

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

**CLAIM No: BVIHC (COM) 2020/0171
IN THE MATTER OF SUMNER GROUP MINING LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT, 2003**

BETWEEN:

SUMNER GROUP MINING LIMITED

Applicant

and

ZICA S.A.

Respondent

Appearances:

Mr. Shane Quinn, with him Ms. Arabella di Iorio, of Agon Litigation for the Applicant

Mr. Iain Tucker and Ms. Tamara Cameron of Walkers for the Respondent

2020: December 8, 14

JUDGMENT

[1] **JACK, J [Ag.]:** The applicant ("Sumner Mining"), a BVI company, by an application made 16th October 2020 seeks to set aside a statutory demand served on it on 2nd October 2020 by the respondent ("Zica") in respect of an alleged debt of £2 million sterling.

[2] Sumner Mining is part of a group whose parent company is Summer Group Holdings Ltd ("Sumner Holdings"). The moving force behind Sumner Holdings and its subsidiary companies is Mr. David Sumner ("Mr. Sumner"). The group has a large portfolio of businesses around the globe including in the mining, defence and healthcare sectors. Sumner Mining holds shares in VI Mining plc ("VI Mining"). VI

Mining has been listed on a junior exchange of the London Stock Exchange, but is currently in the process of delisting. Confusingly VI Mining plc is renaming itself as Sumner Group Mining plc, but I shall use the old name.

- [3] The moving force behind Zica is Mr. Willy Paterson-Brown. Mr. Sumner for over ten years had business dealings with Mr. Willy Paterson-Brown and his brother Mr. Tim Paterson-Brown. These involved various cross-investments in each other's businesses. Relations deteriorated in late 2018 and collapsed completely in September 2019.
- [4] It is common ground that on 15th October 2018 Summer Mining (then called Lamb Mining Ltd) agreed to buy and Zica agreed to sell two million shares in VI Mining at a total price of £2 million sterling, payable "in cash prior to or on Completion" (Clause 3). The shares were transferred on completion but the price was never paid.
- [5] The share purchase agreement contained an entire agreement clause (Clause 8), and a variation clause (Clause 9.1). These provide:
- "8. This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- 9.1 No variation of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives)."
- [6] On 9th December 2019, Zica served a statutory demand on Sumner Mining. Thereafter there were without prejudice discussions between the parties and no steps were taken in respect of this first statutory demand. The without prejudice discussions ended in September 2020. Thereafter Zica served the second statutory demand, which is the subject of this application.

[7] Section 157 of the **Insolvency Act 2003**¹ provides:

- “(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;
 - (b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or
 - (c) the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum.
- (2) The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused
- (a) because of a defect in the demand, including a failure to comply with section 155(3); or
 - (b) for some other reason.”

[8] Ms. di Iorio and Mr. Quinn submit in their skeleton on Sumner Mining’s behalf:

“For the purposes of these submissions the following factual background is relevant:

- a. The purported debt underlying the statutory demand served on 2 October 2020 arose out of a share agreement dated 15 October 2018 between the Respondent and the Applicant.
- b. Under this agreement the Respondent was required to transfer shares in a third company (VI Mining PLC) to the Applicant in consideration of the sum of GBP2,000,000.
- c. Even though the transfer of shares took place on 15 October 2018 without the transfer of the GBP2,000,000 in the other direction, there was a common understanding between William Paterson-Brown, David

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

Sumner and the relevant companies, that such payment was not being sought and that it would be brought into general accounting between the Paterson-Browns and Mr. Sumner.

d. On 18 September 2020 David Sumner was served with a Worldwide Freezing Order obtained by a number of gold traders in the English High Court. The security trustee for these gold traders is or was the Respondent.

e. The underlying basis for the WWFO against David Sumner is untrue. The Order was obtained on the false basis that Mr. Sumner was the ultimate beneficial owner of a BVI company known as DSCP which company had purportedly been involved in defrauding gold investors to the extent of US\$25m.

f. Mr. Sumner applied to have that WWFO discharged and filed evidence for that purpose on 2 October 2020.

g. The Applicants in the English proceedings ultimately agreed to have that Order discharged as against Mr. Sumner on 9 October 2020 (it remains in place as against DSCP).

These are the facts that pertain to this purported debt. The reality is that there was an agreement or understanding between the parties which gave rise to an estoppel (either promissory or by convention). The Applicant prays this estoppel in aid of its application to set aside the statutory demand served on 2 October 2020, which it submits is unconscionable. Further, the Applicant alleges that the statutory demand was served improperly for a collateral purpose.”

[9] Items (d) to (g) above are in my judgment irrelevant. Neither Sumner Mining nor Zica were parties to the English proceedings. The rights and wrongs of those proceedings have no connection with the obligations of Sumner Mining and Zica as between themselves under the share purchase agreement.

[10] Insofar as there is said to be an estoppel, whether promissory or by convention, as a matter of law these defences are in my judgment barred by the whole agreement and the variation clauses which I have set out. Insofar as the estoppel was established before the agreement was entered (as Mr. Sumner appears to be alleging), it offends the whole agreement clause. Insofar as the estoppel post-

dates the making of the agreement (and whether this is alleged is unclear), it is barred by the variation clause. (The practical effect of an estoppel is to vary the contract.) No written document is relied upon to prove an estoppel, so there is no basis for treating the contract as varied. The requirement of writing is recognised and enforced by the Court: **Rock Advertising Ltd v MWB Business Exchange Centres Ltd**.²

- [11] Even if that is wrong, however, the reliance on an estoppel fails on the facts. The test to be applied is that stated by Byron CJ in the well-known **Sparkasse Bregenz** case:³

“If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly... [T]he dispute must be genuine in both a subjective and objective sense. That 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... 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 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.”

- [12] It is well established that the same test applies to the setting aside of a statutory demand under section 157(1): **Pacific Fertility Institutes Holding Co Ltd v Pacific Fertility Institutes (HK) Holding Co Ltd**.⁴

- [13] In the current case, what Mr. Sumner says is:

² [2018] UKSC 24, [2019] AC 119 at para [10] (Lord Sumption).

³ *Sparkasse Bregenz Bank AG v Associated Capital Corp* (Civil Appeal No 10 of 2001, determined 18th June 2003) at para [3], as followed in *China Alarm Holdings Ltd v China Alarm Holdings Acquisitions LLC* (BVIHCV 2008/0285, determined 20th April 2009) at paras [17], [19] and [29], *Angel Wise Ltd v Stark Moly Ltd* (HCVAP 2010/030, determined 13th February 2012) at para [19] and *Jinpeg Group Ltd v Peak Hotels and Resorts Ltd* (BVIHCV 2014/0025, BVIHCV 2015/0003, determined 8th December 2015) at paras [27] and [33].

⁴ BVIHC (COM) No 142 of 2019 (determined 21st January 2020).

“22. Even though Completion under the SPA took place on 15 October 2018 and Zica transferred its shares in VI Mining plc to [Sumner Mining], there was a common understanding between the Paterson-Browns and me that [Sumner Mining] would not be required to pay the purchase price to Zica in cash upon Completion but that it would be brought into a general accounting between the Paterson-Browns and myself.

23. There were other claims or demands which I or my companies could have made but which we did not make. For example, the Paterson-Browns had agreed to fund 50% of the costs of confidential legal proceedings of which I had conduct. This was done on the understanding that the Paterson-Browns and I would share the proceeds of any award (if successful), and share the amount payable under any adverse award (if not). I was ultimately unsuccessful in that arbitration and the Paterson-Browns have still not reimbursed me for US\$900,000 of these costs.”

[14] And that is the sum total of the evidence in support of the alleged estoppels. No documentary evidence is exhibited to support Mr. Sumner’s case. There is not even any document, such as a letter of dispute from Mr. Sumner, raising this defence after service of the first statutory demand. No explanation is given as to why a professionally prepared share purchase agreement should contain terms so diametrically opposed to what Mr. Sumner says was the true agreement. No details are given as to when or where the discussions took place which led to the “common understanding” or as to who else might have been present at the discussions. Nor is any explanation given as to what a “general accounting” might entail, how it would be affected, or why any monies might be owing at the end of it to Mr. Sumner or his companies.

[15] In my judgment, Mr. Sumner fails to make a substantial case of estoppel so as to satisfy the **Sparkasse Bregenz** test. He has failed to satisfy me “that there is something which ought to be tried”. His evidence is mere assertion, contradicted by the terms of the share purchase agreement and not supported by external evidence. Accordingly, the statutory demand does not stand to be set aside under section 157(1).

[16] I turn then to section 157(2). Where an application for the appointment of a liquidator is not made for a proper purpose, the Court is entitled to refuse to appoint a liquidator. In **Tall Trade Ltd v Capital WW Investment Ltd**⁵ I said:

“63. ...It is well established that:⁶

‘the petitioners [for winding up] as [creditors]... are *prima facie* entitled *ex debito justitiae* to a winding up order, and it seems to me to be impossible to displace that *prima facie* position without the very strongest proof that the petition is being improperly made use of for some ulterior motive.’

64. Likewise the English Court of Appeal in **Re Southard & Co Ltd**⁷ held:

‘where the debt is established and not satisfied and there are no exceptional circumstances, the creditor is entitled to expect the Court to exercise its jurisdiction in the way of making a winding up order.’

65. **French’s Applications to Wind Up Companies**⁸ gives a helpful list of cases where an improper motive has been found to nullify a winding up petition, but the learned author warns:

‘Although a creditor’s petition to wind up a company has an improper collateral purpose it may nevertheless be permitted to proceed if the winding up would, to a material extent, serve the petitioner’s interest as creditor, even if that is not the petitioner’s principal purpose.’”

[17] Mr. Quinn sought to pray in aid this line of authority in submitting that the same considerations apply to setting aside a statutory demand. A “substantial injustice” would result under section 157(2)(b) if a putative creditor could serve a statutory demand for an improper purpose, he submitted.

[18] I disagree. Issues of improper purpose are matters for the substantive hearing for the appointment of a liquidator. This is because the Court when deciding whether

⁵ BVIHC (COM) 2020/0025, 2020/0043, 2020/0095 and 2020/0157 (determined 3rd December 2020).

⁶ *Re Amalgamated Properties of Rhodesia (1913) Ltd* [2917] 2 Ch 115.

⁷ [1979] 1 WLR 1198 at p 1203.

⁸ 13th Ed, 2015 at para 2.119.

to appoint a liquidator has to exercise a discretion, taking into account the interests of all the creditors. The interests of all the creditors cannot be considered on an application to set aside a statutory demand. As the authorities I have cited show, even if the putative creditor does have an improper motive in presenting the application for the appointment of a liquidator, that does not automatically mean the application stands to be dismissed. Indeed, dismissal of an application on such a ground is comparatively rare. On an application to set aside a statutory demand, the Court cannot take the necessary overview. In my judgment, the “some other reason” in section 157(2)(b) will be something akin to the procedural defects identified in section 157(2)(a); it does not extend to improper motive.

[19] Further, as I noted in **Tall Trade**

“I am doubtful whether [**Sparkasse Bregenz**] is the correct test when assessing whether an application for the appointment of a liquidator is brought for an improper purpose. When a debt is disputed on substantial grounds, it is always open to the putative creditor to bring ordinary court proceedings to establish the debt. No such alternative proceedings are available if a defence of improper purpose is made. The standard of proof would normally be whether the allegation was true on the balance of probabilities. Otherwise the Court could hold on balance of probabilities that the application was not brought for an improper purpose, but nonetheless would have to dismiss the application, because the respondent company had shown substantial grounds for thinking that there might be an improper purpose, even though these grounds were less than 50 per cent probable. (See also the cases... which suggest ‘the very strongest proof’ of an improper purpose is required.)”

[20] Establishing an improper motive can raise difficult questions of fact.⁹ Setting aside statutory demands is supposed to be a quick and summary process. Determining motive on balance of probabilities is unsuited to such a procedure. This is another reason for deciding that section 157(2)(b) is not intended to cover such cases.

[21] Even if all that be wrong however, in my judgment Sumner Mining fails on the facts. There is no evidence that Zica, or the Paterson-Brown brothers, are

⁹ “[T]he devil himself knoweth not the intention of man”: (1477) YB 17 Ed IV fo 2 (Bryan CJ).

motivated by anything other than a desire to get their money back. The £2 million is a substantial sum. Given that relations between Mr. Sumner and the Paterson-Browns have so comprehensively broken down, it is not surprising that they want payment. Given that there is, as I have found, no substantive defence to Zica's claim to the money from Sumner Mining, it is entirely reasonable for them to pursue Sumner Mining by issuing a statutory demand. Even on the **Sparkasse Bregenz** test, Sumner Mining have failed to show that Zica has an improper purpose in serving a statutory demand.

[22] Accordingly I refuse to set aside the statutory demand. I shall hear counsel on what consequential orders should be made.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar