IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NOS:BVIHCV 135 of 2009 and 152 of 2009

BETWEEN:

PIONEER FREIGHT FUTURES COMPANY LIMITED

Applicant

And

WORLDLINK SHIPPING LTD, SAMOA

Respondent

Appearances: Mr Dirk van Heck of Maples and Calder for the Applicant
Ms Claire Robey of Martin Kenney & Co. Ltd. for the Respondent

JUDGMENT IN OPEN COURT

[2009; 22 June; 1 July]

[Application to set aside statutory demand – forward freight contracts – FFABA 2007 and 1992 ISDA Master Agreement terms – English choice of law and English High Court exclusive jurisdiction provision – s 157(1)(a) Insolvency Act, 2003 – whether question justiciable only in English High Court – whether substantial dispute]

[1] **Bannister J [ag]:** This is an application by Pioneer Freight Futures Company Limited ('Pioneer') to set aside two statutory demands served upon it by Worldlink Shipping Limited, Samoa ('WS') on, respectively, 7 and 14 April 2009. The statutory demands claim sums due under several forward freight contracts entered into between the two companies. The first is in the sum of $3.3 million (after credit had been given for payments totaling $1.7 million already made by Pioneer). The second demand is in the sum of $2.5 million.

[2] The trades were made under the umbrella of the Forward Freight Agreement Brokers Association 2007 terms ('the FFABA terms') which incorporated the provisions of the 1992 ISDA Master Agreement (Multicurrency – Cross Border) (without Schedule) ('the Master Agreement'). It is common ground that as a result the agreements between the parties are governed by and to be construed in accordance with English law and are subject to the exclusive jurisdiction of the High Court of Justice in London, England.

[3] It seems to have been Pioneer's original position, which I glean from an affidavit made in these proceedings by Mr Michael Pringle ('Mr Pringle') on 28 April 2009, that no statutory demand could be presented under the FFABA terms and Master Agreement until a judgment had been obtained against it in the English courts. This argument was based upon the exclusive jurisdiction clause in the FFABA terms to which I have referred. The argument is plainly bad and I did not understand Mr van Heck (who appeared for Pioneer) to persist in it at the hearing.

[4] At the hearing Mr van Heck did not dispute that Pioneer has an indebtedness to WS in the amounts demanded. But he says that WS has not established that Pioneer is under any present liability to pay the money or any part of it. So, he says, WS cannot present valid statutory demands because, by section 155(2)(a) of the Insolvency Act, 2003 ('the Act'), the debt supporting a statutory demand must be both due and payable. He bases his argument on two separate provisions of the Master Agreement. The first is clause 2, which so far as relevant is in the following terms:

> "2. Obligations
>
> (a) General Conditions
>
> (i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.
>
> . . .

(iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement."

[5] The second is clause 5(a)(vii)(2), which reads as follows:

> "5 Events of Default and Termination Events
>
> (a) Events of Default. The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:-
>
> . . .
>
> (vii) The Party, any Credit Support Provider of such party or any applicable Specified Entity of such party:-"
>
> . . .
>
> (2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;"
>
> . . .

[6] Mr van Heck's starting point in applying to set aside the statutory demands is his contention that Pioneer's evidence raises what he describes as a powerful inference that WS is insolvent.

[7] The evidence upon which Mr van Heck relies is contained in part in an affidavit of Andrew Johnstone, an employed lawyer in the firm of Holman Fenwick Willan London, Pioneer's solicitors. Mr Johnstone says that 'there are good grounds for suspecting that WS may be insolvent or unable to pay its debts'. Shortly, he relies on a letter from a firm of solicitors to

Pioneer which contains allegations that a company called Glorywealth is owed money by WS. WS put in evidence to show that the issues between Glorywealth and WS are the subject of ongoing arbitration proceedings. He also says that an officer of Pioneer has told him that WS owes money to an entity called Cosco Bulk Carriers; and that the dry freight market is in a state of collapse.

[8] At the commencement of the hearing Pioneer asked for leave to put in a second affidavit sworn by Mr Pringle on 18 June 2009. Ms Robey, who appeared for WS, objected to my admitting this very late evidence, mainly on the grounds that timing differences did not enable her to obtain full instructions from her client in China in order to be able properly to respond to it. In the event, I decided that I should do so. The new evidence appears to show that Worldlink Samoa has been the subject of three Rule B, New York attachment freezing measures over the last year or so. It is plainly impossible to infer insolvency from the fact that a party is the subject of a freezing order, so the new evidence goes nowhere on the insolvency point.

[9] Mr van Heck does not rely upon the evidence which I have summarized above as establishing an Event of Default within the meaning of clause 5(a)(vii)(2). Instead, as I have already mentioned above, he says the evidence raises 'a powerful inference' that WS was insolvent. He relies, as I understand him, on this inference as buttressing his primary argument, which is that as a matter of construction of the Master Agreement it is for WS to establish that no Event of Default persists in respect of itself as a condition precedent to being able to enforce payment under clause 2(a)(i). Mr van Heck says that WS has not done this, so that it cannot make a claim against Pioneer for immediate payment and thus cannot present a statutory demand satisfying section 155(2)(a) of the Act. He goes on to argue that since WS claims the right to payment without having first to prove that it is not subject to an Event of Default, that gives rise to a dispute which can be resolved, because of the exclusive jurisdiction clause to which I have referred, only in the High Court in England. So he says that the court should be satisfied that there is a substantial dispute whether WS is in a position to make these statutory demands and he says that they must be set aside accordingly under section 157(1)(a) of the Act.

[10] In support of his argument Mr van Heck relies on certain well known passages from the decision of the Court of Appeal in *Sparkasse Bregenz Bank AG and in the Matter of Associated Capital Corporation*, BVI Civil Appeal No. 10 of 2002:

> "4. I think that I should dispose of the argument relating to adducing evidence of Austrian Law and the obligation of the Court to determine the validity of the claims. The agreement between the parties clearly mandated that the agreement is subject to the law of Austria and that the Court responsible for the bank's headquarters in Vienna has exclusive jurisdiction over any possible legal dispute arising out of the agreement. This provision is unambiguous. Austrian Law would be relevant to resolve the questions that were raised by the parties. It is not necessary to rely on Austrian Law to determine whether there was a dispute. One can conclude that a dispute exists without knowing how the dispute would be resolved. The learned trial Judge concluded that there were disputes of both a factual and legal nature and it is not for this Court to resolve those disputes. He concluded that the dispute between the parties should be settled in accordance with the terms of the agreement before it could be said that there was a debt which could ground a winding up order. The principles outlined above, clearly indicate that it was his duty to determine whether there is a genuine and substantial dispute as to whether there is a debt. None of the jurisprudence indicates that it was his duty to resolve the dispute. I reject the contention that the failure to lead Austrian law in evidence was an error or impacted on the burden of proof. The questions that the judge was required to answer, and those that he did answer did not require any knowledge of Austrian Law. If he had attempted to resolve the dispute he would have been improperly encroaching on, and usurping a jurisdiction which the parties had conferred on the Austrian Court.

5. There is authority for the proposition that a winding up order should not be made where the company is claiming that it has a genuine and substantial dispute with the creditor to the extent or in excess of the alleged debt, and that dispute is to be determined by another Court or tribunal. This was so even where the creditor had established its debt to the extent that it was entitled to levy execution, and the company's claim was by way of a cross-claim which had not as yet been adjudicated. This gives effect to the rationale that a winding up order could sound the death knell of a company and it would be unlikely that a liquidator would prosecute the company's claims with the diligence and efficiency of the directors. I think that the learned trial judge was correct to conclude that a possible legal dispute between the parties as to the existence of the debt should be resolved in the correct forum as a condition precedent to commencing the winding up proceedings in these Courts."

[11] It appears from the report that *Sparkasse* was decided on the hearing of what was then a petition to wind up, rather than on an application to set aside a demand made under section 116 of the Companies Act (Cap 285). But sub-section 157(1)(a) of the Act provides that:

"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;"

and it seems to me that the principles laid down by the Court of Appeal in *Sparkasse* must apply equally to an application to set aside a statutory demand under sub-section 157(1)(a). It also seems to me that, in a statutory demand case, those principles must apply with equal force to the question whether a debt is presently payable as they do to the

question whether any liability exists at all, since both questions are critical to the ability to serve a compliant statutory demand. I might add that in my judgment the word 'due' at the end of sub-section 157(1)(a) must mean 'due for payment'. It cannot be construed as having the same meaning as 'owing' and the only other meaning that can sensibly be given to the word in context is 'due for payment' (or 'payable'), thus providing the necessary correspondence between the wording of sub-section 155(2)(a) and that of sub-section 157(1)(a).

Substantial dispute

[12] The dispute indentified by Pioneer in this case is exclusively one of law. It is a dispute based entirely upon the construction of a contract governed by English law and with respect to which the parties have decided that the High Court in England shall have exclusive jurisdiction. Although he did not put it precisely this way, I think that Mr van Heck's contention in these circumstances is that if the BVI court reaches the point where it recognizes the existence of any dispute as to the construction of the Master Agreement, it should not even attempt to decide whether or not that dispute is in itself a substantial dispute for the purposes of section 157(1)(a) of the Act. Instead, it should defer to the exclusive jurisdiction clause, set aside the statutory demands and leave the parties to litigate in England.

[13] The only suggested ground of defence to WS's demand for payment is that a term is to be implied into the Master Agreement to the effect that a party is not entitled to payment or delivery under the contract unless it has first proved that it is not the subject of any of the list of potential Events of Default contained in the Master Agreement and that WS has not complied with that term. The question for me is whether I am precluded by the exclusive jurisdiction clause from deciding whether that ground of defence is one of substance or whether, if I attempted to do that, I would, to adapt the words of the Chief Justice in *Sparkasse*, be improperly encroaching on, and usurping a jurisdiction which the parties have conferred upon the English Court.

[14] Ms Robey referred me to the decision of the English Court of Appeal in *AWB Geneva SA v North American Steamships* [2007] EWCA Civ 739, of which I was shown a transcript, as authority for the proposition that the exclusive jurisdiction clause in the FFABA terms does not affect this court's ability to conduct its own insolvency procedures. That is undoubtedly the effect of the authority in the factual circumstances with which it was concerned, but it is important to stress that the foreign insolvency proceedings with which the English Court of Appeal was concerned involved a Canadian insolvency regime which was in place at the time when the Court of Appeal gave judgment and the question was whether the exclusive jurisdiction clause meant that the English court should grant an anti-suit injunction restraining the continuation of those insolvency proceedings. The Court of Appeal upheld the trial judge in deciding that since the Canadian insolvency proceedings did not involve a judicial determination of the parties' rights under the agreements, the exclusive jurisdiction clause was not engaged by them and that accordingly no anti-suit injunction should be granted.

[15] In the present case, no insolvency proceedings are on foot in this jurisdiction. *AWB Geneva* does not, in my judgment, decide that it is legitimate for a foreign court outside the context of ongoing local insolvency proceedings and in the face of an exclusive jurisdiction clause, to decide a point as to the true construction of the contract of which it forms a part. It certainly does not decide that it is legitimate for such foreign court to do so in circumstances where the decision will (if it goes one way) mean that one party to the contract will, for practical purposes, be deprived of a defence which it wishes to be allowed to run against a demand for payment by the other. On the contrary, Thomas LJ said at paragraph [26] in *AWB Geneva*:

> '*Clearly, if the proceedings in Canada were proceedings which related to a dispute under the contract, then that would be characterised as a contractual issue and subject to the exclusive jurisdiction clause which I accept is wide in its scope.*'

I consider that that observation was part of the *ratio* of the English Court of Appeal's decision and it seems to me to apply with some precision to the issue which I have to decide.

[16] Ms Robey points out, correctly, that I have a duty under section 157(1)(a) of the Act to decide whether or not the points taken on behalf of Pioneer satisfy me that there is a substantial dispute as to WS's claim to be entitled to immediate payment. She says that the exclusive jurisdiction clause cannot operate to relieve me of that duty, so that I am bound by the Act to decide whether the defence raised by Pioneer is one of substance. The difficulty that she faces is that if I were to decide that it is not, I would in effect be deciding in this jurisdiction that Pioneer has no defence to WS's claim for payment. That seems to me to be indistinguishable from making a judicial determination as to the parties' rights under the contract.

[17] I think that the fallacy in Ms Robey's argument on this point is that it assumes that the only matter in dispute is the strength of Pioneer's argument on the construction of the Master Agreement. In truth, Pioneer's position is more than that. Pioneer is saying (a) that it wishes to deploy its construction point (b) that it is contractually entitled to deploy the point in the High Court in London and (c) that it is not for the BVI court to deprive it of that right. Understood in this way, it seems to me that Pioneer, whatever I might think privately about its point of construction, does indeed raise a dispute of substance.

Other Arguments

[18] I ought briefly to mention other arguments raised by Mr van Heck. He relies upon the fact that at the time when the statutory demands were served, WS had not served so-called 'cure notices' under clause 5(a)(i) of the Master Agreement. Clause 5(a)(i) is in the following terms:

> "Failure to pay or Deliver. Failure by the party to make, when due, any payment under this Agreement or delivery under section 2(a)(i) or 2(c) required to be made

by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party."

[19] The purpose of clause 5(a)(i) is to enable a party not in default to convert a failure by the other party to perform an obligation of payment or delivery into an Event of Default and thus to confer upon the notifying party the rights which are enjoyed under the Master Agreement against a party subject to an Event of Default. It has no bearing on the question whether the opposite party is liable to pay or, as the case may be, deliver. There is no merit in this argument.

[20] Finally, Pioneer says that the invoices tendered by WS are gross, whereas it had been agreed between the parties that they should be netted off. It was not suggested that this failure to net off brought the amount due from Pioneer to WS below the statutory minimum and it seems to me that even if the point otherwise has any merit, which I am unable to detect, it is irrelevant.

Conclusion

[21] For the reasons given in the first section of this judgment this application succeeds and the statutory demands will be set aside.

Edward Bannister

Commercial Court Judge

1 July 2009