

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO: BVIHC (COM) 2022/0059

**IN THE MATTER OF BEC LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

BETWEEN:-

BEC LIMITED

Applicant

and

(1) A2

(2) A1

Respondents

Appearances:

Mr. Phillip Riches QC, with him Ms. Olga Osadchaya of Harneys for the Applicant

Mr. Timothy de Swardt and Mr. Merrick Ricardo Watson of Kobre & Kim for the Respondents

2022 May 31
June 2

JUDGMENT

- [1] **JACK, J [Ag.]** The applicant (“the Company”) applies to set aside a statutory demand served by the respondents (“A2” and “A1” respectively) on 2nd March 2022 in respect of the costs and disbursements incurred in respect of a LCIA arbitration. The amounts claimed were legal fees and disbursements of US\$6,185,886.85, arbitration costs of £618,249.91 sterling, and post-award interest at 2 per cent over the LIBOR US Dollar 3-month rate as at 13th November 2021.

[2] The facts are not substantially in dispute. I can take them from the statutory demand itself, which said:

“1. The Debt arises from arbitration awards handed down by the LCIA in Case No. 153051 viz (i) the Partial Award on Liability dated 12 March 2019 (the ‘Partial Award’), and (ii) the Final Award on Quantum (Save as to Undertakings) dated 13 October 2021 (the ‘Final Award’) (together ‘the Awards’).

2. The arbitration proceedings were commenced after a dispute on payment of tax liabilities pursuant to a Stock Purchase Agreement dated 11 February 2014 (the ‘SPA’) executed by [A2] as the Seller, [A1] as the Seller’s Guarantor, the Company as the Buyer, and its parent company registered in Bermuda... as the Buyer’s Guarantor, for the purchase of all the issued and outstanding share capital in a Bahamian company, BECB Limited (‘BECB’) in the amount of US\$970,801,858.

3. During a course of meetings between the parties held between 27 January 2014 and 10 February 2014, the Creditors agreed to be responsible for the tax liability of the ordinary business operations of BECB unrelated to the SPA up to closing whereas the Company and BECB agreed to responsible for transfer taxes and VAT.

4. The Creditors also agreed to be responsible for corporate income tax and business taxes arising from the sale of BECB and that, since APC would be responsible for such taxes, it would negotiate such tax liabilities directly with the Tianjin Offshore Oil Tax Bureau (the ‘TOOTB’) (the ‘Alleged Promise’).

5. Between 5 December 2014 and 11 August 2015, the TOOTB issued a series of notices to BECB and [A1] informing them of the corporate income tax payable with respect to the transaction.

6. TOOTB ultimately set a deadline of 30 September 2015 for the tax payments to be made. This resulted in the Company writing to Creditors on 18 December 2021 to enforce the indemnity clauses in the SPA.

7. The Company and BECB commenced arbitration before the LCIA in Case No. 153051 on 8 June 2015 in which they asked for an award that the Creditors pay the taxes due and owing on behalf of BECB.

8. The parties successfully secured a reduction in tax liabilities from the TOOTB and on 7 December 2015, [A2] made a payment of US\$193.8 million to TOOTB on behalf of BECB on a without prejudice base as agreed between the parties (the ‘Tax Payment’).

9. TOOTB later confirmed that BECB was entitled to reduced tax liabilities under Chinese Law i.e., the Tax Payment would entitle BECB to reduce its taxable

income for a period of eight years from 2014 thus ensuring that it would have tax savings accrued from the step-up in its income tax basis (the 'Tax Benefit').

10. The Arbitration Tribunal was constituted on 26 August 2015 in accordance with the LCIA rules and in accordance with clause 13.04 of the SPA.

11. Under the terms of the Awards, the Tribunal held that:

(a) BECB do forthwith pay to [A2]: (i) the tax benefit in the sum of US\$142,943,168 (the 'Tax Benefit Sum'). (ii) pre-award simple interest on the Tax Benefit Sum at the LIBOR US Dollar 3-month rate¹ on 9 December 2015 plus an uplift of 2% calculated from 9 December 2015 to 13 October 2021, in the sum of US \$20,845,860.39; and (iii) post-award interest at the LIBOR US Dollar 3-month rate on 13 November 2021 plus an uplift of 2% on all amounts due and unpaid under sub-paragraphs (i) and (ii) above from 13 November 2021 until the date of full payment.

(b) the Company and BECB do jointly and severally pay to the Creditors, the Debt which comprises of Creditors' total fees and disbursements in the sum of US\$6,185,886.85 (the 'Fees and Disbursements') plus arbitration costs in the sum of GBP 618,249.91 (the 'Costs') plus post-award interest at the LIBOR US Dollar 3-month rate on 13 November 2021 plus an uplift of 2% on all amounts due and unpaid on the Fees and Disbursements and Costs from 13 November 2021 until the date of full payment.

Application to amend

[3] The application to set aside the statutory demand originally relied solely on section 157(2)(a) of the **Insolvency Act 2003**¹ ("substantial injustice"). At the outset of the hearing, Mr. Riches QC, who appeared for the Company, applied to add a substantive ground under section 157(1)(a) ("substantial dispute"), namely that the debt was unenforceable under the "revenue rule", to which I shall come. The test under section 157(1)(a) in deciding whether to set aside a statutory demand is that set out in **Sparkasse Bregenz**,² where Sir Dennis Byron CJ said that the **Insolvency Act 2003** means that:

"The reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring

¹ No 5 of 2003, Laws of the Virgin Islands.

² *Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp* [2003] ECSCJ No 47.

forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding.”

[4] Mr. de Swardt, who appeared for the respondents, disputed the application to amend on two grounds. Firstly, he said that the Court had no jurisdiction to allow an amendment. Secondly, he submitted that the argument that the revenue rule applied in the current case was hopeless, so that the Court as a matter of discretion should refuse the amendment.

[5] As to the first point, it is right that Mr. Riches QC in his skeleton sought to rely on CPR 20.1 (amendments to statements of case). This was an error: the application of CPR Part 20 to insolvency matters is specifically excluded: **Insolvency Rules 2005**.³ However, the Court’s general powers of case management under CPR Part 26⁴ are in my judgment sufficient to permit the amendment of the application to rely on fresh grounds. An application is not a statement of case. It frequently arises that applications need to be amended. Any exclusion of the possibility of amendment of an application would be most inconvenient. Applications to set aside statutory demands must be made within fourteen days of service. This is an exceptionally tight timetable. There is no power to extend time. It is not surprising that parties wish to develop their cases or raise new points after the expiration of the time limit. In the current case, for example, the Company changed its legal representation on Friday 27th May 2022. Its new legal team wanted to rely on the revenue rule at the hearing on 31st May 2022. There is in principle nothing objectionable about that.

[6] If I refused the application to amend the grounds for setting the statutory demand aside, then the Company in answer to any application for the appointment of liquidators would almost certainly seek to challenge the appointment on the ground that the revenue rule afforded the Company a defence. It is an open question whether it is permissible, when opposing an application for the appointment of liquidators, to rely on grounds not argued

³ Statutory Instrument 2005 No 45, Laws of the Virgin Islands, Schedule 1.

⁴ The case management powers given by CPR 26.1(2)(a) and (b) are the only exclusions and are not in point.

on the application to set aside. In **Goods Technology Starting International Ltd and another v Geminis Investors Ltd**,⁵ I had refused to set aside a statutory demand.⁶ The putative creditor subsequently sought to obtain a substantive judgment, *inter alia*, for the sums sought in the statutory demand. Counsel for the creditors argued that the judgment refusing to set aside the statutory demand gave rise to an issue estoppel. (In the event, counsel for the company conceded that the putative debtor was unable to resist an application for summary judgment, so I did not need to determine the question.) However, in the earlier case of **Re Capital WW Investment Ltd**,⁷ I had dismissed an application to set aside a statutory demand. On the subsequent application to appoint liquidators, the company sought to raise a fresh defence. I held that I had a discretion to permit the fresh point to be argued and I allowed the point to be argued. I subsequently held on the merits that the fresh defence failed and I appointed liquidators. The Court of Appeal upheld my decision to appoint liquidators but without commenting on my allowing the fresh point to be taken at all.⁸

- [7] On case management grounds I therefore allowed the amendment to the application sought by Mr. Riches QC regardless of the merits of the revenue rule point.

The revenue rule point

- [8] The revenue rule point is put in this way in Mr. Riches' skeleton:

"8. The underlying dispute arises out of [the SPA] between, inter alios, BEC and [A2] (a wholly-owned subsidiary of [A1]), by which BEC agreed to buy from A2 the entire shareholding of a company called BECB, a company operating in the PRC.

9. After the transfer and purchase was completed on 8 August 2014, a dispute arose between the parties to the SPA as to who bore liability for tax said by the PRC Tax Authorities (in notices issued by the [TOOTB] between December 2014 and August 2015) to be owed by BECB (i) in respect of the period prior to completion and (ii) pursuant to the SPA transaction itself. BEC's and BECB's position was that A2 and A1 had agreed to bear those liabilities.

⁵ BVIHC (COM) 2022/0010 (30th May 2022, unreported).

⁶ BVIHC (COM) 2022/0001 (oral judgment, 1st March 2022; written judgment 30th May 2022, unreported).

⁷ *Re Capital WW Investment Ltd; Tall Trade Ltd v Capital WW Investment Ltd* [2020] ECSCJ No 398, [2020] ECSCJ No 399

⁸ [2022] ECSCJ No 848.

10. BEC and BECB commenced LCIA Arbitration No. 153051 (seated in London, governed by English law, per the arbitration agreement in the SPA), seeking an order that A2 and A1 pay the tax debts said to be due. BECB, although not a party to the arbitration agreement in the SPA, contended that it was entitled to bring the claim in the arbitration under the SPA and pursuant to the **Contracts (Rights of Third Parties) Act 1999**.⁹ In the event, no jurisdictional challenges were raised in the arbitration.

11. On 9 December 2015, A2 and A1 paid US\$193 million in respect of BECB's tax liabilities to the PRC Tax Authorities on behalf of BECB (the 'Tax Payment'), doing so without prejudice to their contention that they were not liable for them. BEC and BECB therefore sought to discontinue the arbitration, the liability for which it was claiming having been satisfied. A2 and A1, on the other hand, considered that their payment of BECB's tax liabilities gave rise to a claim against BEC and BECB in unjust enrichment, and sought to bring a cross-claim against BEC and BECB (despite BECB not being a party to the arbitration agreement) for restitution of the tax liability sum.

12. In December 2015 and January 2016 BECB and BEC corresponded with TOOTB regarding amortisation and BECB's tax liability, with the result that on 29 January 2016 TOOTB confirmed that, as a result of the Tax Payment, BECB was entitled to amortise the amount of the acquisition price paid by A2, less unamortised research and development expense, so that it had a greater annual depreciation expense that it could reflect in its accounts each year, entitling it to reduced tax liabilities under PRC tax law. In short, TOOTB set out that the Tax Payment entitled BECB to reduce its tax liability for up to 8 years from 2014 (the 'Tax Benefit').

13. In its Procedural Order No. 1 dated 3 June 2016, the Tribunal permitted BEC and BECB to withdraw their claims, with A2 and A1's cross-claim becoming the main claim. Costs regarding the withdrawn claim were reserved to the Final Award.

14. A2's and A1's cross claim was for:

- 14.1. Restitution of the value of the Tax Payment in the sum of US\$193 million;
- 14.2. Alternatively, restitution of the value of the Tax Benefit in the sum of US\$171.8 million.

15. A2 and A1 then commenced additional arbitration proceedings against [the parent company] in LCIA Arbitration No. 163407 and sought consolidation of those proceedings with the existing proceedings. In the event, the Tribunal in each arbitration... ordered the proceedings be conjoined, but not consolidated, with a single hearing of the evidence, but separate awards.

⁹ 1999 c. 31.

16. In its Liability Award, the Tribunal concluded that no promise was made or shared between the parties that A2 and A1 would cover BECB's tax liabilities as BECB and BEC alleged and nor was there any such common oral agreement or understanding or post-contract reaffirmation of the same.

17. The Tribunal then concluded that the A1 parties' primary claim failed, because, as a matter of construction, BECB and BEC were not liable to indemnify for the tax liabilities. The Tribunal further concluded (by a majority) that the tax liability was a liability of BECB arising out of the sale of BECB, but with the A1 parties contractually liable to indemnify BECB in that respect.

18. The remaining question then concerned the alternative claim. The issue on this was whether BECB's tax liability had to be paid gross by A2, or only net, i.e. whether the A2 was only liable for a lesser portion of BECB's overall tax liability to TBOOT. The Tribunal concluded that that was indeed the result. Thus, although A2 had paid the gross amount, it was in fact only liable for the net amount, with the difference remaining a liability which BECB had had TBOOT, but which A2 had paid on BECB's behalf. BECB was thus obliged to reimburse A2 for that additional portion of its liability to TBOOT which A2 had paid. The quantum of that sum due was held over to the Final Award.

19. On 13 October 2021 the Tribunal rendered its Final Award, deciding that the quantum was US\$142,943,168, for which BECB was liable. In addition, the Tribunal ruled that BEC and BECB were jointly and severally liable for the A1 parties' fees and disbursements in the sum of US\$6,185,886.85 and arbitration costs in the sum of £618,249.91.16

20. The Statutory Demand was then served on BEC in the BVI on 2 March 2022 seeking payment of the arbitration fees and disbursements and costs sums set out immediately above, plus interest and uplift in the sum of US\$45,529.49 for the period 13 November 2021 to 2 March 2022."

[9] Mr. Riches QC submitted:

"23. It is clear from the summary above that the Awards and the debt said to be due thereunder, as well as the Statutory Demand, arise out of a tax liability of BECB to the PRC tax authorities, as notified to it by TBOOT. The Awards concluded that the tax liability was that of BECB, with A2 contractually obliged to pay only part of it. In circumstances where A2 had in fact paid the full amount (in the form of the Tax Payment), the Tribunal concluded that the difference between the gross and the net amount due had in the event been paid by A2 on behalf of BECB. As a result, BECB was obliged to pay to A2 the difference between the

gross and the net amount due to the PRC tax authorities, being the value of the Tax Benefit it had received.

24. Thus, the sum awarded and the fees and costs awarded were in respect of a tax liability of BECB to the PRC tax authorities which had been paid by A2 on BECB's behalf and which the A1 parties sought to assert over KCMPL. 25. It is, thus, at the very least arguable that the Statutory Demand seeks to enforce a claim in respect of tax due in a foreign jurisdiction."

[10] Mr. Riches cited the Privy Council's advice in **Webb v Webb**.¹⁰, which held:

"32. It is a long-standing principle of the common law that the courts will not collect taxes of a foreign state for the benefit of the sovereign of that foreign state. The history of the principle, which I will call the foreign tax principle, as did the Court of Appeal, was explored by the House of Lords in **Government of India v Taylor**.¹¹ As Viscount Simonds observed at p 504, it was already well established when Lord Mansfield CJ repeated the formula: 'for no country ever takes notice of the revenue laws of another' in a series of cases in the 18th century: **Planché v Fletcher**;¹² **Holman v Johnson**;¹³ and **Lever v Fletcher**.¹⁴ A persuasive explanation for the principle, provided by Lord Keith of Avonholm in **Government of India** at p 511, is that the enforcement of a claim for taxes is an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."

[11] However, the Privy Council went on to say:

"38. That is not to say the principle is without limits, however. Thus, whilst a court will not entertain an action by a foreign state directly or indirectly to enforce that foreign state's exchange control legislation, a court may properly recognise a foreign revenue law where necessary to do so. So, for example, a court declined to prevent trustees of a foreign trust from remitting moneys to comply with the exchange control legislation of the foreign state whose law was the proper law of

¹⁰ [2020] UKPC 22.

¹¹ [1955] AC 491.

¹² (1779) 1 Doug 251 at p 253.

¹³ (1775) 1 Cowp 341 at p 343.

¹⁴ (1780) unreported, cited in Park on Marine Insurance, 8th ed (1842), Vol 1, pp 536-7.

the trust, where the trustees were obliged to obey that law and where their failure to do so might have serious penal consequences: **In re Lord Cable, deceased**.¹⁵

[12] This Court will not permit the enforcement, whether directly or indirectly, of foreign revenue laws: **Gregson v Meribelle Investments Ltd**¹⁶ and **West Bromwich Commercial Ltd v Hatfield Property Ltd**,¹⁷ applying **QRS 1 ApS v Fransden**.¹⁸ However, Mr. de Swardt takes four points to show that the principle does not assist the Company:

“13. First, the only part of the Award being enforced (through a statutory demand) in the BVI is the part of the Award relating to costs in the arbitration. Whatever BECB’s liabilities may be, it is not the debtor in the BVI, nor is it the target of any enforcement action in the BVI. An adverse costs award against the Applicant was a natural and foreseeable incident of agreement to LCIA arbitration. It is not the direct or indirect enforcement of another sovereign’s tax laws.

14. Second, the PRC tax authorities have no interest in the arbitral proceedings or these proceedings — or indeed any winding up proceedings that may follow — whatsoever, not even through a third party or nominee (such as a liquidator or receiver).

15. Third, TOOTB has already been paid. There are no outstanding tax liabilities to be enforced, in this jurisdiction, or the PRC, or anywhere else. That is important because it follows that TOOTB does not need or seek to vindicate its rights through the Arbitral Award or proceedings such as these. Its rights have already been vindicated. Here, all that the Arbitral Award and Statutory Demand vindicate are the private rights of private companies. However dressed up by the Applicant, they do not fix any party with an obligation to pay, directly or indirectly, an unpaid tax liability.

16. Fourth, the Applicant conflates recognition of a foreign revenue law with enforcement. The Court is entitled to acknowledge and apply such laws — so long as (as here) there is no question of enforcement. *Per* [**Dicey, Morris and Collins on the Conflict of Laws**]:¹⁹

“Although it was once said that revenue laws are never recognised abroad, this proposition had no justification and it is clear that a foreign revenue law which is part of the applicable law may be recognised. Accordingly where no question of enforcement arises, foreign revenue

¹⁵ [1977] 1 WLR 7 (Slade J).

¹⁶ [2020] ECSCJ No 90 and [2020] ECSCJ No 158.

¹⁷ [2020] ECSCJ No 370 and [2021] ECSCJ No 446.

¹⁸ [1999] 1 WLR 2169 (English Court of Appeal).

¹⁹ 15th Ed (2012) at para 5-031.

laws are applied by the courts if they are relevant to an issue, although in individual cases such laws may (like any other foreign rule) have to be disregarded on grounds of public policy.”

17. Here, the only potential relevance of foreign tax law is to quantification of an award debt that is not even claimed in this Statutory Demand. There is simply no question of enforcement of that foreign tax law: BECB's tax liability has already been paid and TOOTB does not ask this Court, even indirectly, for any assistance. Indeed, the quantification in this case was of how much TOOTB would pay KCMPL (not the other way round).”

[13] Had it been material, I would have wished to hear more argument on the first point. There seems to me to be some force in Mr. Riches' submission that, if the principal is unenforceable on public policy grounds, awards, like costs, which are parasitic to the principal claim should also be unenforceable. In the event, however, I do not need to decide this issue.

[14] In my judgment the other three points are well-made. The Chinese tax authorities were paid in full many years ago. All that is in dispute is which of three private companies, as between themselves, is liable to reimburse the other private company or companies. That is a quintessential private law dispute. It has nothing to do with a sovereign nation like the PRC enforcing its own tax laws. The TOOTB has no interest in the current proceedings or the arbitration which preceded them.

[15] In my judgment, enforcement of the arbitration award does not offend the revenue rule. The Company does not satisfy the **Sparkasse Bregenz** test.

The other points

[16] The other points were not pursued by Mr. Riches QC with any vigour, although they were not formally abandoned. There is in my judgment nothing in them. The statutory demand is not confusing. It adequately identifies the sums claimed. The Company just like A1 and A2 participated fully in the arbitration without taking any point as to the jurisdiction of the arbitration panel. The panel records a submission to the jurisdiction of the panel. Further there is the argument, which I consider well-founded, based on the English **Contracts**

(Rights of Third Parties) Act 1999. Moreover, the Company did seek, and indeed obtained, an extension of time from the English Commercial Court to mount a challenge to the award, but decided not to pursue the challenge. I accept Mr. Riches' point that that is not necessarily fatal to the Company's ability to take the point in this jurisdiction, but the obvious reason the Company did not pursue any challenge in the English courts is — and I find this to the **Sparkasse Bregenz** standard — that the challenge was hopeless.

- [17] The Company also submitted that the arbitration award needed to be registered in this Territory before steps under the **Insolvency Act** could be taken. I disagree. All the Act requires is that there be an undisputed debt. The arbitration award itself is sufficient evidence of that.

Conclusion

- [18] In those circumstances, I refuse the application to set aside the statutory demand.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar