

**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

Appearances:

Mr. Mark Forte and Matthew Brown for the applicant
Mr. Andrew Willins of Appleby for the respondent

2020: June 30,
July 6

JUDGMENT

[1] **JACK, J [Ag.]**: By an application made on 6th March 2020 the applicant (“Rangecroft”) seek 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. It raises an important point on the interaction between that Act and the Arbitration Act 2013.

[2] The facts relied on by the applicant are these. On 9th October 2014, Rangecroft as borrower and Sistema PJSFC (“Sistema”), a Russian company as lender

entered a loan agreement for the sum of US\$17½ million. The purpose of the loan was so that Rangecroft could lend the money to Lenox, which it did by a loan agreement of the same date for a term expiring on 14th November 2019. Lenox is in default of the agreement with Sistema, thus triggering a cross-default provision in the Rangecroft-Lenox agreement. Further Lenox did not pay the outstanding principal on 14th November 2019. At the date of issue of the application, Rangecroft say Lenox owed it 469,384,607.44 Russian roubles (about US\$9,916,667) and US\$7,636,117.64.

- [3] Lenox's objections are summarised in para 8 of Mr. Willins' skeleton argument under four heads:

"(1) It is disputed that the debt is repayable on grounds that: (i) there was an agreement or understanding that the Payment would not be repayable by Lenox; and (ii) that the Rangecroft-Lenox Loan Agreement is unlawful and void by reason of financial assistance rules under Cypriot law...

(2) Lenox has substantial cross-claims against Rangecroft either: (i) by way of an indemnity arising out of the Lenox guaranteeing the obligations of Rangecroft; and/or (ii) in a claim of misrepresentation against Rangecroft...

(3) In any event, the relationship between Lenox and Rangecroft under the Rangecroft-Lenox Loan Agreement is governed by an English Arbitration Agreement...

(4) Finally, the Application is an abuse of process given the ongoing Cypriot Proceedings."

- [4] Clause 20.1 of the Rangecroft-Lenox loan agreement provided for the application of English law. The clause continued (so far as relevant):

"20.2 If the Parties are unable to resolve any dispute arising out of or connected with this Agreement, including a dispute as to the validity, existence or termination of this Agreement or this Clause 20 or any non-contractual obligation arising out of or in connection with this Agreement ("the Dispute") by mutual agreement within twenty (20) Business Days, the Dispute or matter shall be resolved by arbitration pursuant to the rules of the LCIA which are incorporated by reference in this Clause 20.

20.3 There shall be the sole arbitrator nominated by the LCIA.

20.4 The arbitration proceedings shall take place in London, England and shall be conducted in English, and the arbitrator shall be fluent in the English language.

20.5 The arbitrator shall have the authority to consider and include any proceedings, decision or award (whilst such proceeding, decision or award is ongoing or pending) any further dispute properly brought before it by any Party or any of its Affiliates insofar as such dispute arises out of any Transaction Document, but, subject to the foregoing, no other parties or other disputes shall be included in, or consolidated with, the arbitral proceedings.”

- [5] Mr. Willins raised an issue as to whether all of the four heads of defence or cross claim on which he relied fall within the scope of the arbitration clause. In my judgment, however, clauses 20.2 and 20.5 are very wide. All four of Lenox’ defences and cross claims fall to be arbitrated under them. In any event, I am entitled, as a belt and braces exercise, to put conditions on the stay which I shall order: CPR 26.2(3). These will include a requirement that the parties put for determination by the arbitrator all the matters of dispute which are currently before me.
- [6] In the current case, Rangecroft assert that there is no substance to the defences. Mr. Forte submitted that I should determine that issue. In the event that I determined there was no substance to the defences, then I should appoint a liquidator. It was only, he said, if I found that there was substance to the defences that I should direct that matters proceed to determination by an arbitrator.
- [7] Mr. Willins rather sought to have his cake and eat it. He took issue with the substance (or alleged lack of substance) of Rangecroft’s claims, and he asserted the existence of cross claims with substance, but then on page 28 of his skeleton he submitted that the matter should go to arbitration.

- [8] In my judgment, that is not a permissible course on Lenox' part. If the matter must be stayed (or the application for the appointment of a liquidator dismissed) so the matter can go to arbitration, then it would be quite wrong for me to express even a tentative view as to the merits or otherwise of Lenox' defences.
- [9] There are important differences between BVI insolvency law and English insolvency procedure. In England, it is normal for creditors to serve a statutory demand on a company before issuing a winding-up petition against it. However, there is no direct means of applying to set aside a statutory demand. Instead, the putative debtor has three remedies: (a) issuing proceedings for an injunction preventing the putative creditor from presenting a winding-up petition; (b) issuing proceedings for an injunction enjoining the putative creditor from advertising the petition; or (c) appearing on the hearing of the petition and opposing it.
- [10] In this Territory, by contrast there is a statutory procedure for setting aside a statutory demand. The putative debtor must issue proceedings to challenge the demand. The test is the same as for appointing a liquidator. The Court applies Byron CJ's well-known formulation in **Sparkasse Bregenz**:¹

"The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. 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. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the 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, 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."

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].

- [11] If a putative debtor does not apply to set aside the statutory demand, then the debtor can still dispute the debt at the hearing of the application to appoint a liquidator. The test is the same.
- [12] Where there is an arbitration agreement, the position is more complicated. It has long been the position in English law that if Court proceedings are brought to determine a “dispute” which parties have agreed should be arbitrated, the Court should (ignoring exceptions) automatically stay the action on a timeous application by a party, so the matter can be referred to arbitration. What has been controversial is what constitutes a “dispute”. Must it be a genuine dispute of substance? Or can even an insubstantial dispute trigger the staying of the Court proceedings? Under the **Arbitration Act 1950** (UK)² the Court might refuse a stay when “there is not in fact any dispute between the parties with regard to the matter agreed to be referred.” In practice what this meant was that, if the plaintiff could meet the test for summary judgment (which is very similar to the **Sparkasse Bregenz** test), the Court would not stay the action, so that arbitration could occur. Instead the Court would give judgment for the debt. This position was reversed by the **Arbitration Act 1996** (UK)³ which provided that “the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.” In other words, the Court would not investigate the substance of the dispute, or even the *bona fides* of a defendant’s assertion that there was a dispute. On a timeous application, the Court had no power to refuse a stay.
- [13] Section 18(1) of our **Arbitration Act 2013**⁴ adopts the approach of the 1996 Act. The first case on appeal to discuss the interaction of the (very low) dispute threshold in the 2013 Act with the **Sparkasse** test when deciding whether to appoint a liquidator was **C-Mobile Services Ltd v Huawei Technologies Co**

² 14 Geo 6 c 27 section 4.

³ 1996 c 23 section 9(4).

⁴ 2013 c 13, Laws of the Virgin Islands.

Ltd.⁵ Huawei had served a statutory demand on C-Mobile. C-Mobile applied to set aside the statutory demand. On 11th February 2014 this Court refused the application. No issue appears to have been taken on this application as regards any arbitration provision. Huawei then applied for the appointment of a liquidator. On the hearing of that application, C-Mobile sought for the first time a stay on the basis that the debt on which the claim was based was subject to an arbitration clause. The Court refused the stay and appointed a liquidator.

[14] C-Mobile appealed. Pereira CJ held:

“[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.”

The learned Chief Justice then referred to **Salford Estates (No 2) Ltd v Altomart Ltd**⁶ and concluded that:

“[19] ...the Mandatory Stay Provision does not apply to a wind up proceeding. A wind up application, although it may be premised on the underlying debt, is not an action or proceeding on the debt or under the contract. Winding up is a class remedy. It is a collective remedy being undertaken for the benefit of all creditors who will no doubt rank according to any priority to be accorded to their proofs of debt in the scheme of the liquidation.”

⁵ BVIHCPMAP 2014/0017 (determined 15th September 2015, unreported).

⁶ [2014] EWCA Civ 1575, [2015] 1 Ch 589.

[15] Our Court of Appeal revisited the issue in **Jinpeng Group Ltd v Peak Hotels and Resorts Ltd**.⁷ The underlying dispute concerned an alleged loan and stock conversion agreement. Eight figure sums of money had gone missing. On 18th September 2014, Jinpeng issued an originating application for the appointment a liquidator on the “just and equitable” ground and an ordinary application for the appointment of provisional liquidators. After obtaining the appointment of the provisional liquidators *ex parte*, this Court struck the case out on the basis that there were substantial disputes of fact. Jinpeng appealed. The Court of Appeal determined that there were in fact no disputes of substance. It then had to consider the effect of an arbitration clause in the relevant documents.

[16] Webster JA, giving the judgment of the Court held as follows:

“[45] The arbitration clauses in this case are designed to resolve disputes between the contracting parties, and I have already found that the dispute between the parties is covered by the clauses. However, once the appellant submitted this dispute to the court as the basis of a creditor’s winding up application it became an issue between the respondent and its creditors over the company’s ability to pay its debts as they fall due. This form of proceeding is not covered by the arbitration clauses in the agreements or section 18(1) of the **Arbitration Act 2013**. Therefore the court should not grant an automatic stay of the application under section 18(1) just because the respondent has raised a dispute over the appellant’s status to apply for a winding up order. This is confirmed by the decision in **Salford Estates (No 2)**... At paragraph 35 the Chancellor said:

‘Furthermore, it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts.’

This passage was cited with approval by the Chief Justice in the **C-Mobile** case. It follows that the respondent is still required to prove that the appellant’s status is disputed on genuine and substantial grounds, which I

⁷ BVIHCMAP 2014/0025 AND 2015/0003 (determined 8th December 2015, unreported).

have found it has failed to do. However, this is still not the end of the matter.

[46] The **Salford Estates** case also makes the point that even though section 18 (the automatic stay) does not apply to a creditor's application, where the disputed debt falls under the arbitration clause, the court retains its wide discretionary powers under section 122(1)(f) of the Insolvency Act 1986 in England (section 162(1)(b) of the BVI Insolvency Act 2003) to stay or dismiss the application. At paragraph 39 the Chancellor said:

'It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficulty to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 [Arbitration] Act.'

And at paragraph 40:

'It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding-up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration.'

And finally at paragraph 41:

'For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under [section 122(1)(f) of the 1986 Act], it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is *bona fide* disputed on substantial grounds.'

[47] The position outlined by the Chancellor in these passages comes close to the automatic stay position which is now firmly a part of the learning in connection with section 18 of the **Arbitration Act**. He is saying in very clear terms that a winding up application based on a debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances. However, I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the **C-Mobile** case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction

under section 162(1)(b) is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.

...

[49] The debt in the case at bar is not disputed on genuine and substantial grounds and it falls under the terms of the arbitration clauses. Therefore, the court has a wide discretion under section 162 of the **Insolvency Act 2003** to stay or dismiss the Originating Application and to force the parties to resolve the dispute by arbitration. However, the appellant does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order. It has to show that the dispute is not on genuine and substantial grounds and leave it to the court to exercise its discretion under section 162 on the usual bases."

[17] My starting point is to note that winding up a company on the basis of its insolvency should be in this jurisdiction, as Pereira CJ pointed out in the passage cited, "a two-step process". The putative creditor serves a statutory demand, then it issues its application for the appointment of a liquidator. The two stages are an important safeguard. The putative debtor has the opportunity to challenge the statutory demand in a private forum, where little damage will be suffered to its reputation. If the debtor fails, it can pay the debt without the matter needing to come to public attention. Further, the application to set aside the statutory demand is a pure party-and-party dispute. It is not "a collective remedy... undertaken for the benefit of all creditors."

[18] Importantly, in my judgment, on an application to set aside a statutory demand, the Court is obliged to apply section 18 of the **Arbitration Act**. The Court will not investigate the extent to which the debt is disputed on substantial grounds: it will simply refer the matter to arbitration.

[19] This distinguishes the current case from both **C-Mobile** and **Jinpeng**. In **C-Mobile** the debtor had unsuccessfully sought to set aside the statutory demand, apparently without relying at that stage on the arbitration clause. By the time the Court was considering the appointment of a liquidator it was far too late to rely on the clause. In the nature of the business, C-Mobile was bound to have many trade creditors. (It was a mobile telephone company in the Côte d'Ivoire, the Gambia

and Liberia: see Blenman JA's judgment on the application for a stay.⁸) In **Jinpeng** large sums of money had gone missing, apparently stolen. The substantive application was based on the "just and equitable" ground. There was an urgent need to protect the creditors.

[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.

[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.

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

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

⁸ Determined 2nd October 2014.

- [24] This is not to say that no conditions should be applied to the referral. Lenox has not yet made any attempt to commence an arbitration. A putative debtor has no incentive to ensure that any arbitration proceeds speedily. The Court will of course be aware of the danger of delay.
- [25] In the current case, I have already told counsel that they should try to agree who the sole arbitrator should be. If they do not, then I will impose a condition that they will surrender the appointment to me. Further, the most immediate need is to determine whether the **Sparkasse Bregenz** test is or is not satisfied. I shall direct that the parties request the arbitrator to determine that issue by way of an interim award, to be delivered no later than 29th July 2020 based on the bundles and skeletons already before me, with any oral hearings for submissions the arbitrator may order. I shall direct the parties to agree that the arbitrator may hold hearings on Tortola, notwithstanding that the seat of the arbitration is London. If the arbitrator decides that there are substantial disputes, then it will be a matter for him or her what further directions to give for the further conduct of the arbitration.
- [26] Lastly, I have considered whether I should dismiss the current application or merely stay it. In my judgment it is appropriate to stay it. Mr. Willins tells me Leon J granted a stay in the not dissimilar circumstances of litigation of a cross-claim in another jurisdiction.⁹ As a result of the conditions which I have set out in the previous paragraph, the existence or otherwise of a substantial dispute will be resolved within four weeks. It would be pointless to require Rangecroft to start its winding up proceedings from scratch in the event that the arbitrator finds that there is no substantive defence to Rangecroft's claim.

Adrian Jack
Commercial Court Judge [Ag.]

⁹ *Malitskiy v Stockman Interhold SA*, BVIHC (COM) 2015/0008 (determined 23rd December 2015).

By the Court

Registrar