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

CLAIM NO: BVIHCV (COM) 2011/0129

BETWEEN:

ALEXANDER JACOBUS DE WET

Applicant

and

VASCON TRADING LIMITED

Respondent

Appearances: Ms Claire Goldstein for the Applicant
Mr Ben Mays for the Respondent company

JUDGMENT

[2011: 28 November; 6 December]

(Creditor's application for appointment of liquidators – statutory demand neither complied with nor set aside – respondent company claiming that debt disputed – whether substantial dispute – arbitration agreement to submit to the Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce and Industry – whether arbitration clause to be taken into account in determining where substantial dispute – **Pioneer Freight Futures Company Limited v Worldlink Shipping, Ltd, Samoa**[1] considered)

[1] **Bannister J [ag]:** On Monday 28 November 2011 I appointed Joint Liquidators to the Respondent Vascon Trading Limited ('the Company') and refused a stay pending the outcome of an appeal from the judgment. These are my reasons for that decision.

[1] **BVIHCV 135 of 2009 and 152 of 2009** (1 July 2009)

Facts

[2] The Company was incorporated under the laws of the British Virgin Islands on 13 January 2004. It is a SPV for the development of a block of apartments on a parcel of land in Dubai, United Arab Emirates, which was acquired in 2004. Sales off plan began in 2006 and it appears that some 200 investors have purchased units. The intention was to develop the land by building about 250 apartments for sale to investors with a deadline for completion of 30 November 2009, although provision was made for that time to be extended by six months at the Company's option if delay to the works justified it. The Applicant ('Mr de Wet') was one such purchaser and he entered into a sale and purchase agreement (which I assume to have been in standard form) on 5 February 2008. The purchase price of the apartment was the equivalent in AED of (roughly) US$400,000, of which Mr de Wet was required to pay a deposit of some US$81,000 on contracting. He has also paid the equivalent of roughly $126,000 in stage payments down to 1 September 2008, but has not made a further stage payment of some US$60,000 due under the terms of the contract on 1 March 2009. In all, he has paid some US$210,000. Although the contract provided that if a part payment was not made within ten working days of the due date the Company could terminate and forfeit up to 30% of the purchase price, the Company did not take that step when Mr de Wet missed the stage payment due on I March 2009. The contract therefore remained on foot.

[3] The contract provided for the Company to give the purchaser a certificate of practical completion by 30 November 2009. Upon the giving of the certificate the purchaser was obliged to complete within (at the latest) 45 days after the certificate had been given.

[4] Clause 13.4 of the contract provided as follows:

> 'If the Certificate has not been issued by 30th November 2009, (provided this date may be extended by notice from the Seller to the Purchaser by up to six (6) months to reflect delays in respect of the Building Works) then the Purchaser may by notice in writing terminate this Agreement, following service of such notice, this Agreement shall terminate in all respects subject only to Clauses 13.5 and 20.

Clause 13.5 provided as follows:

> 'Following termination under Clause 13.4, the Seller shall repay the Deposit and any part payments made (to the extent paid to the Seller under this Agreement) and the parties shall not have any further liability under this Agreement.'

Clause 20 of the contract provides:

> '20. GOVERNING LAW & DISPUTES
>
> 20.1 This Agreement shall be governed by and construed in accordance with the law of the Emirate of Dubai and the UAE.
>
> 20.2 Each party irrevocably consents to any process in any legal action or proceedings arising out of or in connection with this Agreement being served in accordance with the provisions of this Agreement relating to services of notices. Nothing contained in this Agreement shall affect the right to serve process in any other manner permitted by Law.
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> 20.3 All disputes that may arise between the parties shall, if they cannot be amicably settled, be settled by arbitration pursuant to the Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce and Industry before a panel of 3 Arbitrators, such Arbitration to be conducted in the English language in Dubai. Notwithstanding the foregoing, the parties each agree that either of them may submit to the non-exclusive jurisdiction of the Courts of Dubai to seek interim measures including injunctive relief in relation to the provisions of this agreement or their respective performance of it. Any award given by the Arbitration tribunal is to be final and binding.'

[5] No certificate of practical completion was given by 30 November 2009 and no notice of extension was served by the company. Even today it appears from an affidavit put in on behalf of the Company by Mr Keith Linsell ('Mr Linsell'), one of its directors, that the development has progressed only to the stage of excavation and foundation and Mr Linsell does not presently envisage practical completion before about August 2014.

[6] On 11 August 2011 lawyers acting for Mr de Wet gave notice under clause 13.4 terminating the agreement and demanding repayment under clause 13.5 of the US$210,000 or so which Mr de Wet had handed over by way of deposit and part payments. Mr de Wet has received apologies and emollient explanations from the Company, but he has not been repaid his money. On 26 August 2011 he served a statutory demand under section 155(1) of the Insolvency Act, 2003 ('the Act'). No application was made to set aside the demand and no part of the money due and payable to Mr de Wet has been paid.

The application

[7] Ms Goldstein, for Mr de Wet, put her case simply. She submitted that there was no dispute that the debt was due and payable. Clauses 13.4 and 13.5 of the contract clearly entitle Mr de Wet to terminate the contract (meaning that no more money is payable under it) and to recover what has already been paid. Although Ms Goldstein did not make this submission, it seems to me that the fact that Mr de Wet did not pay the stage payment due on March 2009 makes no difference to the ultimate position. Even if he had done so, it would have been recoverable under clause 13.5 and the result would simply have been to increase the amount due from the Company. It certainly cannot be set off by the Company for the reason that the contract is now determined and the liability extinguished. Ms Goldstein says that the uncontested and unsatisfied statutory demand clearly establishes the Company's insolvency and that nothing that has subsequently been urged by Mr Mays, for the Company, raises a substantial, or indeed any dispute as to the Company's liability or solvency.

The defence

[8] Mr Mays relies upon the evidence of Mr Linsell and upon an affidavit of foreign law, for which no permission had been sought, made by Mr Al Shamsi, of Al Shamsi & Partners, advocates and legal consultants in Dubai and the United Arab Emirates ('UAE').

[9] Mr Linsell explains the delay in completion by reference to the general economic downturn affecting the UAE and the fact that certain plans critical to the obtaining of building permits were not ready until 31 December 2008. He says that the land upon which Mr de Wet's apartment was to have been constructed cannot be sold because, he says, all the other 200 or so purchasers have an interest in the land – although in a later passage Mr Linsell says that purchasers will acquire their undivided interests only on completion. I have to say that I find it very difficult to imagine that it is impossible as a matter of UAE law for the development as a whole to be sold or mortgaged, but that is what Mr Linsell says. He goes on to explain that the Company has opened an escrow account which contains the deposits and part payments made by investors – or rather what is left of them after payment of development costs. He says that under regulations enforced by the Dubai Real Estate Regulation Agency ('RERA'), the funds in the account are appropriated to individual investors and may be resorted to only for the purchase of the land (there is no evidence whether any part of the purchase price of the land remains outstanding) and construction costs.

[10] In his evidence Mr Al Shamsi points out, first, that reliance upon clause 13.4 of the contract is subject to the law of Dubai and of the UAE. That is plainly correct, but Mr Al Shamsi does not say how, if at all, the application of that law affects the plain meaning of clause 13.4 (or, for that matter, of clause 13.5). He then deals with the powers and functions of RERA and states that since 2007, when the relevant local legislation came into force, it has been mandatory to maintain escrow accounts for all deposits and part payments and that all withdrawals from such accounts are subject to the approval of RERA. He continues with the *non sequitur* that as a result the Company cannot pay Mr de Wet without the approval of RERA. While it may be true that the Company cannot pay Mr de Wet from the escrow account without the approval of RERA, it does not follow (and it is not alleged) that the Company is prohibited from raising other funds to make the repayment or that there would be any legal bar to paying Mr de Wet what the Company clearly owes him from funds other than those in the escrow account (such as loans from directors or shareholders or capital subscribed for a further issue of shares).

[11] Mr Al Shamsi says that Mr de Wet cannot 'request payment from the Company without an application to or the approval of RERA.' This simply cannot be right as a general statement. RERA can have no right, for example, to prevent a creditor of a BVI registered company from serving it with a statutory demand under the Act. Mr Al Shamsi's observation must be read in the context of the escrow account system, with which he is dealing in the passage which includes this statement, and must be intended to mean that Mr de Wet would need RERAS's approval to make a demand to be paid out of the escrow account.

[12] Mr Al Shamsi goes on to say that as a result of the delays mentioned by Mr Linsell developers in the UAE, including the Company, were obliged to reschedule their stage payment programmes to bring them into line with progress of construction (or lack of it). In the Company's case, a revised payment schedule was apparently imposed by RERA on 17 December 2009. Mr Al Shamsi also refers to Law No 9 of 2009, which deals with the position over delay in payment or default in the terms and conditions of the contract *by the Purchaser* (emphasis added). He does not suggest that it has any impact upon the obligations of the Company in respect of completion or upon its liabilities if it fails to meet the contractual date for practical completion.

[13] Finally, Mr Al Shamsi refers to The Executive Council's Decree No 6 of 2010 which, says Mr Al Shamsi, provides for further regulations relating to the Interim Real Estate Register in the Emirate of Dubai, which, he says, provide (or, perhaps, will provide) for the rights of both the Developer and the Purchaser in the event of the other party not complying with the terms and provisions of the contract. Mr Al Shamsi does not say that anything in decree number 6 of 2010 restricts or fetters the rights of Mr de Wet under clauses 13.4 and 13.5 of the contract.

[14] None of this is evidence that the Company has any grounds for disputing Mr de Wet's right under clauses 13.4 and 13.5 to demand repayment of his money. It follows that there is no dispute, let alone any substantial dispute, that the Company owes him the US$210,000 which was the subject of the statutory demand or that the Company is to be

treated as insolvent for failure to comply with it. Indeed, the latter fact is established independently by the evidence of Mr Linsell and Mr Al Shamsi as to the Company's inability to pay.

[15] Mr Mays, for the Company, referred me to my decision in **Pioneer Freight Futures Company Limited v Worldlink Shipping, Ltd, Samoa**.[2] At paragraphs [16] and [17] of the judgment I said:

> '[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.
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> [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.'

[16] Although I am satisfied that the case was rightly decided on its facts, I consider than my analysis in those two paragraphs was wrong. On reflection, I consider that Ms Robey's submissions[3] were correct. I agree that the Court must first decide, on the evidence before it, whether there is a dispute at all. If the evidence (as in this case) discloses no ground at all for challenging the debt, then it is irrelevant that there may be an exclusive

[2] **BVIHCV 135 of 2009 and 152 of 2009** (1 July 2009)
[3] although they were concerned with a statutory demand case

jurisdiction or arbitration provision. It seems to me that insofar as I held otherwise in **Pioneer** I was misinterpreting, rather than following, the decision of the Court of Appeal in **Sparkasse Bregenz Bank AG**.[4] Although it was not brought to my attention in **Pioneer**, I referred the parties in the present case to the decision of the England and Wales Court of Appeal in **BST Properties v Reorg Apport Penzugyi RT**.[5] In that case the English Court of Appeal upheld a decision that there was no substantial dispute about the debt relied upon by the petitioning creditor. In granting leave to appeal at an oral hearing, however, Chadwick LJ had taken the view that that the presence of an exclusive jurisdiction clause in the relevant loan agreement meant that it was reasonably arguable that the debtor had good grounds for restraining further prosecution of the winding up petition (in other words, he thought that the view I took in **Pioneer** was at any rate arguable). At the hearing of the substantive appeal, the Court of Appeal held that the exclusive jurisdiction clause was irrelevant to the question whether the debt was bona fide disputed on substantial grounds. Only if a substantial dispute is identified will the exclusive jurisdiction clause fall to be taken into account.

[17] I am thus satisfied that that part of my reasoning in **Pioneer** to which I have referred above was faulty and that the proper approach is that explained in **Sparkasse Bregenz Bank** and in the **BST Properties** case.

[18] Mr Mays raised various points based upon the damage that would allegedly be caused to the development if I made a winding up order and asked me to take those matters into account when assessing the case as a whole. But the Court having once reached the point where Mr de Wet establishes both that he has an undisputed debt and that the Company is insolvent, Mr Mays felt bound to accept, correctly, that Mr de Wet had established, on the authorities, a right *ex debito justitiae* to the appointment of Liquidators and that the Court's discretion is, in truth, exercisable in one way only[6].

[4] BVI Civil Appeal No 10 of 2002
[5] [2001] EWCA Civ 1997
[6] **Re Pritchard** [1963] Ch 502

Conclusion

[19] It is for these reasons that I appointed the Joint Liquidators on 28 November 2011, and refused a stay of that order.

Commercial Court Judge

6 December 2011