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

CLAIM NO: BVIHCV 2009/324

BETWEEN:

WELLGATE INTERNATIONAL LIMITED

Applicant

and

CRASTVELL TRADING LIMITED

Respondent

Appearances: Ms Tameka Davis and Mr Richard Evans for the Applicant
Mr John Carrington and Mr Terrance Neale for the Respondent

JUDGMENT

[2009: 7 December, 16 December]]

(Application to set aside statutory demand – cross claim – Section 157(1)(b) of Insolvency Act, 2003 – unlawful interference with business)

[1] Bannister J [ag]: This is an application by Wellgate International Limited ('Wellgate') to set aside a statutory demand served upon it by Crastvell Trading Limited ('Crastvell') on 3 September 2009. The demand is in the sum of US$8,572,995, made up of a principal amount of US$5 million lent by Crastvell to Wellgate together with interest down to 29 July 2009. Although the statutory demand does not allude to the fact, the debt is in fact a judgment debt, being the subject of a default judgment entered in the High Court of Justice in England and Wales, Queen's Bench Division, Commercial Court on 29 July 2009 ('the judgment'). Wellgate does not deny that this money is due and owing and has made no attempt to set aside the judgment as such. I was told, however, that on 7 December 2009, when I heard this application, an application was being filed in London to have the judgment set aside and the Court was shown a copy of an affidavit of one Joseph P Galda ('Mr Galda'), who describes himself as General Counsel for Wellgate, which is intended to

support that application. Although that affidavit makes complaint about various procedural deficiencies which Mr Galda says attended the obtaining of the default judgment, he does not suggest that the judgment as finally obtained is in any way irregular. Instead, Wellgate's application to set aside is based upon a claim to have a set off in respect of torts allegedly committed against it by Crastvell, the judgment creditor. Whether such a claim (if established) is capable of operating by way of set off so as to extinguish Crastvell's English judgment debt is a matter of English law and procedure and is in any case irrelevant for present purposes.

[2] In making this application, Wellgate relies upon essentially the same allegations as it intends to use in its attempt to set aside the English judgment. By way of authority, it relies upon section 157(1)(b) of the Insolvency Act, 2003 ('the Act'), which is in the following terms:

> '157(1)(b) Hearing to set aside statutory demand
>
> ....
>
> (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.'

Wellgate also relies upon the well-known decision of the English Court of Appeal in Re Bayoil SA[1] to the effect that where a debtor company (a) has 'a genuine and serious' cross claim which (b) it has been unable to litigate and which (c) is in an amount exceeding the amount of the creditor's debt the Court has a discretion to, and in the absence of special circumstances should, dismiss or stay an application for winding up. It will be observed that the test contained in section 157(1)(b) of the Act differs from that in Bayoil. Section 157(1)(b) contains no condition that the debtor must have been unable previously to litigate the cross claim and instead of the words 'genuine and serious cross claim' the test is whether the debtor has a reasonable prospect of establishing a set off, counterclaim or cross claim. While the authority of Bayoil is obviously valuable by analogy, in this Court I must apply the test as laid down by section 157(1)(b).

[1] [1999] 1 All ER 374

[3] In its application notice Wellgate summarises its counterclaim as being for damages for unlawful interference with the 'consummation' of an intended agreement for the disposal of all or a majority of the shares in its wholly owned subsidiary Bozel SA ('Bozel') to a company called MTransMinas Mineracao ('MTransMinas'). Wellgate characterizes this contract as 'an economic relationship'. It says that if this transaction had completed, it would have produced a 'significant majority investment' *in Bozel* by MTransMinas and the full payment of the debt due to Crastvell. Wellgate also alleges that Crastvell had interfered with at least three other business transactions between Wellgate and, respectively, 'Jessup', Trilliant Exploration Corp ('Trilliant') and 'the Yasheng Group'.

[4] The application notice goes on to say that Crastvell contacted MTransMinas and persuaded it to wait until Crastvell took control of 'the Bozel assets', whereupon Crastvell would make MTransMinas a more attractive proposal. Wellgate says that this amounted to interference with the transaction, which prevented Wellgate from entering into it and benefiting from it. It says that this interference was done with the intention of injuring Wellgate by depriving it of the opportunity to settle its debt to Crastvell before Crastvell issued its proceedings. Wellgate says that this interference was unlawful because Crastvell was allegedly subject to a confidentiality agreement which prevented the use of what it describes as 'proprietary information', which is said to include the identities of lenders and investors (but not, apparently, prospective purchasers of shares), otherwise than for the purpose of monitoring Crastvell's investment in Bozel and one of its subsidiaries, PowerBras Energia Holding Ltda ('Powerbras'). Wellgate goes on to describe these acts as having been done in bad faith and with a view to acquiring 'the Bozel assets' at a fraction of their value.

[5] Wellgate says that this allegedly unlawful interference has led to a loss of opportunity estimated at 'up to' $65 million; legal fees of $250,000 to date and mounting; and other litigation associated costs of more than $1 million.

[6] Mr Galda swore an affidavit in support of Wellgate's application to set aside on 17 September 2009. In that affidavit he says that MTransMinas signed a confidentialty agreement with Wellgate and conducted due diligence on Bozel. He does not exhibit a copy of that agreement. Mr Galda says that MTransMinas told Bozel's Brazil directors that it had prepared an initial all cash offer 'in excess of' US$45 million? This piece of hearsay evidence fails to comply with CPR Part 30.3(2)(b)(ii). What the terms of the prepared offer were or how many shares were to be

purchased is not stated in this affidavit. Mr Galda exhibits a copy of the facility agreement under which in June 2008 Crastvell lent to Powerbras and Wellgate the US$5 million which founds the English judgment and says that shortly after the loan had been made Crastvell exercised options to acquire shares in Powerbras granted to it by the facility agreement. He says that these investments 'included' due diligence. He goes on to say that because of the collapse of the world economy in the fall of 2008 Wellgate/Powerbras became unable to repay the loan on 31 December 2008 as stipulated for by the facility agreement. He then complains about proceedings taken in various jurisdictions by Crastvell against Wellgate and says that he believes that the object of the litigation is to appropriate either the shares in or assets of Bozel.

[7] Mr Galda then turns to the alleged wrongful interference with the MTransMinas intended share purchase. He says that he believes that Crastvell, by one Andrei Lisyansky ('Mr Lisyansky'), who claims to be an agent of Crastvell and who has made an affidavit in this application, contacted MTransMinas to discourage it from finalizing its initial offer. He says that he believes that Crastvell did this because it wishes to gain control of Bozel through its litigation strategy and sell it to MTransMinas or its (unnamed) affiliate at a significantly lower price. In support of this allegation, Mr Galda relies upon what is described as an affidavit of one Wando Borges ('Mr Borges').

[8] The 'affidavit' is in fact a signed and notarized statement. Mr Borges says that he is an economist and a director of one of Bozel's subsidiaries as well as a business advisor to Wellgate. He says that 'several months ago' (the statement is dated 20 August 2009 – before the statutory demand was served on 3 September 2009) he was approached by Wellgate and Bozel and told that one or other of them (it is not clear which) was looking for financing and/or the sale of Bozel in whole or in part. He says he contacted various potential investors, including MTransMinas and that MTransMinas at the request of 'the directors' signed a confidentiality and non-disclosure agreement, following which information was disclosed to MTransMinas. MTransMinas informed the Bozel directors that it was putting together a plan for either an outright acquisition of Bozel or a significant majority investment. Mr Borges says that a meeting was scheduled for late July with some of the Bozel directors to complete the terms of MTransMinas' proposal. He says that at that meeting (which he does not claim to have attended) the owners of MTransMinas informed one of the Bozel directors that they were in contact with Crastvell and had been encouraged by Crastvell to wait until Crastvell took control of the Bozel assets, when Crastvell would make a much more

attractive proposal to MTransMinas than that which was contemplated by Wellgate and Bozel. This piece of double hearsay appears to be the lynchpin of Wellgate's cross claim.

[9] Mr Galda adds that Crastvell attempted to get Jesup and Lamont, New York based investment bankers, to cancel their joint mandate with Trafalgar Capital to raise US$20 million for the Bozel group. Since the material upon which Mr Galda relies for this allegations makes clear that Jesup and Lamont did not do so, this evidence can safely be discarded.

[10] Finally, Mr Galda makes certain allegations concerning a proposed acquisition of Bozel by an entity called the Yasheng Group of China, but since none of these allegations add up to anything in the nature of interference on the part of Crastvell, they, too, can safely be discarded. He also complains that Crastvell attempted to frustrate a contract for the sale of Wellgate's shares in Bozel to a company called Trilliant Exploration. In fact, it was this Court that granted an injunction to prevent that disposition. I do not understand Wellgate to claim that the obtaining of that injunction amounted to the tort of unlawful interference.

[11] All of these allegations of interference are denied by Mr Lisyansky on behalf of Crastvell.

[12] In an affidavit in reply sworn on 4 December 2009, Mr Galda alleges for the first time that Crastvell was provided with information in connection with intended purchases by the terms of a confidentiality agreement signed on or around 2007 and that Crastvell broke that agreement by using this information in a manner intending to harm Wellgate by approaching the MTransMinas team in an effort 'to prevent the agreement, causing losses of between $50 and $64 million, which are continuing'. No copy of the alleged confidentiality agreement is exhibited and Mr Galda does not even summarise its terms.

[13] Even if Crastvell did sign a confidentiality agreement with Wellgate in around 2007, there is no evidence that that agreement contained any information whatsoever about MTransMinas or about any offer it might make for a shareholding in Bozel. Indeed, the overwhelming probability is that it did not, since if the statement of Mr Borges is accepted, the directors of MTransMinas were only contacted 'several months' before 20 August 2009. In the absence of any evidence about the terms of this agreement, if it ever existed, it must be assumed, therefore, that even if, which Mr Lisyansky denies, he did approach MTransMinas and attempt to dissuade that company from

making an offer for Bozel shares, that approach did not involve any breach of an agreement between Wellgate and Crastvell.

[14] Mr John Carrington, who appeared together with Mr Terrance Neale for Crastvell, points out that the tort of interference with commercial interests by unlawful means requires the application of unlawful means directed at a third party with the intent to cause damage to the commercial interest of the claimant and that the unlawful means employed must (if causing actual loss) be actionable at the suit of the third party: OBG v Allen[2]. The classic examples are where a third party is prevented or dissuaded from entering into a contract with the claimant by threats, intimidation, or fraud. Assuming, against Crastvell, that it did approach MTransMinas in the manner claimed and attempt to get it to abandon its intention to make an offer for Bozel shares, that cannot have been unlawful. Even if, in making that approach, Crastvell broke the terms of a confidentiality agreement it had entered into with Wellgate in 2007 or thereabouts, that would not have made the attempt to dissuade MTransMinas from contracting with Bozel or Wellgate actionable at the suit of MTransMinas. It is not tortious for A to seek to persuade B not to contract with C. If it were, no financial adviser could carry on business.

[15] It follows that even on the most favourable view of Wellgate's evidence, it wholly fails to make out that it has any cross claim at all against Crastvell, let alone a claim worth more than Crastvell's judgment debt. It follows *a fortiori* that it has no reasonable prospect of establishing any such claim. This application must therefore be dismissed. I accordingly authorize Crastvell to make application for the appointment of a liquidator over Wellgate.

Commercial Court Judge

16 December 2009

[2] [2007] UKHL 21