

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) No 37 of 2020

IN THE MATTER OF LENOX INTERNATIONAL HOLDINGS LTD

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

RANGECROFT LTD

Applicant

and

LENOX INTERNATIONAL HOLDINGS LTD

Respondent

Determined on paper with written submissions:

Mr. Mark Forte and Ms. Jane Fedotova of Conyers Dill & Pearman for the applicant

Mr. Andrew Willins of Appleby for the respondent

2020: November 19

JUDGMENT (No 2)

[1] **JACK, J [Ag.]**: This matter comes back to me for determination of costs and consequential orders. By an application made on 6th March 2020 the applicant (“Rangecroft”) sought the appointment of a liquidator over the respondent (“Lenox”) pursuant to sections 159(1)(a) and 162(1)(a) and (2)(b) of the Insolvency Act 2003. By a judgment of 6th July 2020, I determined that the application should be stayed pending a reference to arbitration.

- [2] Lenox raised two defences to the underlying claim and two cross-claims.
- [3] Although the relevant agreement between the parties referred disputes to be determined by an arbitration under the rules of the London Court of International Arbitration, the parties in fact determined that the arbitration should be an *ad hoc* arbitration. They agreed that Arabella di Iorio FCI Arb should sit in Tortola as sole arbitrator and determine only whether the two defences and the two cross-claims met the **Sparkasse Bregenz**¹ test, which I set out in my first judgment.
- [4] It is a tribute to the strength and resilience of the arbitration community in this Territory that the parties were able very quickly to arrange an arbitration before an experienced arbitrator able to sit in Tortola, notwithstanding the difficulties caused by the Covid-19 pandemic.
- [5] I shall not set out Ms. di Iorio's conclusions in any detail in order to preserve the parties' confidentiality. It suffices to say that she found that one defence and one cross-claim met the **Sparkasse Bregenz** test and one defence and one cross-claim did not. She made no order in respect of the costs of the arbitration, save that the parties were jointly liable for her fees.
- [6] On Rangecroft's behalf it is submitted:

"Once the matter was referred to arbitration pursuant to the terms of the loan agreement, then the matters in dispute were mandated to be resolved by arbitration. The arbitration therefore took jurisdiction over all issues including the question of costs and whether to exercise the discretion to award same. Having heard full argument on many issues over a full day, the Tribunal determined the issue on merits and 'split the baby', albeit the Applicant would argue it had 'the bigger half'. In particular there were four substantive issues, on which the Applicant succeeded outright on two, on the **Sparkasse** test, and missed out 'by a whisker' (the word of the Tribunal, not Counsel) on the third.

¹ Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp, Civil Appeal No 10 of 2002 (determined 18th June 2003, unreported) at para [3]. In relation to cross-claims, the test is sometimes referred to by reference to Re Bayoil SA [1999] 1 WLR 147.

The Application had little by way of active engagement on the issues given the Court adjourned of its own motion at the outset of the day. The costs of preparing for that contested hearing were not wasted given the same hearing then proceeded by way of arbitration. For the Respondent to be given a cost windfall, presumably after claiming all the same costs it was deliberately deprived of in the arbitration, would be manifestly unfair even if open to the Court to re-visit the issue with the dispute having been resolved already.

Finally, it is worth having reference to the Tribunal's determination on costs at paragraphs 117-120 of the Award. The emphasis at the hearing on bad argument is noted as a contributing factor in the incidence of costs. This is after predicting the Respondent would seek an order for costs and specifically dismissing that approach. If the Applicant need rely on discretion as to costs of the Application, then it does so citing this finding in support."

[7] Lenox' submission was:

"1 Rangecroft has failed in its application to put Lenox into liquidation. The usual rule therefore applies: that the unsuccessful party should pay the costs of the successful party: CPR 64.6(1).

2 It is understood that Rangecroft will point to the fact that Lenox succeeded on two issues before the Arbitrator, and that it failed on two issues, leading the Arbitrator to make an order that there be no order as to the costs of the arbitration. However, that mistakes the issues before the Court. The Arbitrator was asked, in relation to each of the defences and cross claims, to decide whether or not each satisfied the **Sparkasse / Bayoil** test. By contrast, the question for this Court is altogether more binary: whether any one of them should lead to the dismissal of the application for the appointment of liquidators. On this, Lenox has been successful.

3 It is notable that Rangecroft chose to take proceedings without first serving a statutory demand, despite the fact that there was a dispute which invoked the arbitration clause within the Rangecroft-Lenox Loan agreement. It took a chance (no doubt for good strategic reasons connected with the Cypriot litigation) which backfired and which forced Lenox to incur significant costs, which Rangecroft should pay.

4 Rangecroft might seek to draw some comfort from the fact that although Lenox had disputed the validity of demands purportedly served on behalf

of Rangecroft, the scope of the dispute had not been clearly articulated until Lenox served its evidence in these proceedings. However:

(i) It has only itself to blame: it served no letter before action, and no statutory demand.

(ii) It is well established that even an indisputable claim can give rise to a 'dispute' within the meaning of an arbitration clause if it is not responded to: **Hayter v Nelson**² and **The Halki**.³

It was therefore bound to serve notice of arbitration in any event.

5 The decision of the Arbitrator means that the Court has not had to consider Lenox's alternative case that the Originating Application was served for the collateral purpose of putting Lenox into liquidation to stifle the Cypriot litigation commenced by Lenox. The Court might think that it says it all that Rangecroft has not – even now – initiated an arbitration before the LCIA.”

[8] In my judgment, the approach proposed by Lenox is the correct one. The issue before me was whether to appoint liquidators or, as I did, stay the application so that the **Sparkasse Bregenz** issue could be arbitrated. If I had not stayed the application and had reached the same conclusion as Ms. di Iorio, then the usual order for costs would have been that Rangecroft should pay Lenox' costs. It is true that it would have been open to me to make a different order for costs to reflect that Rangecroft had succeeded on some issues, however, it is unlikely that that would have been very much if anything, because the length of the case would not have been increased. Further, I would have had to bear in mind the “collateral purpose” argument which Lenox were advancing. This argument will not now ever be determined.

[9] In addition, I accept Lenox' point that all the costs of the Court proceedings could have been avoided if Rangecroft had served a statutory demand and then referred the matter to LCIA arbitration once Lenox indicated there was a dispute. That is a very powerful consideration in deciding to award costs against Rangecroft.

² [1990] 2 Lloyd's Rep 265.

³ [1998] 1 Lloyd's Rep 465.

- [10] I do not accept that the issue of the costs in the Court proceedings was before Ms. di Iorio. Her costs order only touched the costs of the arbitration. Of course, her costs order is something I am entitled to take into account, but it is not in my judgment determinative of the costs order I should make. Likewise, insofar as there is an overlap between the costs incurred on the substantive issues (a) before me and (b) before Ms. di Iorio, whoever taxes the costs will be astute to prevent any form of double-counting. That, however, is a matter for a detailed assessment.
- [11] In the circumstances, I consider that the usual order that Rangecroft should pay Lenox' costs is appropriate. There is nothing sufficiently weighty in the circumstances of the case under CPR 64.6(5) to displace the general rule in CPR 64.6(1).
- [12] In the light of Ms. di Iorio's conclusions on the merits, the application to appoint liquidators should stand dismissed. (I do not need to determine whether my order staying the application for the appointment of liquidators has the effect of extending the six-month period for determining such applications. I shall assume without deciding that the application has not been automatically dismissed.) Even it were otherwise appropriate to stay the application further (and I do not consider that it is), the fact that Rangecroft have not commenced a substantive arbitration under the LCIA rules would in my judgment make that inappropriate.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar