IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

MATTER NO: BVIHCV 2009/308

IN THE MATTER OF SECTION 156(1) OF THE INSOLVENCY ACT 2003 AND RULE 152 OF THE INSOLVENCY RULES 2005

AND IN THE MATTER OF AN APPLICATION BY PIONEER FREIGHT FUTURES COMPANY LIMITED ("THE COMPANY") TO SET ASIDE A STATUTORY DEMAND PURSUANT TO SECTION 157(1) OF THE INSOLVENCY ACT 2003

BETWEEN:

PIONEER FREIGHT FUTURES COMPANY LIMITED

Applicant

And

MAP MARINE LIMITED

Respondent

Appearances: Mr Dirk van Heck of Maples & Calder for the Applicant
Mr Stephen Moverley Smith, QC and Mr Christopher Young of Harney Riegels & Westwood for the Respondent

JUDGMENT

[2009: October 15

November 5, 16]

(Statutory demand – whether bad as being served prematurely – whether defect capable of being cured by occurrence of subsequent event – whether substantial dispute – consequences of Applicant's conduct)

[1] Bannister J [ag]: This is an application by Pioneer Freight Futures Company Limited ('Pioneer') to set aside a statutory demand served upon it on 21 August 2009 by the respondent, MAP Marine Limited ('MAP'). The parties had concluded two freight futures

confirmations on Forward Freight Agreement Brokers ('FFABA') 2007 terms and those terms incorporated the 1992 International Swap Dealers Association ('ISDA') Master Agreement (Multicurrency – Cross Border) (without schedule) ('the Master Agreement'). It is common ground that the confirmations in issue stipulated for Automatic Early Termination on the happening of an event of default as defined in the Master Agreement, in which case payment payable would be calculated by reference to the 'Second Method and Loss' provisions in clause 6(e)(i)(4) of the Master Agreement. It is also common ground that the confirmations were governed by English law and were subject to the exclusive jurisdiction of the High Court of Justice in London.

[2] The statutory demand is in the sum of US$10,160,920.45 alleged by MAP to have become due to it from Pioneer upon an automatic early termination event ('AET') which MAP says occurred when MAP went into receivership on 12 May 2009. The affidavit sworn by an English Solicitor with Holman Fenwick Willan London in support of the application exhibits an earlier statutory demand based upon the same trades but demanding over US$1 million less than the demand with which I am concerned. This discrepancy did not figure in the argument before me. The same affidavit also deposes to the fact that each of these two statutory demands refer to two trades that had been previously settled. Only two, made on 31 January 2008 and 21 February 2008 respectively, were 'live' on the occurrence of the AET. It is not suggested that that has any bearing upon the amount claimed in the statutory demand with which I am concerned. Although Mr van Heck, who appeared for Pioneer, formally declines to concede that the appointment of the receiver over MAP was sufficient to cause an AET to occur, the case was argued throughout on the basis that it had and I think that I can safely assume that the point is not live.

[3] In order to understand the scope of the debate, it is necessary first to set out certain provisions of the Master Agreement:

> '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.
>
> (ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement, in freely transferable funds and in the manner customary for payments in the required currency. Where settlement is by delivery (that is, other than by payment), such delivery will be made for receipt on the due date in the manner customary for the

relevant obligation unless otherwise specified in the relevant Confirmation or elsewhere in 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. 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) *Bankruptcy*. The party, any Credit Support Provider of such party or any applicable Specified Entity of such party: -

….

(6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets.

6. Early Termination

(a) *Right to Terminate Following Event of Default.* If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all

outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).

….

(d) *Calculations*

(i) Statement. On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including all relevant quotations and specifying any amount payable under Section 6(e)) and (2) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation obtained in determining a Market Quotation, the records of the party obtaining such quotation will be conclusive evidence of the existence and accuracy of such quotation.

(ii) *Payment Date*. An amount calculated as being due in respect of any Early Termination Date under Section 6(c) will be payable on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default) and on the day which is two Local Business Days after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under applicable law) interest thereon (before as well as after judgment) in the Termination

Currency, from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Applicable Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed.

(e) *Payments on Early Termination*. If an Early Termination Date occurs, the following provisions shall apply based on the parties' election in the Schedule of a payment measure, either "Market Quotation" or "Loss", and a payment method, either the "first Method" or the "Second Method". If the parties fail to designate a payment measure or payment method in the Schedule, it will be deemed that "Market Quotation" or the "Second Method", as the case may be, shall apply. The amount, if any, payable in respect of an Early Termination Date and determined pursuant to this Section will be subject to any Set-off.

(i) *Events of Default*. If the Early Termination Date results from an Event of Default

(4) *Second Method and Loss*. If the Second Method and Loss apply, an amount will be payable equal to the Non-defaulting Party's Loss in respect of this Agreement. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party: if it is a negative number, the Non-defaulting Party will pay the absolute value of that amount to the Defaulting Party.

14. Definitions

….

"*Loss*" means, with respect to this Agreement or one or more Terminated Transactions, as the case may be, and a party, the Termination Currency Equivalent of an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with this Agreement or that Termination Transaction or group of Terminated Transactions, as the case may be, including any loss of bargain, cost of funding or, at the election of such party but

> without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position (or any gain resulting from any of them). Loss includes losses and costs or gains) in respect of any payment of delivery required to have been made (assuming satisfaction of each applicable condition precedent) on or before the relevant Early Termination Date and not made, except, so as to avoid duplication, if Section 6(e)(i)(1) or (3) or 6(e)(ii)(2)(A) applies. Loss does not include a party's legal fees and out-of-pocket expenses referred to under Section 11. A party will determine its Loss as of the relevant Early Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonable. A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.'

[4] The effect of these provisions is that upon the happening of an EAT the non-defaulting party is entitled under clause 6(e)(i)(4) of the Master Agreement to be paid any loss (calculated by reference to the definition of 'loss' in clause 14, which rather confusingly includes 'gain' within the concept of loss) which it has suffered. If it turns out that the non-defaulting party (here, Pioneer) has suffered a loss (in the ordinary sense of that word) then MAP must pay the amount of the loss to Pioneer. If it turns out that Pioneer, as non-defaulting party, has made a gain, then Pioneer must pay the absolute amount of that gain to MAP.

[5] As soon as reasonably practicable following on the happening of an AET, each party must make the calculation on its part *if any* contemplated by section 6(e), and provide a copy to the other party showing in reasonable detail its calculations and specifying 'any' amount payable under section 6(e). The copy must give details of an account into which any money payable to it is to be paid.

[6] Since MAP was the defaulting party in this case, it seems to me that it was for Pioneer to make the calculation required by section 6(d)(i). Section 6(d)(i) envisages that (depending upon the payment measure chosen by the parties) it may be that one or other party will not have any obligation to provide calculations. In a 'Second Measure and Loss' case, as here, it does not seem to me that it was for MAP to make any calculation, since it was by reference to Pioneer's loss (or gain) that any money would be payable either to or by Pioneer. The definition of 'Loss' in clause 14 shows that many of the matters which would be for consideration in determining Pioneer's 'Loss' (as defined) would be peculiarly within the knowledge of Pioneer. So that it does not seem to me that it was for MAP to provide

any calculations at all. Pioneer has never provided any calculation, let alone a detailed one.

[7] Any amount due under these provisions is payable (in the present case) on the day that 'notice' of the amount payable is effective. The Master Agreement does not say anything about such a notice except (a) that it will be effective on a business day if given before the close of business on a business day and if after close of business, that it will take effect on the next following business day and (b) that to be effective for the purposes of section 6 the notice must be given by means other than facsimile or e-mail. Clause 6 therefore leaves the identity of the person who is to serve the notice to be gathered from the general terms of the Master Agreement. In my judgment, that is because it is commercially obvious that the party serving the notice will be the party in whose favour the calculations required to be exchanged or provided under section 6(1) turn out. Clause 9 of the applicable FFABA 2007 terms contains rather different provisions, but neither party made anything of that distinction.

[8] On 22 May 2009 MPA sent by e-mail to Pioneer a letter in the following terms:

> 'Dear Sir
>
> MAP Marine Limited (Receivers & Managers Appointed) ("the Company")
>
> Pursuant to a registered debenture charge created by the Company in favour of Macquarie Bank Limited, I advise that, on 12 May 2009, Steven Sherman and I were appointed as Receivers and Managers of the Company, A copy of our deed of appointment is attached for your reference.
>
> We are advised that the Company holds various forward or current contract positions with you, including the following forward Freight Agreements ("FFAs"):
>
> (b) FFA Trade Reference 008838, dated 31 January 2008; and
> (c) FFA Trade Reference 010802, dated 21 February 2008.
>
> Pursuant to Section 6(a) of the 1992 ISDA Master Agreement (Multicurrency-Cross Border) (the "Master Agreement") and Clause 10(f) of the above FFAs, our appointment as Receivers and Managers constituted an event giving rise to an "Automatic Early Termination" and, accordingly, an Early Termination Date occurred on 12 May 2009.

In light of the above, you are required (pursuant to Sections 6(d) and (e) of the Master Agreement), as soon as reasonably practicable, to make the calculations contemplated by the Master Agreement arising out of the termination of the FFAs and send to us a statement showing those calculations and the net amount payable. In that regard, we note that, by applying an average of the daily Balto Exchange settlement rate for the months of January (US$4,397.64), February (US$10,622.35), March (US$14,610.7) and April 2009 (US$11,302.49) and an average of the Balto Forward Assessment for BFA Paramax daily rate (as published by the Balto Exchange) over the 8 month period 1 May 2009 to 31 December 2009 (a daily rate of US$14,588), results in the sum of US$11,957,837.43 being payable in favour of the Company.

We look forward to receiving your calculations as soon as reasonably practicable.

In the meantime we are investigating whether any actions commenced against you in various jurisdictions would constitute an event giving rise to an "Automatic Early Termination" and, accordingly, whether an Early Termination Date had occurred under the Master Agreement before 12 May 2009. We reserve our rights in that regard.

Should you have any queries in relation to the above please do not hesitate to contact Ryan Eagle of this office on +01-2-8288 9949.

Yours faithfully

MAP MARINE LIMITED'

[9] This letter was clearly not a 'notice' for the purposes of section 6(d)(ii) of the Master Agreement. First, because it was sent by e-mail; secondly, because it does not purport to be notice that an amount is payable (let alone a demand for payment). It is merely a request for Pioneer's calculation, coupled with a summary of a calculation made by MAP (although whether that calculation complies with the Second Method and Loss provisions appears highly unlikely). It was certainly not an invoice for the purposes of the FFABA 2007 terms.

[10] On 21 August 2009 MAP served a statutory demand upon Pioneer. The 'Particulars of Debt' provided were in the following terms:

'1. The Company is indebted to the Creditor in the sum of US$10,160,920.45 inclusive of accrued interest (the "Debt")

as at the date of this demand, being the principal sum of US$10,097,737.31 plus interest due in the sum of pursuant to certain freight confirmations dated 19 April 2007, 18 October 2007, 31 January 2008 and 21 February 2008 entered into by the Company and the Creditor under the terms of a 1992 ISDA Master Agreement (Multicurrency – Cross Border) (without schedule) (together the "Agreement").

2. The Debt arose following Automatic Early Termination of the Agreement following an Event of Default in respect of the Creditor under either Section 5(a)(vii)(6) of the Agreement resulting in an Early Termination Date of 12 May 2009, interest being calculated at the Applicable Rate from the Early Termination Date.

3. As of the date of this demand the Debt remains due to the Creditor.'

[11] It will be noticed that the amount of the debt claimed in the statutory demand differs from the liability put forward in the letter of 22 May 2009.

[12] The application came before me on 15 October 2009, when Mr van Heck, who appears for Pioneer, took the point that the letter of 22 May 2009 was bad as a demand because (a) it was sent by e-mail and (b) because there had been a failure on the part of MAP to provide particulars of an account into which money payable should be paid. Mr Moverley Smith, QC, who appeared together with Mr Christopher Young for MAP, submitted that the statutory demand was the notice in this case. I pointed out that if the statutory demand was being relied upon to effect notice under section 6(d)(ii), then it could not also operate as a statutory demand for the purposes of section 155(2) of the Insolvency Act, 2003, since section 155(2)(a) stipulated that a statutory demand could be made only when the debt was payable at the time of the demand and this clearly meant that the debt must be already payable when the demand was made. After some discussion, I adjourned the hearing to enable this point to be considered by the parties.

[13] The adjourned hearing resumed on 5 November 2009, when Mr Moverley Smith,QC referred me to a decision of David Richards J in TS&S Global Limited v Fithian-Franks and ors[1], where it had been argued on behalf of the guarantor defendants that a statutory demand could not be used to cause a debt to become payable. In fact, the Judge did not have to decide the point, because the guarantors' liability was immediate and no demand was necessary in order to render them liable to pay. But the Judge went on, *obiter*, to consider the arguments which he had heard and at paragraph [32] of his judgment, said:

[1] [2007] EWHC 1401 (Ch)

> 'I can see considerable force in these submissions on the facts of this case, but in my view section 268 of the Insolvency Act, the Insolvency Rules and the terms of the prescribed form proceed on the basis that the debt in question is already immediately payable by the time that the statutory demand is served. The purpose of a statutory demand is to establish the presumption that the debtor is unable to pay his debts and thereby entitle the creditor to present a bankruptcy petition. It is not intended as a means of fulfilling contractual pre-conditions to making a debt immediately payable.'

[14] I respectfully agree with what is said in that passage. In my judgment the statutory demand was not sufficient to cause the money claimed to become payable. Undismayed by this, Mr Moverley Smith, QC went on to rely upon a further *obiter* passage in the judgment:

> 'While the contents of the demand were correct in this case, it was served prematurely, in the absence of an earlier demand under the guarantee. In that sense, it was a demand which ought not to have been served. But the consequence is not that it is void as a statutory demand but that the court has the discretion to set it aside under rule 6.5(4). Applying the approach stated by Nicholls LJ, I would have held that the facts of this case made it inappropriate to set aside the demand. There was no consideration by the district judge of this discretion in his judgment, so that on this appeal it would have arisen for exercise by this court. '

[15] Mr Moverley Smith, QC, relying on that passage, says that in this case the demand was not a nullity. He points to section 157(2) of the Act, which gives the Court a discretion to set aside a statutory demand where there is a defect in the demand, including a failure to comply with the security provisions of section 155(3). He says that this shows that a premature demand cannot be a nullity because otherwise it would not be a matter of discretion in the Court to set it aside; rather, it would be mandatory that it should be set aside.

[16] Building upon this submission, he said that while valid notice for the purposes of section 6(d)(ii) had not been given before the statutory demand was served, a hard copy of the letter had been served subsequently with the Respondent's evidence in these proceedings and that had had the effect of making the debt due and payable by the time the application came on for hearing; he said that the test for mandatory setting aside under section

155(1)(a) is whether the debt *is* owing or due and that that means 'is owing or due when the application to set aside comes on for hearing'; he said that the debt in the present case was owing or due by the time the application came to be heard because service of the evidence amounted to a valid notice for the purposes of section 6(d)(ii) of the Master Agreement and the debt became payable on the day that evidence was served; and that the debt therefore is now 'due and owing' within the meaning of section 155(1) and the demand is therefore good and should not be set aside.

[17] I disagree. With respect to David Richards J, a demand which is premature is without effect as a demand under section 155 of the Act (or, absent exceptional facts, for any other purpose, since *ex hypothesi* the creditor had no right to demand payment by way of statutory demand or otherwise). If that were not so, serious injustices could result. Debtors could be served with 'statutory' demands weeks before their debts had become payable and be faced with having to make applications to have the demands set aside before the creditor had any right to enforce payment. The submission of Mr Moverley Smith, QC that the words 'is owing or due' in section 157(1) means 'owing or due at the hearing of the application to set aside' is misconceived. In context the words mean 'was owing and payable when the demand was served. They do not operate in direct contradiction to section 155(2)(a) and enact that a statutory demand may be served at any time provided that by the time an application to set aside is heard (assuming one is made at all) the debt is due and payable.

[18] The fact that the Court has a discretion under section 157(2) to set aside is irrelevant to the question whether a demand served prematurely is ineffective for the purposes of section 155, since that sub-section is concerned only with 'a defect in the demand'. Premature service in non-compliance with section 155(2)(a) is not a defect in the demand; it renders the demand ineffective as a statutory demand, because it was not served in accordance with the provisions of the Act.

[19] The statutory demand must therefore be set aside under section 157(2)(b) of the Act. It seems to me that the language of section 157 is apt to cover a demand purporting to be a statutory demand even if the demand is wholly without effect.

[20] That still leaves to be decided the issue raised by Pioneer in this application, namely whether the debt on which MAP relies is subject to a substantial dispute.

[21] The factual position is that Pioneer has now been served with a hard copy of MAP's letter of 22 May 2009. While I agree with Mr van Heck that that letter is not a demand, still less a notice under clause 6(d)(ii) or an invoice under Clause 9 of the FFABA 2007 terms, it does ask Pioneer to carry out its undoubted duty under the Master Agreement to provide calculations of its 'Loss' in circumstances where it appears to me that Pioneer is the only

party with any obligation to do so. Pioneer has had that obligation since it first became aware that the AET had occurred – which I find to be 22 May 2009.

[22] Pioneer's refusal to provide any calculations of its 'Loss' does not raise a dispute of any sort. Nor does the fact (if it is a fact) that Pioneer has not been provided with an account number into which payment may be made. Even if, which is probable, MAP's receivers have changed its banking arrangements, the absence of information which could be sought and provided by an exchange of e-mails does not give rise to a dispute. If, of course, Pioneer accepted that it had a liability to pay but was unable to do so because MAP had failed to supply it with bank details, that would be a different matter, but that is not what is said. So far from there being any sort of dispute, what the Court is faced with is a simple refusal to perform.

[23] Pioneer is only able to submit that it is not liable to pay anything to MAP because of that refusal. It is only because of its own breach of contract that it is able to make that case. The Master Agreement itself provides contractual machinery, in section 6, for the resolution of differences as to claims. Pioneer cannot, by refusing to engage that machinery, claim that there is a dispute of any sort. To permit it to do so would violate the long standing principle that parties are not permitted to use their own defaults in order to defeat the legitimate claims of others.

[24] In the absence, therefore, of any evidential challenge to MAP's claim, I find that there is no substantial dispute that Pioneer is indebted to MAP in the sum claimed in the demand of 21 August 2009. In so finding, I am not usurping the jurisdiction of the High Court in England, since I am not purporting to decide an issue under the contract – I am deciding only that there is no issue to be decided.

[25] It is true that there is no evidence and I do not find that the sum which I have found that Pioneer owes to MAP has yet become payable. Given the fact that the statutory demand must be dismissed, no question as to Pioneer's solvency remains in issue in this application. Nothing in this judgment should be taken as addressing that question, which I leave entirely open.

[26] I therefore set aside the statutory demand but find that there is no substantial dispute that MAP is a creditor of Pioneer in the sum of US$10,160,920.45.

Commercial Court Judge

16 November 2009