

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2020/0034

**IN THE MATTER OF FAIR CHEERFUL LTD
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

BETWEEN:

IS INVESTMENT FUND SEGREGATED PORTFOLIO COMPANY

Applicant

and

FAIR CHEERFUL LTD

Respondent

Appearances:

Miss Rosalind Nicholson of Walkers for the applicant

Mr. Neil McLarnon and Mr. Bjhavesh Patel of Travers Thorp Alberga for the
respondent

2020: July 13,
July 16

JUDGMENT

[1] **JACK, J [Ag.]:** By an originating application dated 4th March 2020 the applicant seeks the appointment of a liquidator over the respondent. The applicant relies on section 8(1)(c)(ii) of the **Insolvency Act 2003**¹ (failure to pay its debts as and when due) to show the respondent's insolvency. No statutory demand was served, so the applicant cannot (and does not) rely on section 8(1)(a) to show insolvency.

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

- [2] The alleged debt arises under the terms of a share sale and purchase agreement (“the SPA”) between the parties entered 28th December 2017. It has since been twice amended. The SPA makes provision for the payment of monies in certain events. Critically, the SPA includes a term providing for disputes to be resolved by arbitration before the Hong Kong International Arbitration Centre (“HKIAC”). The applicant alleges that circumstances have arisen in which monies stand to be paid. There is a dispute as to whether that is correct and as to whether the applicant has made proper demand for the monies, so that a debt is due and owing.
- [3] The **Insolvency Act** permits a creditor to present an application for the appointment of a liquidator without first serving a statutory demand, but it is not generally desirable. In particular, it potentially interferes with the putative debtor’s right to have disputes referred to arbitration. Under section 18 of the **Arbitration Act 2013**² the Court is obliged to refer disputes to arbitration. If the applicant had served a statutory demand and the respondent had applied to set the statutory demand aside, then the automatic referral to arbitration under section 18 would apply to that application.
- [4] As I held in **Re Lenox International Ltd; Rangecroft Ltd v Lenox International Ltd**:³

“[20] Now it is true that a putative creditor is not obliged to serve a statutory demand before issuing an application for the appointment of a liquidator. This is not, however, something the Court encourages, save in appropriate cases. No good reason for failing to serve a statutory demand has been provided in the current case. The Court should, in my judgment, be astute to prevent the putative debtor from being prejudiced by the putative creditor’s failure to serve a statutory demand.”

- [5] As Pereira CJ held in **C-Mobile Services Ltd v Huawei Technologies Co Ltd**:⁴

² 2013 c 13, Laws of the Virgin Islands.

³ BVIHC (COM) No 37 of 2020 (determined 6th July 2020).

⁴ BVIHCMAP 2014/0017 (determined 15th September 2015, unreported).

“[15] I also fully support the view that the court must have due regard for the policy underlying the Mandatory Stay Provision and discourage parties from seeking to bypass the parties’ chosen method of dispute resolution by presenting a wind up application. However, it is important to note that under the IA there is a two-step process as it relates to the non-payment of a debt which is alleged to be due and owing. The alleged creditor must first serve a statutory demand on the company. The company may dispute the debt and at the same time it is quite open to the company to engage the arbitration agreement where one governs their relations. ...[T]he company may seek to set aside the statutory demand either by showing that the debt is *bona fide* disputed on substantial grounds (section 157(1) IA), or ask the court to exercise its discretion (section 157(2) IA) and set aside the statutory demand by showing that to maintain it would cause substantial injustice. In my view, evidence of a referral to arbitration would be a factor to be considered in the exercise of such discretion.”

[6] In the current case, Miss Nicholson said that the debt was undisputed over, she said, the long period it had been owing. However, the only other reason Miss Nicholson advanced for not serving a statutory demand was that under the BVI **Insolvency Act** there was no relation-back, so that transactions made by the company could only be impugned from the date of the appointment of the liquidator. Both these reasons potentially apply to all applications for the appointment of a liquidator. They cannot amount to a good reason without undermining the “two-step process” identified by the learned Chief Justice. If there were a real risk of assets being dissipated, as was the case in **Jinpeng Group Ltd v Peak Hotels and Resorts Ltd**,⁵ that would be a completely different matter. However, the current case is an ordinary commercial dispute with no allegations of fraud or bad faith.

[7] In my judgment it would undermine the policy of the **Arbitration Act** if I were on the facts of this case to examine whether the respondent’s objections met the **Sparkasse Bregenz** test⁶ (“the reason for not paying the debt must be honestly

⁵ BVIHCPMAP 2014/0025 AND 2015/0003 (determined 8th December 2015, unreported).

⁶ *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].

believed to exist and must be based on substantial or reasonable grounds”). As the Court of Appeal in **C-Mobile** recognised, when the Court is considering whether to appoint a liquidator, it is exercising a discretion: see **Salford Estates (No 2) Ltd v Altomart Ltd**.⁷

[8] In some cases, in deciding whether to refer a case to arbitration, it will be very material whether the objection meets the **Sparkasse Bregenz** threshold. In particular, where there are other creditors, the fact that when applying for the appointment of a liquidator “a creditor [is] exercising the statutory right belonging to all the creditors of the company to apply to wind up the company”⁸ will be very material.

[9] However, the Court needs to look at the reality of the matter. In the current case, there are no supporting creditors. There is no evidence of trade creditors, indeed no evidence of any other creditors at all. It is in truth a one-on-one commercial dispute. It would be wrong to characterise the applicant as selflessly acting on behalf of a body of creditors. There is every reason to hold the applicant to the bargain it struck with the respondent, namely that disputes would be referred to the HKIAC. One of the main reasons for businessmen agreeing to arbitrate is confidentiality. Whether the respondent here has a viable defence or not is something which the parties agreed should not be resolved in the public forum of a court.

[10] As such this case is very similar to **Lenox International**, where I held:

“[21] In the current case, there are no supporting creditors, despite the application having been advertised. Indeed there is no evidence that Lenox has any other creditors than Rangecroft. The weight to be attached to the collective nature of the application for the appointment of a liquidator is thus comparatively low.

[23] I have considered whether, in exercising my discretion whether to appoint a liquidator or instead to refer the dispute to arbitration, I should

⁷ [2014] EWCA Civ 1575, [2015] 1 Ch 589.

⁸ Jinpeng at para [47].

first determine whether there exists a substantial dispute between the parties. In my judgment, doing that on the facts of this case would prejudice Lenox. It is merely because Rangecroft has, without adequate excuse, issued direct the application to appoint a liquidator that the matter has not been referred to arbitration as of right on the application of Lenox. It would cause precisely the prejudice section 18 of the **Arbitration Act** is intended to avoid, if I determined the substance or otherwise of Lenox' defence. One of the reasons for parties choosing arbitration rather than litigation is that arbitration is a confidential procedure.

[24] Balancing these matters in my discretion, this is a case for referring the dispute to be determined by an arbitrator."

- [11] Applying this approach to the exercise of my discretion, this is a case in my judgment where I should not determine the **Sparkasse Bregenz** issue.
- [12] I turn then to question whether I should simply dismiss the application for the appointment of a liquidator or stay it on terms. In **Lenox International** I stayed the application so that the question could be resolved by arbitration whether the **Sparkasse Bregenz** threshold was met. I imposed terms that the parties (or in default of agreement, the Court) would chose an arbitrator on Tortola who could determine that issue by the end of term. (If the arbitrator did find there was a genuine dispute, then he or she would continue to determine the substantive dispute.) A material factor in imposing those conditions was that the respondent did not appear to be very keen on the matter going to arbitration. The Court will not countenance delaying tactics.
- [13] In the current case, the respondent has already on 16th June 2020 referred the dispute to the HKIAC. The HKIAC have accepted the referral and asked the applicant to nominate its arbitrator. Miss Nicholson did not seek any direction from me that the arbitration panel should determine the **Sparkasse Bregenz** point as a preliminary point. Instead she sought a condition that the respondent should not dispose of any of its assets until the arbitration panel made its award.

- [14] In my judgment it is inappropriate to stay an application for the appointment of a liquidator for an indefinite period. A short adjournment, as I granted in **Lenox International**, may be justifiable, but a longer adjournment is not. There is no evidence of any risk of dissipation. I refuse to adjourn the application on the terms advanced by Miss Nicholson.
- [15] Accordingly, I shall simply dismiss the application for the appointment of a liquidator with costs.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar