

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 142 of 2019

BETWEEN:

PACIFIC FERTILITY INSTITUTES HOLDING CO LTD

Applicant

and

PACIFIC FERTILITY INSTITUTES (HK) HOLDING CO LTD

Respondent

Appearances:

Ms. Rachael Stitt and Mr. Matthew Freeman of Campbells for the Applicant

Mr. Alain Choo-Choy, QC, and Mr. Richard Evans of Conyers for the Respondent

2020: January 14;
January 22.

JUDGMENT

- [1] **JACK, J [Ag.]:** On 18th September 2019 pursuant to section 155 of the Insolvency Act 2003 the respondent served a statutory demand on the applicant in respect of a claimed liability to pay US\$500,000. On 30th September 2019 the applicant applied pursuant to section 156(1) of the same Act to set aside the statutory demand. It is this application which is now before me.

The undisputed facts

- [2] The main protagonists in this matter are on the one side, Mr. Leon Li (“Mr. Li”), and on the other Mr. Xu Zhong-ping (“Chairman Xu”), the chairman of China Environmental Technology Holdings Ltd. All the parties have referred to this company as “ListCo”. It is listed on the Hong Kong Stock Exchange, although its place of incorporation is the Cayman Islands. Chairman Xu is also a director of INNOMED Group Ltd (“INNOMED”).
- [3] Mr. Li had a business providing pregnancy services. On 30th December 2016 the parties entered a joint venture agreement, whereby the business was to be shared 50:50. The corporate structure which was established is this. Mr. Li was the 100 per cent shareholder in Pacific Fertility Holding Co Ltd, the current applicant. It is incorporated in this Territory and I shall call it “PFI BVI”. ListCo is the 100 per cent shareholder in INNOMED, a BVI company. INNOMED hold 100 per cent of the shares in Pacific Fertility Institutes (Singapore) Pte Ltd (“PFI Singapore”). PFI Singapore is now in liquidation following a petition by an unrelated third party.
- [4] PFI BVI and INNOMED are each 50 per cent shareholders in Pacific Fertility Institutes Holding Co Ltd (“PFI Cayman”), which is incorporated in the Cayman Islands. PFI Cayman in turn holds 100 per cent of the shares in Pacific Fertility Institutes (HK) Holding Co Ltd (“PFI HK”), the respondent to the current application. PFI HK held 80 per cent of the shares in Pacific Fertility Institutes Inc (“PFI Saipan”). PFI Saipan ran a hospital/clinic in Saipan, the capital of the Commonwealth of the North Mariana Islands, a former trust territory of the United States, and appears to have been the most valuable part of the business. For completeness, I should say that PFI HK also owned 100 per cent of the shares in Pacific Institutes Co Ltd, a Hong Kong company, but this company plays no rôle in the current proceedings. By order of Kawaley J made in the Grand Court of the Cayman Islands on 17th July 2019, provisional liquidators were appointed of PFI Cayman on the “just and equitable” ground.

- [5] On 5th June 2018 PFI BVI transferred US\$64,086.16 (or SG\$85,000) to PFI Singapore. On 7th June 2018 PFI HK transferred US\$500,000 to PFI BVI's bank account with Taishin Bank in Hong Kong. Immediately after PFI BVI received these monies, PFI BVI transferred US\$435,931.29 (or SG\$576,259) from Taishin Bank to PFI Singapore. The result was that PFI BVI transferred a total of US\$500,017.45 to PFI Singapore. The fact of these transfers was common ground between the parties.
- [6] During this time, Mr. Li was a director of (inter alia) PFI BVI, PFI HK and PFI Singapore. The transfer of US\$500,000 to PFI BVI was effected by Mr. Li giving an instruction to make the transfer to Ms. Qi Xiaoyu, an accountant. Mr Li says she was employed by INNOMED. Mr. Li's instructions to Ms. Qi on 7th June 2018 were given by WeChat. In translation they read: "Please transfer USD500,000 to this account. Note: PFI Singapore Loan" and "This amount is for the purpose of lending to PFI Singapore, and I will use Taishin account to transfer it."
- [7] After receipt of the money in Singapore, Mr. Li sent a WeChat message to Mr. Zhang Dee (or Di), a director of PFI Singapore saying in Mr. Li's own translation: "You should note these Singapore dollars as the loan to [PFI HK]." The certified translation of this WeChat message is: "You should note these SGD amounts as loans from [PFI HK]." It appears that the literal translation of the relevant Chinese ideogram is "to", but the certified translator uses the context to translate the ideogram as "from".
- [8] Notwithstanding those instructions, the monies were noted in the books of PFI Singapore as a "capital injection."

The law

- [9] There was no dispute between the parties as to the relevant law, which I can take from Mr. Choo-Choy QC's skeleton on behalf of PFI HK at para [20] as follows:

"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 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.” *Per* Byron CJ¹.

In order to assess whether the debt is disputed on substantial grounds the Court is duty bound to carry out a preliminary investigation of the evidence (including expert evidence where relevant) to determine whether the debt is disputed on genuine and substantial grounds (i.e. it must determine whether a claimed dispute about whether the debt is due and payable crosses the threshold of a ‘substantial dispute’ within the meaning of... section 157(1)(a)).²

The mere fact that a party asserts that certain things did or did not occur is not sufficient in itself to raise a triable issue. Such evidence must be considered against the background of all of the other admissible evidence in order to judge whether it is an allegation of any substance.³ The Court is not bound to accept uncritically every affidavit statement — however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable or incredible, it may be — as raising a dispute of fact which calls for further investigation.⁴

Although Byron CJ’s well-known speech in **Sparkasse** was given in the context of a petition to wind up, it is well established that the test of a disputed debt is the same in the closely related context of an application to set aside a statutory demand, as is evident from the approach in the statutory demand cases (e.g. **China Alarm Holdings** and **Angel Wise**).

¹ *Sparkasse Bregenz Bank AG v Associated Capital Corp* (Civil Appeal No 10 of 2001, decision of 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* (BVIHCMAP 2014/0025, BVIHCMAP 2015/0003, delivered 8th December 2015) at paras [27] and [33].

² *China Alarm* at paras [31]-[34], [40] and [44], *Angel Wise* at para [19] and *Jinpeg* at para [29].

³ *China Alarm* at para [40].

⁴ *Angel Wise* at paras [24]-[25] and *Jinpeg* at para [34].

PFI HK's case

- [10] PFI HK's case is that Mr. Li is a crook. Mr. Choo-Choy QC relies on three separate matters. Firstly, in November 2018, Hong Kong police charged Mr. Li with offences of possession of a forged identity card, failing to surrender to custody, escaping from legal custody and resisting arrest by a police officer. The escape from legal custody was apparently effected through the ceiling of a toilet at the police station.⁵ He was convicted of the offences in February 2019 and sentenced to eighteen months imprisonment, subsequently reduced on appeal to twelve months.
- [11] Secondly, in August 2018 accounting irregularities were identified at PFI HK with three questionable transfers of money of US\$43,500, US\$72,500 and US\$636,000 respectively to Mr. Li's personal account. In addition, there was a payment of US\$630,000 paid to a BVI company called UBaby ostensibly as a consultancy fee. UBaby was owned and managed by a Mr. Sang Tian, who also served time in Hong Kong for assisting Mr. Li in his escape from police custody. Chairman Xu suggests that these transfers were part of a bigger fraud by Mr. Li, whereby Mr. Li inflated the profits of the business to hit a profit target in the Share Purchase Agreement of US\$5 million.
- [12] Thirdly, on 3rd July 2017, 7th March 2018 and 21st March 2018 PFI Singapore transferred the sums of SG\$1,578,850.00, SG\$283,290.50 and SG\$600,000.00 (totaling SG\$2,462,140.50) to a company called IVF Lab Services Pte Ltd ("IVF Lab"). These payments were in respect of invoices raised for fictitious supplies. IVF Lab failed to comply with a statutory demand served on it by PFI Singapore for the return of these monies and was wound up on 17th May 2019. It was then discovered that in 2017 Mr. Li had caused PFI Singapore to transfer US\$1,133,043.21 to IVF Lab, which was then transferred on to Mr. Li's personal bank account. Similarly, on 20th March 2018 PFI Singapore transferred

⁵ *South China Morning Post*, 18th November 2018, cited by Kawaley J in *Re Pacific Fertility Institutes Holding Co Ltd* (Grand Court of the Cayman Islands, FSC No 105 of 2019, decision of 17th July 2019).

US\$600,000 to IVF Lab, which was transferred on to Mr. Li's personal account the following day.

- [13] As to the transfer of monies to PFI BVI, there was, Mr. Choo-Choy QC submitted, no economic rationale for the transfer. There was no loan, either between PFI HK and PFI BVI or between PFI HK and PFI Singapore. In any event, a loan of money to PFI Singapore was not in the best interests of PFI HK. It was obviously just a means of supplying money to PFI Singapore so that Mr. Li could steal it as soon as it arrived. PFI BVI has no defence to a claim for monies had and received. It received the money; no consideration passed; so it is liable to restitution. No defence of change of position arises, because Mr. Li (who was for these purposes the directing mind of PFI HK, PFI BVI and PFI Singapore) was acting in bad faith: **Lipkin Gorman v Karpnale Ltd.**⁶

PFI BVI's case

- [14] PFI BVI raised two technical objections to the serving of a statutory demand. Firstly, Ms. Stitt said that a restitutionary claim could not be a "liability" within the meaning of the Insolvency Act: **Trade and Commerce Bank v Island Point Properties SA**⁷. Secondly, PFI HK had made no demand for return of the monies prior to serving the statutory demand. Thus at the time of service of the statutory demand there was no debt due and owing.
- [15] The substantive defence raised was that PFI BVI was a mere conduit for payment of the monies to PFI Singapore. There was a loan arrangement between PFI Singapore and PFI HK. The fraud allegations were just that: Mr. Li had been interviewed by the Hong Kong police in relation to the transfers from PFI HK to him personally and to UBaby, but had not been charged. He had not even been interviewed by the Singapore police. The fraud allegations were collateral matters, wholly unsuitable for determination in an application to set aside a statutory

⁶ [1991] 2 AC 548.

⁷ BVIHCVAP 2009/12 (delivered 13th August 2010).

demand. Such applications were intended to be summary. PFI BVI had raised a sufficient defence to satisfy the **Sparkasse Breganz** test.

The technical defences

[16] I turn first to the technical defences. The facts of **Island Point** were very different to the current case. A company called Tarbet owed US\$5.65 million to the claimant bank (which was in liquidation following substantial irregularities). In turn Tarbet's accounts showed Island Point owing it somewhat over US\$1 million. The bank's case⁸ was that it "had gratuitously and wrongly transferred those funds [viz the US\$5.65 million] to Tarbet and that Tarbet had in turn transferred those funds to Island Point. On this basis it was argued that [the bank] had a restitutionary claim as against Tarbet and similarly, via Tarbet, a restitutionary claim against Island Point."

[17] The Court of Appeal⁹ upheld the decision of this Court that these facts did not show that any debt was payable. It was an equitable restitutionary claim, which might be a "liability" but was not necessarily (and was not on the facts) a debt due and payable at the time of the demand. However, the Court of Appeal expressly held at para [35] that

"a present obligation to repay must arise out a contractual relationship or under some statutory provision or out of circumstances giving rise to an obligation to repay on the basis of money had and received, in order to be treated as a debt."

[18] The current demand is a common law claim for monies had and received, not an equitable claim. In my judgment it is a claim for a fixed sum of money and can properly be described as a debt. Under the old system of causes of action, it was a claim for *indebitatus assumpsit*. This is not just the cause of action for monies lent, goods sold and delivered etc (which are contractual claims) but also for

⁸ At para [3(e)].

⁹ At paras [33] to [35].

monies had and received (a quasi-contractual or, in modern parlance, restitutionary claim).

- [19] So far as the need for PFI HK to make a (non-statutory) demand on PFI BVI before issuing a statutory demand is concerned, in my judgment a restitutionary obligation arises without any need for notice of demand. Time runs for limitation purposes from the date of receipt of the money, not the date on which repayment is demanded. Parke B held in **Norton v Ellam**¹⁰

“It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan.”

The same applies to monies had and received: **Bullen & Leake & Jacob’s Precedents of Pleading**¹¹.

- [20] Accordingly, I reject the technical defences raised by PFI BVI.

The substantive defence

- [21] I turn then to the substantive defence which is raised, namely that PFI BVI was a mere conduit for a loan being made by PFI HK to PFI Singapore. A major plank of PFI HK’s case is that Mr. Li was a fraudster. If there was no fraud, then it is in my judgment highly unlikely that any thought would be given to making a claim against PFI BVI. Within a group or a joint venture it is very normal for monies to be moved around without enormous thought being given to matters such as dates of repayment, rates of interest and so forth. Transfers between companies in an informal manner are common.

¹⁰ (1837) 2 M & W 461 at p 464.

¹¹ 19th Ed, 2019, at para 14-02.

- [22] Further the monies were being moved from an entity, PFI HK, which was beneficially owned 50:50 Li/ListCo, to an entity, PFI Singapore, 100 per cent beneficially owned by ListCo, so no issue of direct prejudice to ListCo can arise. Building up the Singapore business would have been in ListCo's interests. There was an ostensible commercial reason for making the transfer from PFI HK to PFI Singapore.
- [23] The instructions given by Mr. Li to Ms. Qi are on their face innocuous. He says that PFI HK is making a loan of US\$500,000 to PFI Singapore. That ostensibly is what happened. Now Mr. Choo-Choy QC submits that there is no reason to route the payment of the monies via PFI BVI. The reason provided by Mr. Li for doing so, namely that PFI HK could not make a direct transfer from a Hong Kong bank account to a Singapore bank account, is preposterous. Be that as it may, there was a reason to send some monies at least to PFI BVI, because that company had already sent US\$64,086.16 or SG\$85,000 to PFI Singapore a couple of days earlier.
- [24] In my judgment, the question why PFI HK did not just send the money to PFI Singapore direct is a red herring. The money was sent ultimately to PFI Singapore.
- [25] Ms. Stitt submitted that fraud allegations are wholly unsuitable for determination in the course of a summary procedure, such as the present. In my judgment, it is not possible to take such a blanket approach in considering fraud allegations. Often allegations of fraud will indeed require detailed examination of evidence and inferences from evidence which are unsuited to a summary procedure such as the present. In some cases, however, the putative creditor will be able show very clearly that there has been a fraud which directly impacts on the defences put forward by the putative debtor. The current case does not in my judgment fall in this latter category. I agree that it is possible, as Mr. Choo-Choy QC submits, that the purpose of transferring the money to PFI Singapore was so that Mr. Li could more readily steal it, once it was in PFI Singapore's hands. However, that does

not affect the nature of the transfer of the monies via PFI BVI. Routing the money through PFI BVI did not facilitate the proposed theft. It was purely neutral. Ms. Qi knew the money was to be a loan to PFI Singapore. The theft (on the assumption that there was going to be a theft) was going to take place after the money had been lent by PFI HK to PFI Singapore. How the money got from PFI HK to PFI Singapore is neither here nor there.

[26] Again, it is possible that PFI HK can establish a large conspiracy to defraud to which PFI BVI was a party. However, it is difficult to imagine a claim which was less suitable for summary determination on an application to set aside a statutory demand. The default position is that a putative creditor should bring ordinary court proceedings to establish the debt. The service of a statutory demand is only for clear cases where there is no genuine dispute.

[27] A major difficulty with PFI HK's claim is that the most realistic legal analysis is that either PFI HK has a claim against PFI BVI for monies had and received or it has a claim against PFI Singapore for monies lent. There is no straightforward legal basis — and none in my judgment which meets the **Sparkasse Bregenz** threshold — on which PFI BVI and PFI Singapore can both be liable to PFI HK.

[28] I have not overlooked the point that Mr. Li has chosen not to adduce detailed evidence rebutting the allegations of his misappropriating monies and defrauding ListCo. I agree with Ms. Stitt's submission that the allegations of fraud are collateral to the claim against PFI BVI. Whether Mr. Li is a ne'er-do-well or not is not directly relevant to the correct legal analysis of the payment of US\$500,000 to PFI BVI. Once PFI BVI established an arguable defence that the monies were transferred as part of a loan from PFI HK to PFI Singapore, it did not in my judgment need to rebut the allegations of fraud made against Mr. Li.

[29] Accordingly, I find that there is a substantive defence to PFI HK's claim against PFI BVI. There is a genuine dispute under the **Sparkasse Bregenz** test as to whether the monies advanced by PFI HK were to be a loan to PFI Singapore. If they were, that rebuts any claim to restitution against PFI BVI.

Conclusion

[30] It follows that I shall set the statutory demand aside.

Justice Adrian Jack
Commercial Court Judge (Ag)

By the Court

Registrar