking, amongst other things, payment of sums alleged to be due under the Funding Agreement, and on the other serve a statutory demand for sums alleged to be due under the same Funding Agreement. This before the issues have been ventilated before the arbitral tribunal and properly tested, in accordance with UAE law, on the facts. This is being done in the face of the contractually agreed dispute resolution procedure, i.e. arbitration.
- [27] Whilst Arius sought to argue that the main purpose of commencing the Arbitration was to obtain disclosure of the Settlement Agreement, it is plain, on a reading of the terms of the request to arbitrate that this is not so, as what was sought was far more wide-ranging. The relief sought included declarations, and orders for payment for alleged breaches of the Funding Agreement and for quantification of amounts allegedly due to be paid to Arius. I reject Arius' attempt to limit or reclassify the purpose for which it brought the Arbitration. It appears to be a last-ditched attempt to extricate itself from the position in which it put itself by referring the dispute to arbitration. It seems to me that the question of whether there is a debt is very much live in the Arbitration. In addition and in any event, some of Arius' claim even looks more like a claim for damages for breach of contract, as opposed to claiming a debt. A related point is that a Statutory Demand cannot in any event be issued on the basis of a damages claim; it ought only properly to be issued in respect of a debt that is due and payable- section 155 of the *Insolvency Act* .
- [28] Further, although Arius has raised points about WPIL and payment of the Arbitration fees, I find it curious, that in an email to the DIAC, on 9 October 2023, Arius was insisting that WPIL must pay fees, yet it, the party that had brought the Arbitration in the first place, was seeking in the same email an extension of time to pay its fees "*to facilitate amicable resolution of the matter*". This is a very strange, and in ways a misleading statement by Arius, since October 9 was a date after the Statutory Demand was issued, thus belying the notion of amicable resolution. At the end of

the day, both parties have been involved in some amount of toing and froing in their dealings with the DIAC. However, it is plain that the Arbitration remains extant.

[29] In addition, although Arius raises the fact that preliminary points were taken by WPIL and its shareholders (the second and third respondent in the Arbitration), on the 15 September 2023 the DIAC decided that the Arbitration should proceed against all three Respondents. Further, the parties to an arbitration, subject to the applicable arbitration rules, are free to take jurisdictional and other points within the Arbitration. (emphasis mine) Without more, this does not give the Court any right per se to interfere and take over/ hijack the dispute and therefore this point did not assist Arius.

[30] Waterfront relies on the fact that there is a genuine dispute (Section 157(1)) but it also, does separately rely firmly, and, in my view, more fundamentally, on other grounds i.e. abuse of process, and substantial injustice under Section 157(2)). This is plain from a reading of the Originating Application and supporting evidence, its skeleton argument, as developed orally at the hearing, and in its supplemental written submissions. This is brought into sharp focus in the grounds set out in the Originating Application, particularly in paragraph 5 c of the grounds, as follows:

*“c. There would be a substantial injustice if the Statutory Demand is not set aside and WPIL were to be deemed insolvent, as that would undermine the due process of the Arbitration and bar WIPL from advancing its defence to Arius' claims in the proper forum.”*

[31] The specific section of the Act relied upon is not explicitly stated. Indeed, I cannot trace any specific reference to sub-section 157(2) in the Originating Application. However, there is no explicit reference to sub-section 157(1) either. It is in my judgment, absolutely clear that the application, in particular sub-paragraph 5c above, expresses an application for the exercise of the Court's discretion under sub-section 157(2), and that the application is not confined to 157(1), as Arius suggests. I reject outright Arius' submission that the application is not made under

sub-section 157(2). Indeed, in my view, when one looks at the substance of the matter, 157(2) is the major ground upon which the Originating Application is made.

[32] I accept the argument of WPIL that it is not for the Court to investigate the dispute that is currently the subject of an arbitration where that dispute is clearly within the scope of the arbitration clause. That would be to turn this Court into a supervisor of the other proceedings. It is not appropriate for this Court on a summary basis to involve itself in the arbitration proceedings and consider what arguments are or are not being pursued and whether they are 'genuine and substantial'. I am bolstered in my view, that this is the correct way to view matters, and I agree with Mr. McCarthy's submission that a number of the local cases cited have to now be seen through the lens of the decision of the Privy Council in **Family Mart**. It must be appreciated that an important feature of the instant case is that there are ongoing arbitration proceedings, brought by the very party that has now turned around and served a statutory demand. It is also important to note that this is an application to set aside a statutory demand issued in the face of ongoing arbitration proceedings.

[33] I will now turn to an examination of the cases cited on behalf of Arius. The first case referred to by Arius is a recent decision of Ramsey-Hale C.J, Chief Justice of the Cayman Islands in **In the Matter of BPGIC Holdings Ltd<sup>3</sup> ("BPGIC")**. In that case Ramsey-Hale CJ held on a preliminary point that where a winding up Petition is brought on the basis of a Company's inability to pay its debts, and there is an extant agreement to arbitrate, the Court nevertheless must embark upon an enquiry as to whether the debt is *bona fide* disputed on substantial grounds.

[34] At paragraph 29, Ramsay-Hale CJ readily acknowledged that her approach might be counter to the internationalism proclaimed in **Family Mart**. This is how the point was expressed at paragraph 29 of the judgment:

---

<sup>3</sup> FSD 248 of 2023, delivered 20 November 2023).

“29. Such an approach may be inconsistent with the internationalism endorsed by the Privy Council in **Family Mart** which was expressed by Lord Hodge at [28] of the judgment:

‘It is important in cases which arise out of domestic legislative provisions implementing the New York Convention to have regard to jurisprudence in other contracting states to promote legal certainty in the jurisprudence relating to international arbitration’,

But it is consistent with the law with respect to stays in favour of foreign arbitration and with the long-standing approach of the Courts on applications to stay or dismiss petitions on the ground that the debt is disputed.”

[35] In my judgment, the decision in **BPGIC** is readily distinguishable in that it concerned a winding up petition, and not an application to set aside a statutory demand. Further, there is no evidence that in **BPGIC** the party seeking the winding up had already commenced arbitration, whereas here, the party serving the Statutory Demand has already commenced the Arbitration. It also appears that in **BPGIC** it was considered by the learned Chief Justice, based upon the Cayman legislation, that there might be some distinction between domestic and foreign arbitration in relation to the task the Court should engage in. There is nothing in the case law in the BVI that I have been referred to which indicates that such a distinction arises here. There may be other points of departure, but the points mentioned above are sufficient for me to find that the case does not assist me in determining the issues in the case before me.

[36] Arius also referred to and relied on the decision of the ECSC Court of Appeal (ECCA) in **Goldin Investment Intermediary Limited v China Citic**.<sup>4</sup> This case did concern an application to set aside a statutory demand. However, it must be remembered that this case was decided before the Privy Council's decision in **Family Mart**. Less importantly, the decision was dealing with an exclusive

---

<sup>4</sup> BVIHCMAP2022/0010, delivered July 2023.

jurisdiction clause and not an arbitration clause. But it is also distinguishable because the issue of abuse of process did not feature in the case. Indeed, at paragraph 46(ii) of the judgment, Farara J.A. pointed out that the Appellant was not trying to “*run an abuse of process argument (on the ground that serving the statutory demand was an abuse of process, the appropriate or agreed forum being Hong Kong and not BVI)*”. In contrast, WPIL is very much running, front and centre, as a matter of substance, an argument as to abuse of process and substantial injustice.

[37] Arius also referred to the decision of the ECCA in ***Sian Participation Group ( In Liquidation) v Halimeda International***.<sup>5</sup> At paragraph 39 of the ***Sian*** judgment it was stated that it was now settled, on the authority of ***Jinpeng***, that the statutory jurisdiction to make a liquidation order on a creditor’s application under section 162(1) of the *Insolvency Act* is satisfied if the debt is not disputed on genuine and substantial grounds, without the necessity of proving exceptional circumstances. It was further held that in such cases, a debtor is not entitled to an automatic stay of the liquidation proceedings under section 18(1) of the Arbitration Act by merely invoking the existence of an arbitration agreement.

[38] In my judgment, the decision in ***Sian*** is distinguishable on the ground that in that case, unlike the instant one, no arbitration had already been started, and it was not a case involving the setting aside of a statutory demand. Further, this too was a decision arrived at prior to the P.C. decision in ***Family Mart***.

[39] Reference was also made by Mr. Hocking to the decision in ***C-Mobile Services Ltd. v Huawei Technologies Co. Ltd.***<sup>6</sup> It can be seen from the judgment of Pereira CJ, who gave the judgment of the Court that that case did concern an application to set aside a statutory demand. However, the Court held that the application had been made only under section 157(1) of the *Insolvency Act*, and not under section 157(2). That is a point of distinction because in the instant case there is clear reliance on

---

<sup>5</sup> BVIHCMAP 2021/0017, delivered November 2022.

<sup>6</sup> BVIHCMAP2014/0006, delivered September 2015.



sub-section 157(2). However, it is plain, for example from paragraph 14 of the judgment that there was another very important difference, because, even assuming sub-section 157(2) did arise for consideration, by the time of the hearing of the Appeal, the Arbitration had been withdrawn. That is not at all the case here.

- [40] I now turn to the decision in ***Jinpeng Group Ltd. v Peak Holdings Ltd.***<sup>7</sup> ***Jinpeng*** can be distinguished on the basis that the case concerned an application by a creditor for an order appointing liquidators on the just and equitable ground; it was not a case involving an application to set aside a statutory demand. Hence, there was little or no discussion within the judgment as to the Court's powers to set aside a statutory demand under Section 157(2) or under the court's inherent powers to protect its processes from abuse or collateral advantage. ***Jinpeng*** was also decided nearly 8 years before the ***Family Mart*** decision. ***Family Mart*** emphasizes case law from numerous Commonwealth and other jurisdictions as to the proper construction and interpretation of arbitration agreements. The Judicial Committee has accentuated the respect which the courts of many jurisdictions give to the autonomy of parties to choose how they wish their disputes to be resolved (see paragraph 26).

### Resolution of the Issues

- [41] In my judgment, it is patently clear that this Court should exercise its discretion under sub-section 157(2) of the Insolvency Act on the basis that substantial injustice would other wise be caused if the Court does not do so. This is because there is an ongoing arbitration, brought by Arius itself, prior to serving the Statutory Demand and the Arbitration remains on foot. Courts must respect the autonomy of parties to choose the particular dispute mechanism that they agree upon, and in this case, the dispute resolution process freely chosen was arbitration.

---

<sup>7</sup> BVIHCMAP2014/0025 and BVIHCMAP 2015/0003, delivered December 2015.

- [42] I accept WPIL's characterization of the Statutory Demand as an abuse of process and as being oppressive. It is not an appropriate use of the Court's procedures for Arius to pursue parallel proceedings: on the one hand, insolvency proceedings or its pre-cursor in the BVI, and, on the other hand, an arbitration in Dubai, in respect of precisely the same subject matter.
- [43] Further, the Statutory Demand has been served in respect of a debt that Arius knows is disputed, and in breach of a clear and binding arbitration clause. Accordingly, Arius has made its election; it requested and notified the Arbitration.
- [44] Having submitted that it is a substantial injustice for Arius to bring inconsistent proceedings in two jurisdictions at the same time, WPIL argues that that alone is a sufficient basis for the Court to dispose of the Application. I agree with that submission. I am of the view, particularly in light of the analysis in **Family Mart**, that, other than noting that there is in fact a dispute, which dispute there obviously is and which has been referred to arbitration, the Court should make no further enquiry than that. This is so here because a special feature of the instant case is that the Arbitration is on foot and has been commenced by Arius. I appreciate that (see for example paragraph 86 of the decision) **Family Mart** was not concerned with a petition on the grounds of inability to pay debts. However, in my judgment, the decision has pointed generally to the paramountcy of agreements between parties that they will resolve their disputes through arbitration.
- [45] It is also to be noted that in considering an application to set aside a statutory demand under section 157(2) of the Insolvency Act on the basis of an extant arbitration, the Court is exercising a discretion, and is not making an order for a mandatory stay under section 18 of the *Arbitration Act*. It is not making an order for a stay at all; it is making a set aside order.
- [46] However, in any event, even if I am wrong about that, it is plain to me that there are grounds of genuine dispute in relation to termination, and interpretation, of the

Funding Agreement, which is governed by the law of the UAE, and which issues fall to be resolved in the Arbitration. Thus, in the alternative the Court could exercise its mandatory power under sub-section 157(1) of the *Insolvency Act*, to set aside the Statutory Demand.

- [47] I think it is important for this Court to frown upon the written undertaking now offered by the Respondent (after conclusion of the hearing) and offered orally at the hearing. As described by Counsel for WPIL, it is nakedly self-serving and appears to recognise the clearly abusive conduct of pursuing arbitration proceedings (as contractually agreed between the parties) on the one hand, and on the other filing a statutory demand. The Statutory Demand being in respect of the same amounts alleged to arise from the same alleged breaches of contract claimed in the existing arbitral proceedings. As Mr. McCarthy argued, Arius has by offering this undertaking, all but admitted this to be the case. Arius is indeed attempting to hedge its position by saying that the arbitral proceedings, which Arius itself commenced, will be withdrawn, but only upon dismissal of the present application. That is an entirely impermissible course which seems to approbate and reprobate and blow hot and cold at the same time. It is plain to me that the Statutory Demand was served for the improper purpose of exerting pressure on WPIL to pay an alleged debt that is hotly disputed. This Court will not countenance such an approach.

## Disposition

- [48] To borrow the pithy words of Lord Dunedin in the Scottish case of **A. Sanderson & Son Ltd. v Armour Co Ltd**<sup>8</sup>, referred to at paragraph 27 of **Family Mart**: “[i]f the parties have contracted to arbitrate, to arbitration they must go.”
- [49] Accordingly, I make the following orders:
- (1) The Statutory Demand dated 29 September 2023, served by the Respondent on the Applicant is set aside.

---

<sup>8</sup> 1922 SC(HL) 117.

(2) Costs are awarded to the Applicant to be assessed if not agreed within 21 days.

[50] I thank Counsel and their teams for their succinct and helpful submissions on what I consider to be a topical area of the law.

***Ingrid Mangatal  
High Court Judge***

***By the Court***

***Registrar***