

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2020/0022

**IN THE MATTER OF WALTON ENTERPRISES LIMITED
AND IN THE MATTER OF THE BVI INSOLVENCY ACT 2003**

BETWEEN:

**EVERBRIGHT SUN HUNG KAI COMPANY LIMITED
(formerly known as SUN HUNG KAI FINANCIAL LIMITED
(and previously known as SUN HUNG KAI SECURITIES LIMITED))**
Applicant

-and-

WALTON ENTERPRISES LIMITED
Respondent

Appearances:

Mr. Jerry Samuel and Ms. Allana-J Joseph of Conyers Dill & Pearman for the
applicant
Mr. Terence Wong of Appleby for the respondent

2020: March 31;
April 9

JUDGMENT

[1] **JACK, J [Ag.]**: By an originating application issued on 14th February 2020 the applicant (“Everbright”), a Hong Kong company, seeks the appointment of liquidators over the respondent (“Walton”). Everbright had on 27th November 2019 served a statutory demand on Walton in respect of a debt of US\$1,008,409. Walton did not apply to set aside the statutory demand. It is therefore presumed to be insolvent: **Insolvency Act 2003**¹ section 8(1)(a). The requisite formalities of

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

advertisement and obtaining the consent of the proposed liquidators have been observed. Accordingly, Mr. Samuel for Everbright seeks an order appointing the liquidators.

- [2] Notwithstanding these matters, Mr. Wong on Walton's behalf opposes the application on the basis that Walton has a genuine cross-claim in the sum of US\$3 million. The matter was therefore argued before me, remotely due to the coronavirus lockdown, on 31st March 2020.

The facts

- [3] Unusually, there is very little dispute about the facts. Everbright and another Chinese company, China Chang Jiang Energy Corp ("China Chang") entered a joint venture agreement on 26th May 1993 to build and operate a power station in Hubei Providence in the People's Republic of China. The vehicle for the joint venture was to be Hubei Changzhou Power Development Co Ltd ("Hubei Changzhou"). The total investment was to be RMB200 million, split 40% from Everbright and 60% from China Chang. Everbright's contribution was payable in instalments. The agreed exchange rate was US\$1 to RMB8. The agreement provided for arbitration of all disputes before the China International Economic and Trade Arbitration Commission in Shenzhen, also in the People's Republic.
- [4] The power station went live in 1995. That triggered the last instalment of capital due from Everbright to Hubei Changzhou in the sum of US\$3 million. Everbright never paid (and had not paid to date) that sum. Subsequently on 13th June 1997 the joint venture agreement was amended to bring in Walton as an additional joint venturer. China Chang assigned 40% of its shareholding in Hubei Changzhou to Walton.
- [5] In 1999 Walton took the issue of Everbright's non-payment of the US\$3 million to arbitration. By an award dated 19th July 2000, (so far as relevant) the arbitration panel ordered Everbright to pay Hubei Changzhou US\$3 million.

- [6] China Chang challenged that award before the Intermediate People's Court in Shenzhen on the basis that Hubei Changzhou was not a party either to the joint venture agreement (as amended) or to the arbitration. By a judgment delivered on 8th December 2000, it lost. The award in favour of Hubei Changzhou accordingly stood. During 2000 and 2001 Walton took steps before the Hubei Supreme Court to enforce the arbitration award, although these steps did not result in payment.
- [7] In 2008 Walton and two other companies, Global Bridge Assets Ltd and Long Prosperity Industrial Ltd, brought proceedings in Hong Kong against Everbright. Walton claimed the outstanding US\$3 million against Everbright. This claim faced the obvious difficulty that the arbitration award ordered that the US\$3 million be paid to Hubei Changzhou, not to Walton. Accordingly, in 2010 Walton withdrew its claim for the US\$3 million and sought to amend its claim to one for damages. The amendment appears to have been allowed at first instance, but Everbright appealed. The Court of Appeal of Hong Kong on 3rd August 2012 held that no damages claim lay at Walton's suit. That seems to be an orthodox application of common law principles. The loss caused by Everbright's failure to pay the US\$3 million was suffered by Hubei Changzhou. A reflective loss suffered by a shareholder (such as Walton) in Hubei Changzhou is not recoverable at common law.
- [8] The Hong Kong Court of Appeal ordered Walton to pay Everbright's costs in that jurisdiction. Subsequently there were three orders taxing the costs. It is common ground that the sum now owed (including interest) under those orders, is US\$1,008,409. This sum is accordingly not disputed.
- [9] On 22nd June 2016 Hubei Changzhou assigned to Walton, inter alia, the US\$3 million owed to it under the 2000 arbitration award. Walton claims to set off that amount against the US\$1 million odd owed in costs. Walton's right to set off is in dispute.

- [10] The power station was not a success and was demolished in about 2005. Hubei Changzhou continues to hold the land on which it was built, but, so far as appears in evidence, has no other assets. The value of the land is not in evidence. It may well be worthless. Apart from the assignment of the US\$3 million to it, Walton has no assets other than its shareholding in Hubei Changzhou.
- [11] No party raises any issue as to limitation in respect of either the claim or the cross-claim.

The failure to challenge the statutory demand

- [12] Walton failed to challenge the statutory demand within the statutory fourteen day period for doing so after service. No good reason is advanced for this failure. The statutory demand was served on Walton's registered agents on 27th November 2019. Mr. Qin Nian Zu, Walton's sole director, received a copy of the statutory demand in mid-December 2019. He does not himself speak, read or write English, but says that his "assistant briefly verbally translated it to [him]." He says he was unaware he ought to have applied to set aside the statutory demand.
- [13] What are the consequences of this failure timeously to challenge the statutory demand? Section 8(1) of the **Insolvency Act 2003** provides:

"A company or a foreign company is insolvent if

- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
- (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) either
 - (i) the value of the company's liabilities exceeds its assets, or
 - (ii) the company is unable to pay its debts as they fall due."

- [14] Section 157 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.

(3) Where the Court is satisfied that the security interest of a secured creditor has been under-valued in the statutory demand, the Court may require the creditor to amend the demand accordingly, but without prejudice to his right to make application for the appointment of a liquidator or a bankruptcy order, as the case may be.

(4) If, on hearing an application to set aside a statutory demand, the Court is satisfied that there are no grounds for setting aside the statutory demand, it may extend the time for compliance with the statutory demand.

(5) If the Court dismisses an application to set aside a statutory demand, it shall make an order authorizing the creditor to make application for the appointment of a liquidator or a bankruptcy order, as the case may be.

(6) Having considered the evidence before it on a hearing under this section, the Court may either summarily determine the application or adjourn it giving such directions as it considers fit.”

[15] Section 162(1) provides that the “Court may... appoint a liquidator of a company... if (a) the company is insolvent...” The definition of “insolvent” is as set out above in section 8.

- [16] Everbright make two points. In paras 23 and 34 of its skeleton it says that the “corollary of the Company’s inaction [in challenging the statutory demand] and the glaring takeaway from its evidence in opposition is that there is no genuine dispute of the Debt... Moreover, the argument of a set off was available to the Company, had it applied to set aside the Statutory Demand under section 157(1)(b) of the Act. It waived that right and opted not to do so, having full notice of the consequences for failing to do so.”
- [17] The regime for challenging statutory demands can be traced back to Australian legislation. There, a failure to challenge a statutory demand within the short time limit for doing so meant that a company was bound to be wound up unless it could show that it was solvent *both* on the “going concern” basis (that it could pay its debts as and when they fell due) *and* on the balance sheet basis. It could not on the hearing of the winding-up application challenge the underlying debt on which the statutory demand was based. As I pointed out in **Re Mount Grace Insurance Co Ltd; Enterprise Insurance Co Ltd v Mount Grace Insurance Co Ltd**² when considering newly introduced Gibraltar legislation³:

“a regime whereby a statutory demand in statutory form is incapable of challenge after the expiry of 21 days is extremely harsh, as was recognised by the High Court of Australia in **David Grant & Co Pty Ltd v Westpac Banking Corporation**.⁴ This has attracted criticism in Australia with one commentator, Karen O’Flynn, saying⁵ that:

‘the statutory demand procedure is a legislative and practical disaster zone.’”

² 2015 Gib LR 74 at para [15].

https://www.gcs.gov.gi/images/judgments/supremecourt/2014/enterprise_insurance_company_plc_and_anor_v_mount_grace_insurance_company_limited.pdf

³ Insolvency Act 2011 (2011 c 26), Laws of Gibraltar. The Act came into force on 31st October 2014.

⁴ [1995] HCA 43, 184 CLR 163.

⁵ “The Harmer Amendments: 15 years on” at page 9,

http://www.Claytonutz.com/people/oflynn_karen/docs/UNSW_insolvency_paper.pdf, accessed 15th December 2014)

[18] I suggested reasons why the Gibraltar legislation might be capable of being distinguished from the Australian provisions, although in the event I held that the statutory demand was invalid on other grounds.

[19] In an early case in this Territory on the Act, **Metalloyd Ltd v Burwill Resources Ltd**⁶, Hariprashard-Charles J, followed the Australian approach and held that a failure timeously to challenge a statutory demand was fatal to the company's ability to resist a subsequent application for the appointment of a liquidator. The Court of Appeal in **Trade and Commerce Bank v Island Point Properties SA**⁷ rejected this approach. It had:

"[20]... regard to the very nature of International Business Companies which to all intents and purposes are 'offshore' with the only presence in the Virgin Islands being a registered office and registered agent and a mere 14-day time line within which someone at the registered office in the Virgin Islands may bring the statutory demand to the attention of a director perhaps on the other side of the world, who then has to find and instruct solicitors in the Virgin Islands to make an application to set it aside.

[21]... [W]here a company has been unsuccessful in setting aside a statutory demand having made a timely application to do so, the company may not seek to resist the application for appointment of a liquidator on the same grounds relied on for setting aside the demand, absent good and substantial reasons. This simply accords with the well settled principles of estoppel.

[22] However, if [the applicant] was to have its way, based on its urging of the construction to be placed on section 8(1)(a) following and giving effect, it says, to the decision in **Metalloyd**, a perfectly healthy and profitable company actively engaged in its business could find itself being killed off on a wholly fallacious or contrived basis and being wholly deprived of the ability to defend itself from the attack merely because, due to no fault of its own, it missed the deadline for setting aside an utterly bad demand. [The applicant] contends that section 8(1)(a) of the Act should be construed as per the construction placed thereon in **Metalloyd** and that this precludes the judge from reviewing the debt alleged by [the applicant] and assessing the validity of the statutory demand. This effect, it says, is the plain intention of the statute. [The applicant] also says that the approach of the BVI courts is, in essence, to read down the discretions expressly

⁶ BVIHCV 2006/0083.

⁷ HCVAP 2009/12 (delivered 13th August 2010, unreported).

conferred on the court by section 167 of the Act so as not to undermine the plain meaning of section 8(1)(a) of the Act.

[23] In my view, such an approach would be disastrous, and simply cannot be right for several reasons [which are then set out].”

[20] The Court of Appeal does not identify the particular sort of estoppel which would result from an unsuccessful attempt to challenge a statutory demand. In **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd**⁸ Lord Sumption identified six different types of *res judicata*. The first three concern types of cause of action estoppel and the doctrine of *transit in rem judicatam*, none of which are relevant to applications to set aside statutory demands. As to the last three types, he said:

“Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: **Duchess of Kingston's Case**.⁹ ‘Issue estoppel’ was the expression devised to describe this principle by Higgins J in **Hoysted v Federal Commissioner of Taxation**¹⁰ and adopted by Diplock LJ in **Thoday v Thoday**¹¹. Fifth, there is the principle first formulated by Wigram V-C in **Henderson v Henderson**,¹² which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”

[21] Where the Court has considered an application to set aside a statutory demand and has refused the application, then Lord Sumption’s fourth and fifth cases potentially come into play. The Court will not reconsider the matters which were directly before it in the absence of special circumstances. Whether type four or five estoppels would bind the parties on matters which were *not* argued is a difficult question, which it is not necessary to resolve. In the current case,

⁸ [2013] UKSC 46, [2014] 1 AC 160 at para [17].

⁹ (1776) 20 St Tr 355.

¹⁰ (1921) 29 CLR 537 at p 561.

¹¹ [1964] P 181 at pp 197-198.

¹² (1843) 3 Hare 100.

however, the Court has made no determination of the validity of the statutory demand at all, because no application to set aside the statutory demand has been made. Accordingly, type four or five estoppels can in my judgment have no application.

[22] This leaves the sixth form of estoppel, **Henderson v Henderson** estoppel. This is the high point of Everbright's argument. Mr. Samuel persuasively argues that Walton could and should have challenged the statutory demand on the basis of the facts on which it now relies. Whilst that is true, the difficulty in my judgment is that **Island Point** is directly against him. The Court of Appeal accepted that it was not abusive for a company to resist an application for the appointment of a liquidator in cases where the company had failed to challenge the statutory demand. If there is no estoppel from the failure to challenge the statutory demand, there is in my judgment no waiver from the same failure.

[23] Accordingly, in my judgment Walton are entitled to dispute the application for the appointment of a liquidator.

The substantive merits

[24] The classic formulation of the test for refusing to appoint a liquidator on the basis that the debt which grounds the application is disputed is the formulation of Byron CJ in **Sparkasse Bregenz Bank AG v Associated Capital Corp**:¹³

"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... 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... 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

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

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.”

[25] Although the test there was referring to a dispute as to the underlying debt, the test must apply equally to a cross-claim.

[26] In the current case, there is, as I have noted, no real dispute as to the facts. The 2000 arbitration award has been recognised by the Courts in the People’s Republic of China. That is in my judgment good evidence, and certainly good enough evidence to satisfy the **Sparkasse Bregenz** test, that Walton has a genuine cross-claim.

[27] In order to defeat that argument, Mr. Samuel submits that Walton have waived their right. In *Everbright’s* skeleton the point is put this way:

“27. Our primary submission in response to this contention is that the set off asserted by the Company is ineffective, since it falls within section 150(4) of the Act. On the Company’s own evidence, it inexplicably waived its right to pursue the Award in March 2010 by voluntary withdrawal of the claim for US\$3 million. Instead, the Company pursued a claim in damages which was dismissed...

28. Section 150(4) of the Act applies to insolvency set offs in both liquidations and bankruptcy. It states that:

‘Where, before the relevant time, a creditor waives or agrees that he or she will not claim the benefit of a set off under this section, that waiver or agreement takes effect notwithstanding subsection (1), except to the extent that a creditor who was not a party to the agreement, or has not agreed otherwise, is prejudiced.’

29. The Company’s waiver falls within section 150(4) and there is no evidence that any other creditor was prejudiced.”

[28] I am doubtful that section 150(4) applies to the current case at all. It is applicable where the debtor, that is to say *Everbright*, is the subject of insolvency

proceedings. It is not in point where it is the allegedly insolvent debtor, *Walton*, which has the cross-claim. However, even if I am wrong about that, there is a short answer to the point. The alleged waiver in the course of the Hong Kong proceedings predated the assignment of the US\$3 million to Walton in 2016. In 2010, Walton had no cross-claim for US\$3 million to waive. Accordingly, I reject Everbright's primary submission.

[29] Everbright's alternative submission is that:

"30. ...the Application falls to be dismissed as a result of a set off [as] a matter within the Court's discretion. There is no general rule of law that the Court must dismiss a winding up application on the basis of a cross claim, *a fortiori* a set off, raised at the petition stage. Even if there is a genuine and serious cross claim, the Court must ask itself whether there are any special circumstances that would make it inappropriate for the petition to be dismissed. This was clarified by the English Court of Appeal decision in **Re Bayoil SA**¹⁴, which [in] the lead judgment given by Nourse LJ stated as follows:

'I emphasize that the cross claim must be genuine and serious or, if you prefer, one of substance; that it must be one which the company has been unable to litigate; and that it must be in an amount exceeding the amount of the petitioner's debt.'

31. On the case at bar there is no evidence that a cross claim is on foot, that would enable the Court to assess its genuineness. It is also clear from the evidence that the Company had the opportunity to litigate its claim and opted not to do so. Further, it is now too late for the Company to raise this alleged set off, having failed to do so in support of an application to set aside the Statutory Demand under section 157(1)(b) of the Act. These factors are either, sufficient for the Court to refuse the Company's invitation to dismiss the Application or amount to special circumstances why the Application should not be dismissed."

[30] In my judgment, I am able to assess the genuineness of the cross-claim. It is common ground that the 2000 arbitration award created a debt owed by Everbright to Hubei Changzhou, which was assigned in 2016 to Walton. It is quite true that the cross-claim cannot be litigated here, because (unless and until Everbright

¹⁴ [1999] 1 WLR 147 at p 155.

bring ordinary proceedings in this jurisdiction to enforce the Hong Kong costs orders) this Court has no jurisdiction over Everbright. That does not prevent this Court recognising the cross-claim. That was the decision in **Bayoil** on which Everbright (wrongly in my judgment) relies.

- [31] **Bayoil** is authority for the proposition that, unless there are special circumstances, it is wrong to appoint a liquidator when there is a valid cross-claim. Here there are no relevant special circumstances. Walton's failure to challenge the statutory demand does not, on the facts of this case, constitute special circumstances which would justify my exercising my discretion to wind up Walton. This is consistent with **Island Point**. Of particular importance is that the US\$3 million is owed pursuant to a valid arbitration award, validly assigned to Walton.

Conclusion

- [32] Accordingly, I dismiss the application. I shall hear the parties on costs, but my preliminary view is that there should be no order for costs. Walton has brought the current application on itself by failing without good reason to challenge timeously the statutory demand.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar