THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 0035 of 2013

IN THE MATTEROF ZARIA GLOBAL LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 2013

BETWEEN:

ZARIA GLOBAL LIMITED

Applicant

and

PILLAR SECURITISATION SARL

Respondent

Appearances: Mr Stephen Moverley-Smith QC and Mr Ben Mays for the Applicant, Zaria Global Limited
Mr Jonathan Mark Phillips and Ms Julie Engwirda for the Respondent, Pillar Securitisation S.a.r.l.

JUDGMENT

[2014: 14, 28 January]

(Statutory demand – application to set aside – whether failure to comply with request for further evidence capable of amounting to dispute – creditor failing to value security and claiming for gross amount of debt – whether giving rise to substantial injustice – section 157(2) Insolvency Act, 2003 considered – debtor relying on cross claim – whether made out on the facts)

[1] **Bannister J [Ag]:** This is an application made by Zaria Global Limited ('Zaria') to set aside a statutory demand served upon it on 5 March 2013 by Pillar Securitisation S.a.r.l. ('Pillar'). The demand arises out of sums admittedly lent to Zaria by a company called Kaupthing Bank Luxembourg SA ('Kaupthing Luxembourg') between about February 2006 and January 2007 pursuant to a revolving credit agreement described as a Secured Investment Line Agreement ('the SILA'). The principal lending involved two drawdowns, one, of some US$5 million, in February 2006 and another, of about GBP3.36 million, in January 2007, although there was other lending in addition. These two amounts, together with intervening interest and some other charges, went to make up the sum of US$13,632,555.47 claimed in the statutory demand.

[2] The demand explains that Pillar claims by way of assignment from Kaupthing Luxembourg, relying upon articles of demerger approved by the Luxembourg Commercial Court on 8 July 2009 and taking effect on 10 July 2009, pursuant to which the vast bulk of Kaupthing Luxembourg's receivables, including the debt due from Zaria, were assigned to Pillar and all other assets and all liabilities of Kaupthing Luxembourg were 'assigned' to a company called Banque Havilland. It is not suggested by Zaria that there is any defect in Pillar's title to the debt in issue on this application.

[3] It was a term of the SILA that it could be determined under clause 15.5 at any time by Kaupthing Luxembourg or Zaria giving to the other 30 banking days notice. On 10 December 2012, Banque Havilland wrote to Zaria, referring to the SILA and to the demerger arrangements and stating that as a result Kaupthing Luxembourg's claims against Zaria had been transferred to Pillar, while Zaria's 'bank accounts' had been transferred to Banque Havilland. The letter went on to say, by way of *non sequitur*, that 'as a result of the Division,' Banque Havilland was collecting the debt on behalf of Pillar. Banque Havilland went on to give notice terminating the SILA on 25 January 2013,[1] stating that at that date all unpaid advances would be immediately due and payable.[2] As a matter of fact, I doubt that this latter assertion was accurate. Clauses 6 and 7 of the SILA provide for drawdowns to be repayable on the last day of the agreed interest period, or, in the absence of agreement, after three months. Clause 15.5 merely terminates the facility agreement itself. It does not have any accelerating effect on the terms of loans previously granted under it. I was not referred to the agreements pursuant to which each of the two main drawdowns in this case was made, so that I do not know whether their principal sums had or had not become repayable according to their terms before 25 January 2013. The point is academic, however, because the argument before me proceeded upon the footing that they would not have been repayable before 25 January 2013 in the absence of a valid notice under clause 15.5.

[1] the letter says 28 January 2012, but that must be a mistake

[2] there was no suggestion that this period did not comply with clause 15.5

The attack on the statutory demand

[4] Zaria submitted that there was no evidence that Banque Havilland was authorised to determine the SILA on Pillar's behalf. In fact, there was evidence of the agency of Banque Havilland. On 2 January 2014 two managers of Pillar signed a declaration[3] stating that Banque Havilland had entered into a Collection Services Agreement with Pillar under which Banque Havilland had (among other rights) the right to collect the Zaria Loans and terminate the SILA. Mr Stephen Moverley-Smith QC, who appeared, together with Mr Ben Mays, for Zaria on this application, said that that was not good enough. Pillar should be obliged to exhibit the Collection Services Agreement itself.

[5] I do not agree with that. First, because I do not see why Pillar need go further than put in evidence the fact of the agency agreement, without being obliged to give disclosure of what may well be a commercially sensitive document. Secondly, because I do not think that by challenging its creditor to give further disclosure of what is plainly asserted as a fact a debtor raises a substantial dispute for the purposes of this jurisdiction. If it raises anything, it is the possibility of a dispute, which is insufficient. In any event, the fact that Banque Havilland was acting as collection agent for Pillar in relation to the Zaria lending, was made clear in correspondence well before the termination letter was sent. There is nothing in this point.

[6] Mr Moverley-Smith QC had further points on the statutory demand itself. First, he submitted that it overstated the interest component of the debt by some US$2.17 million. Assuming that to be true, it does not help Zaria. That would still leave an undisputed liability, at the date of the demand, in the sum of around US$11.4 million. Then Mr Moverley-Smith pointed to the fact that Pillar had security over shares acquired by Zaria with the assistance of part of the borrowing. It was common ground that the value of that security is in the region of GBP1.1 million. Section 155(3) of the Insolvency Act, 2003 ('the Act') requires the maker of a statutory demand to value any security held for the debt and to claim only the balance in the demand. That Pillar did not do. Section 157(2) of the Act gives the Court power to set aside a statutory demand if satisfied that substantial injustice would otherwise be caused through a defect in the demand, including a failure to comply with section 155(3). I am not satisfied that, in this case, any substantial injustice has been caused to Zaria by the failure to value Pillar's security, so that I should not set aside the demand for that reason. It might have been different if Zaria had indicated a readiness to pay the unsecured part of the debt. Nor do I see any practical good coming from requiring Pillar to amend the statutory demand pursuant to section 157(3) in order to take account of the security.

[7] For these reasons, Zaria's challenge to the statutory demand fails.

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[3] described as a Confirmation'

The cross claim

[8] Zaria also claims to have a cross claim equal to or overtopping the amount of the debt. The cross claim is said to arise in this way. Mr Vivian Imerman, the principal behind Zaria (although never one of its directors) ('Mr Imerman') says that he acted as an agent and investment advisor to Zaria in sourcing and recommending Zaria to invest in the opportunity to invest in what has been referred to on this application as the Somerfield transaction. It is not necessary to go into any great detail about this. Much of the story will be familiar from the financial press. In essence, in around 2006 the Kaupthing Group and others (including Mr Imerman's then brother in law, Robert Tchenguiz) had acquired the share capital of Somerfield plc, then a well known English supermarket operator ('Somerfield'). A plan was developed to on sell the shares at a profit. Kaupthing was offering investors the opportunity to invest in so called sub-participation units, which would carry the right to share in any profit made on the sale of the Somerfield shares. Mr Imerman was told about this by Mr Tchenguiz and had meetings with Mr Magnus Gudmundsson, then President and CEO of Kaupthing Luxembourg ('Mr Gudmundsson'), in relation to the possibility of a participation on the part of Zaria.

[9] Mr Imerman says that in the course of four meetings, held variously in London and the South of France, and ten telephone conversations with Mr Gudmundsson in 2006, of which no written record was made, he was assured by Mr Gudmundsson that the investment vehicle to be used for the scheme ('Isis') was a special purpose vehicle, to be used solely for the Somerfield transaction. Mr Imerman understood that it was implicit in this representation that once Somerfield had been sold, the profits would emerge through the structure directly to the sub-participants, without the risk of their being used for payment of other liabilities of Isis. Mr Imerman goes further than this. He says that Mr Gudmundsson, who, Mr Imerman says, knew that he was acting as investment adviser to Zaria, promised him that as soon as Somerfield was on-sold, Zaria, if it invested, would receive its sub-participation profits and that Mr Imerman should accordingly undertake no further due diligence in relation to the proposed investment in the scheme.

[10] Mr Imerman says that he relied upon these representations in recommending the investment to Equity Trust, then providing director services to Zaria. As a result, Zaria bought GBP5 million worth of sub-participation units in February 2007, borrowing, as I have already said, some GBP3.36 million from Kaupthing Luxembourg for the purpose.

[11] In fact, as is well known, Isis was not clean. It had undertaken equal and opposite obligations to another Kaupthing company as well as other obligations to other entities. The result is that Zaria did not get paid out upon the sale of the Somerfield shares in February 2009 (its entitlement, pursuant to the scheme, was to some GBP8.4 million).

[12] Mr Moverley-Smith says that Mr Gudmundsson must be taken to have been offering Kaupthing Luxembourg's warranty to the effect that Zaria would be paid out its GBP8.4 million in full and as soon as the Somerfield shares were sold in February 2009. Had that happened, he says, Zaria's then current indebtedness to Kaupthing Luxembourg would have been extinguished[4] as soon as the proceeds were credited to its account with Kaupthing Luxembourg and there would thus have been no debt to be assigned to Pillar on the demerger in July 2009. As a result of Kaupthing Luxembourg's breach of that warranty, therefore, Mr Moverley-Smith says that Zaria has a cross claim equal to and balancing the indebtedness from time to time on the account.[5]

[13] I cannot agree with this. Accepting for present purposes, as I do, that everything that Mr Imerman says in his affidavit is true and assuming, as I am prepared for present purposes to assume, that the discussions during the four meetings and ten telephone conversations between Mr Gudmundsson and Mr Imerman in 2006 matured into a collateral warranty, binding upon Kaupthing Luxembourg and actionable at the suit of Zaria, to the effect that Isis was, at the time when the warranty was given and would at all material times thereafter remain, free from all liabilities other than its liability to pay out the holders of the sub-participation units, I do not think that Zaria is in a position to say that it has a cross claim equal to or overtopping Pillar's claim against Zaria.

[14] Zaria would, if the warranty relied upon could be proved, have been entitled to claim against Kaupthing Luxembourg damages for delay in receiving its share of the proceeds of the Somerfield investment and damages for the loss of any part of that share that proves irrecoverable by reason of the breach of warranty (because of the existence of competing claims to the proceeds of sale of the Somerfield shares). The probable maximum amount of that loss, on the present evidence, is GBP5,240,292 - being the difference between Zaria's entitlement to proceeds of the Somerfield shares as at 28 February 2009 (GBP8,353,592) and the Isis liquidator's lowest current estimate of the likely return to Zaria in the liquidation (GBP3,113,300). Assuming (although there is no evidence that that would in fact have happened) that the sum of GBP5,240,292, had it then been available to Zaria, would immediately have been applied by Zaria in extinguishing the entire balance on the sterling account (which was referable only in part to lending for the purposes of the Somerfield transaction) and in reducing the US dollar account (which had no connection at all with the Somerfield transaction) to US$3,986,070 with what remained,[6] the effect would have been to repay and stop interest running on the sterling account and to leave just under US$4 million outstanding and accruing interest on the US dollar account. Zaria would be entitled to claim damages for the delayed receipt in the liquidation of Isis of the anticipated minimum

[4] leaving a surplus of GBP303,112 (pages 41 and 42 of exhibit MSP1 to the first affidavit of Mr Michael Polonsky)
[5] plus the further GBP303,112
[6] US$3,202,217 at an exchange rate of 1.41865 (as used in his calculations by Mr Polonsky)

distribution of GBP3,113,300 (US$4,4416,683.05 at an exchange rate of 1.41865), but that could be dealt with by providing that interest on the notional balance of US$3,986,070 on the dollar account should not run between 29 February 2009 and receipt by Zaria of whatever distribution it becomes entitled to in the liquidation of Isis.

[15] These simple calculations show that, assuming that Zaria proved the existence of the warranty and was compensated in full for its alleged breach, and on notionally crediting the two accounts accordingly, Pillar still has a claim against Zaria in a sum of, at a minimum, around US$4 million.[7] Even if Pillar's security is deducted, the claim is still in the region of US$2.5 million.[8]

[16] Even making all the assumptions which are made above, therefore, including the important assumption that on receipt of GBP8.4 million at the end of February 2009, Zaria would have used it to discharge the entire balance on each of the two accounts, Zaria fails to establish that it has a cross claim sufficient to reduce the demand made against it by Pillar to a sum below the statutory minimum.

Conclusion

[17] For the reasons given in paragraphs [4] to [16] of this judgment, this application is dismissed. Pillar is accordingly authorised to apply for the appointment of a liquidator over Zaria.

Commercial Court Judge
28 January 2014

[7] Mr Imerman says that interest on the two accounts has been overcalculated in favour of Pillar by some US$2.17 million, but the calculations which he produces are illegible and in any event run to April 2013. If there was any overcalculation down to 28 February 2009, the notional cut off date for the running of interest, it will have been a mere fraction of the US$2.17 million figure

[8] using a rough and ready 1.5 exchange rate