EASTERN CARRIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2012/0041

IN THE MATTER OF VENDORT TRADERS INC.

and

IN THE MATTER OF THE INSOLVENCY ACT, 2003

BETWEEN:

VENDORT TRADERS INC.

Appellant

and

EVROSTROY GRUPP LLC

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde Louise E. Blenman	Justice of Appeal
The Hon. Mde Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances:

Mr. Marcus Staff with him Mr. Adam Cloherty and Mr. Jeremy Child for the Appellant
Ms. Tamara Cameron for the Respondent

2013: September 18;
2014: May 26.

Civil appeal – Commercial appeal – Arbitration proceedings – Share and sale purchase agreement – Application to set aside statutory demand – Whether there is a substantial dispute as to whether debt is owing or due

Pursuant to a share and sale purchase agreement ("SPA") the appellant agreed to buy from the respondent 834,693 shares (the "ISKOG Shares") in a Russian company known as ISKOG JSC ("ISKOG") for a total purchase price of RUR44,672,769.36. In that respect, the appellant paid the sum of RUR 15,183,713 to the respondent and on 24th July 2006, the respondent transferred all 834,693 ISKOG Shares to the appellant. The balance of RUR 29,489,056.36 remained outstanding. The SPA was governed by English law and contained an arbitration clause in the event of a dispute.

In 2009, the management of the respondent changed. The then owner of the company, Ms. Elena Smirnova, sought to enforce the debt due under the SPA by making a demand for payment in October 2009 and when this was unsatisfied, commenced arbitration proceedings before the London Court of International Arbitration ("LCIA") in December 2009. Both parties submitted to the jurisdiction of the arbitration tribunal and participated fully in the proceedings. After a contested hearing in which they were both represented by legal counsel, the Arbitrator made an award on 1st November 2011 ("the Award") in which the respondent was entitled to the sum of RUR29,489,056.36 plus interest of 4,467,276.94, arbitration costs of GBP30,973.24 and legal costs of RUR4,397,135.27, GBP35,925.93 and US3,474.15 (together the "Debt") which sums became immediately due and payable upon the Award being made. Demand for payment was made by the respondent by letter on 17th January 2012 couriered to the appellant's registered office. No response was ever received to this demand as a consequence of which the respondent issued the statutory demand.

In the court below, the appellant tried unsuccessfully to set aside the statutory demand under section 157(1)(a)(i) of the Insolvency Act, 2003. It has appealed the decision of the learned trial judge on grounds that there was no debt owing because the Award had not been enforced in the BVI and an unenforceable award could not form the basis of the statutory demand; there was a substantial dispute as to whether the Award was enforceable in the BVI because the Award was either procured by fraud or its enforcement was part of a fraudulent scheme to divest it of its assets; and that the learned judge erred in holding that it had accepted that the Award created an estoppel between it and the respondent.

Held: dismissing the appeal and ordering that the parties file submissions on costs within 21 days, that:

1. It is not necessary for an arbitration award to be first enforced before a statutory demand can be presented in reliance on it. Further, there is no statutory provision or common law principle obtaining in the Virgin Islands which prohibits an award holder from serving a statutory demand or a winding up petition based on an unenforced foreign arbitration award or judgment. Section 28 of the Arbitration Act merely sets out the procedure for enforcing a non-Convention arbitration award and cannot be read as compelling the award holder to enforce the award before relying on it for the purpose of serving a statutory demand or presenting a winding up petition.

   In Re International Tin Council [1987] Ch. 419 applied; Section 28 of the Arbitration Act Cap. 6 Revised Laws of the Virgin Islands 1991 distinguished.

2. For a court to set aside a statutory demand on the basis that there is a substantial dispute as to the validity of the debt there must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The allegations of fraud and misconduct had no bearing on the issue which was before the arbitral tribunal, that is, whether the balance of the purchase price was due. Further, the allegation of fraud complained of by the appellant occurred in 2007, long after the obligation to pay the debt under the SPA had become due. The appellant's obligation to

pay the entire purchase price under the SPA was unaffected by any fraudulent actions which took place after the debt became owing and due under the SPA. In the absence of any fresh evidence of a variation of the SPA, there is no substantial dispute that the Debt is owing and due or that this Award should be enforced.

Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation Territory of the British Virgin Islands, High Court Civil Appeal BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).

3. There could be no challenge to the process or to the rendering of the Award itself, the appellant having been given full opportunity to participate therein. The learned judge was correct in acknowledging that the appellant was estopped save in exceptional circumstances, from re-litigating the issues which had already been decided by an arbitral tribunal of competent jurisdiction.

4. The respondent had an arbitration award which was valid and binding having been issued by a tribunal of competent authority to whose jurisdiction both parties had submitted and which award had not been set aside or even attempted to be set aside. The Award was a liability which was present, due and enforceable within the meaning of section 10(3) of the Insolvency Act, 2003.

Section 10(3) of the Insolvency Act, 2003 applied.

JUDGMENT

[1] BAPTISTE JA: The appellant, Vendort Traders Inc. ("Vendort"), a company incorporated in the British Virgin Islands, appeals an order of Bannister J [Ag.] dismissing its application for an order to set aside a statutory demand served on it by Evrostroy Grupp LLC ("Evrostroy"), the respondent, a company incorporated in Russia.

BACKGROUND

[2] On 24th May 2012, Evrostroy served a statutory demand[1] on Vendort at its registered office pursuant to section 155 of the Insolvency Act, 2003.[2] The demand was for the payment of a debt due under a share sale and purchase agreement ("the SPA") that had been the subject of an arbitration award dated 1st November 2011 (the "Award")[3] in the London Court of International

[1] Record of Appeal, Volume 2 Tab 3, p. 20.
[2] No. 5 of 2003, Laws of the Virgin Islands.
[3] Record of Appeal, Volume 2 Tab 3, p. 25.

Arbitration ("LCIA") made after a contested hearing between the parties. Pursuant to the Award, Evrostroy was entitled to the sum of RUR29,489,056.36 plus interest of 4,467,276.94, arbitration costs of GBP30,973.24 and legal costs of RUR4,397,135.27, GBP35,925.93 and US3,474.15 (together the "Debt") which sums became immediately due and payable upon the Award being made.

[3] The Debt arose out of the SPA[4] entered into by Vendort and Evrostroy on 15th May 2006 pursuant to which Vendort agreed to buy from Evrostroy 834,693 shares (the "ISKOG Shares") in a Russian company known as ISKOG JSC ("ISKOG") for a total purchase price of RUR44,672,769.36. The SPA was governed by English law and contained an arbitration clause in the event of a dispute.

[4] On 17th July 2006, Vendort paid the sum of RUR 15,183,713 to Evrostroy and on 24th July 2006, Evrostroy transferred all 834,693 ISKOG Shares to Vendort. The balance of RUR 29,489,056.36 remained to be paid by Vendort to Evrostroy under the SPA but Vendort made no further payments after the transfer of the shares.

[5] There was no dispute that the SPA was valid and binding on the parties and indeed the appellant relies on the validity of the SPA in claiming ownership of the ISKOG Shares. In 2007 the ownership of Evrostroy changed when Mr. Andrey Bidzinovich Mamporia ("Mr. Mamporia"), a manager of the company purchased the shares from the then sole shareholder, Mr. Denis Vladmirovich Koltsov (Mr. Koltsov"). Ms. Elena Smirnova purchased the shares from Mr. Mamporia in 2009. Upon purchasing the company she sought to enforce the debt due under the SPA making a demand for payment in October 2009 and when this was unsatisfied, commenced arbitration proceedings before the LCIA in December 2009. Both Evrostroy and Vendort submitted to the jurisdiction of the arbitration tribunal and participated fully in the proceedings.

[4] Record of Appeal, Volume 3 Tab 5, p. 228.

[6] After a contested hearing in which both parties were represented by legal counsel, the Arbitrator made the Award on 1st November 2011. Demand for payment was made by Evrostroy by letter on 17th January 2012 couriered to Vendort's registered office.[5] No response was ever received to this demand as a consequence of which the respondent issued the statutory demand.

[7] On 7th June 2012, Vendort filed an application to set aside the statutory demand. It rested its case entirely on the power of the court under section 157(1)(a)(i) of the Insolvency Act, 2003 to set aside a statutory demand where there is a substantial dispute as to whether the debt is owing or due. The crux of Vendort's argument was that:

(a) there was no debt owing because the Award had not been enforced in this jurisdiction(the BVI) and an unenforceable award could not form the basis of the statutory demand; and

(b) there was a substantial dispute as to whether the Award was enforceable in this jurisdiction (the BVI) because, as it contended, the Award was either procured by fraud or its enforcement was part of a fraudulent scheme to divest it of its assets.

[8] These two arguments now form the grounds of Vendort's appeal in addition to a third ground by which Vendort complains that the learned judge erred in holding that the appellant had accepted that the Award created an estoppel between it and the respondent. Vendort complains that the learned judge did not have sufficient regard to the "fresh evidence" which was discovered after the Award was granted.

GROUND 1

The learned judge erred in holding that an alleged debt, founded on a non-Convention arbitration award is a "debt" and "enforceable" in the Territory (for the purposes of the insolvency Act, 2003) even if it has not been recognised and rendered enforceable by the Court pursuant to the Arbitration Ordinance

[9] Vendort contends that the learned judge erred in law in finding that the Award constituted a debt which could be the subject of a statutory demand.

[5] Record of Appeal, Volume 3 Tab 5, p. 239.

According to Vendort[6] an unenforced foreign non-Convention award, as this Award is, is unenforceable having not been declared recognised in this jurisdiction in an action brought for that purpose, and as such was not a debt within the meaning of section 10(3) of the Insolvency Act, 2003.[7] Vendort further contends that the service of a statutory demand and/or the presentation of a winding up petition based on such an award amounts to an impermissible attempt to enforce the award. Vendort relies on Re Makin Nominees Pte Ltd[8] a decision of the Singapore High Court in support of this proposition.

[10] The respondent contends that Vendort's submission is unmeritorious and is discordant with the recognised authorities. Firstly and fundamentally, it is well established that the service of a statutory demand or even subsequent winding up proceedings based on an unsatisfied statutory demand does not constitute enforcement proceedings: see Derek French, Applications to Wind up Companies:[9]

> "Service of a statutory demand for a judgment debt is not a proceeding for the recovery of the amount payable under the judgment.[252] [Standard Commodities Pty Ltd v Societe Socinter Departement Centragel [2005] NSWSC 294, 54 ACSR 489]. It is submitted that service of a statutory demand for a judgment is not execution of the judgment."

[11] In Standard Commodities Pty Ltd v Societe Socinter department Centragel[10] (which was relied on by the respondent in the court below) a case emanating from the Supreme Court in New South Wales, the Court considered an application to set aside a statutory demand based on a French judgment which had not been first registered before service of the demand. Barrett J noted that "… by no stretch of the imagination can service of a statutory demand based on a judgment debt be seen as "proceedings for the recovery of an amount payable under a judgment".[11] Barrett J concluded that the non-registration of the French judgment did not preclude the reliance upon the

---

[6] Record of Appeal, Volume 1 Tab 1, para 1.1(a) of the notice of appeal.
[7] Section 10(3) provides that, "For the purposes of this Act, an illegal or unenforceable liability is not a liability".
[8] [1994] 3 SLR 429.
[9] 2nd edn., Oxford University Press 2008, para. 6.4.1.3
[10] [2005] NSWSC 294.
[11] At para. 20.

foreign judgment as a basis for the service of the statutory demand and did not represent any basis for a contention that there existed a genuine dispute as to the existence of the debt the judgment recognizes or creates.

[12] The respondent argues that the case of Re Makin on which Vendort relies is of dubious authority in the face of clear authority from the appellate court in the United Kingdom which is of greater persuasive authority than the decision of a single judge of the Singapore High Court in that case. The respondent contends that this Court ought to follow the decisions of the English Court of Appeal in cases such as In Re A Company[12] and In Re Lines Bros. Ltd.[13] where in the former case it was made abundantly clear by Lord Cozens-Hardy MR that:

> "In my opinion the winding up petition is neither a proceeding to execution on, nor a proceeding to the enforcement of, a judgment…"[14]

[13] In the English decision, In Re International Tin Council[15] where the creditor sought to wind up the debtor company based on an unsatisfied arbitration award, Millet J held that:

> "…in my judgment the winding up process is plainly not a method of enforcing a judgment or an arbitration award, and there is nothing in the language of Brightman L.J. in In Re Lines Bros. Ltd. [1983] Ch 1, which in any case is descriptive and not intended to be by way of classification, to suggest the contrary."[16]

[14] Moreover, decisions of the Singapore High Court subsequent to Re Makin such as Pacific King Shipping Pte Ltd and another v Glory Wealth Shipping Pte Ltd[17] have been decided in line with the English decisions. In that case, the creditor presented a winding up petition after a statutory demand based on an arbitration award from London, remained unsatisfied. The debtor company contended that there was a bona fide dispute on substantial grounds as the arbitration award was only enforceable by recognition under statute and this had not been done before the service of the statutory demand or the

[12] [1915] 1 Ch 520.
[13] [1983] Ch 1.
[14] At p. 526.
[15] [1987] Ch 419.
[16] At. p. 455.
[17] [2010] SGHC 173.

presentation of the petition. Further, the debtor contended that the award was subject to challenge on breach of natural justice principles.

[15] Following the decision in In Re International Tin Council the court concluded that a winding up application is not regarded as an enforcement of arbitration awards and that a statutory demand is quite distinct from enforcing the award.[18] Pillai J further held that:

> "The real question before me is whether the defendant is precluded from issuing a statutory demand under s 254(2)(a) read with s 254(1)(e) of the Companies Act based on a debt that is founded on an arbitration award because such award can only and exclusively be enforced under the IAA…
>
> I am unable to accept the plaintiffs' argument that the defendant must enforce the Award under this provision of the IAA before it can bring the winding up proceedings against the plaintiffs. No authority is cited for me for the proposition that a successful party of a foreign arbitration award is obliged and confined to enforce the award only by way of enforcement proceedings under the IAA and is thereby precluded from issuing a statutory demand based on a foreign arbitration award followed, if unsatisfied, by a winding up application on grounds of a presumption of insolvency."[19]

[16] I agree with the respondent that that decision is instructive to the present case as it highlights the salient point that it is not necessary for an arbitration award to be first enforced before a statutory demand can be presented in reliance on it. Indeed, it is of critical note that there is no statutory provision or common law principle obtaining in this jurisdiction which prohibits an award holder from serving a statutory demand or a winding up petition based on an unenforced foreign arbitration award or judgment. The effect of section 28 of the Arbitration Act[20] is to merely set out the procedure for enforcing a non-Convention arbitration award; it cannot be read as compelling the award holder to enforce the award before relying on it for the purpose of serving a statutory demand or presenting a winding up petition. It simply does not go that far. Section 28 becomes necessary in cases where an award holder wishes to levy execution and therefore must first enforce the foreign award in

[18] Paras. 17 – 19, p. 6.
[19] Paras. 9 – 11.
[20] Cap. 6, Revised Laws of the Virgin Islands 1991.

this jurisdiction before doing so. An award by itself establishes that a debt is immediately owed; immediately enforcing such debt is an entirely different thing.

[17] Vendort also contends that Bannister J [Ag.] erred in failing to consider whether the Award was a debt which was "owing and due" for the purposes of section 157 of the Insolvency Act, 2003 and/or was "due and payable at the time of the demand" for the purposes of section 155(2)(a) of the Insolvency Act, 2003. Vendort further argues that Bannister J [Ag.] was wrong to conclude that "unenforceable" means "unenforceable as a judgment" or as he put it "not actionable": first, because the words in inverted commas do not appear in section 10(3) of the Insolvency Act, 2003; secondly, because Bannister J's [Ag] formulation impermissibly extended or added to the statutory word actually used. In other words "unenforceable" means what it says.

[18] I agree with the respondent's submission that the learned judge in applying the rules of statutory interpretation correctly construed section 10(3) of the Insolvency Act, 2003 as referring to liabilities which are either illegal or 'not actionable in law'. Used in conjunction with the word 'illegal' it is clear that the word 'unenforceable' was intended to be given its literal meaning that of being incapable of being enforced in law and any other construction of the word would be strained and undesirable. 'Unenforceable' in section 10(3) of the Insolvency Act, 2003 could not be interpreted to mean 'unenforceable as a judgment' because as the learned judge rightly put it, only judgment creditors would then be entitled to issue statutory demands or present winding up petitions. Evrostroy in the present case had an arbitration award which was valid and binding having been issued by a tribunal of competent authority to whose jurisdiction both parties had submitted and which award had not been set aside or even attempted to be set aside. The Award was a liability which was present, due and enforceable within the meaning of section 10(3) of the Insolvency Act, 2003.

GROUND 2

The learned judge erred in concluding that there was no dispute of substance about whether or not the Award should be enforced in the Territory

[19] Vendort contends that the learned judge was wrong to conclude that there was no substantial dispute that enforcement of the Award would be contrary to public policy and/or the Award was obtained by fraud and/or the attempted enforcement of the Award was part of a fraudulent scheme to divest Vendort of its assets. Vendort also asserts that Bannister J [Ag.] failed to direct himself to the proper approach to cases of this kind, as laid down by the Court of Appeal in, for example, Pacific China Holdings Ltd v Grand Pacific Holdings Limited.[21] In particular, the present case is not concerned with the question whether the Award should be enforced, but with only whether there was a triable issue about whether it should be enforced. Vendort argues that Bannister J's [Ag] judgment amounted to an impermissible determination on the merits of the claim rather than focusing on whether it (Vendort) had presented enough credible or new evidence to show a triable issue that the Award should not be enforced.

[20] The respondent submits and I agree that the appellant's submission is flawed as it is based on the incorrect premise that the service of the statutory demand amounted to enforcement of the Award. It has already been established that service of a statutory demand does not constitute enforcement. The question for the learned judge was not whether there was a substantial dispute as to 'the enforcement of the Award' but whether there was a substantial dispute as to whether the debt is due or owing.[22] The learned judge correctly found that the appellant had failed to establish that there was any substantial dispute as to the validity of the debt due by Vendort to Evrostroy.[23]

[21] For the court to set aside a statutory demand on the basis that there is a substantial dispute as to the validity of the debt, Byron CJ in the case of

[21] Territory of the British Virgin Islands, High Court Civil Appeal BVIHCVAP2010/0007 (delivered 20th September 2010, unreported).
[22] See section 157(1)(a)(i) of the Insolvency Act, 2003.
[23] Record of Appeal, Volume 1 Tab 1, para. 13 of the judgment.

Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation[24] held that:

> "There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding.[3] [Palmers Company Law Vol. 3 Para 15.214]."[25]

[22] In the case of Angel Wise Limited v Stark Moly Limited[26] the Court of Appeal relied on the formulation of the Australian court in Eyota Pty Ltd v Hanave Pty Limited[27] as aid for what constituted a substantial dispute as to the debt. In that case it was held that a genuine dispute:

> "connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious issue to be tried" criterion which arises on an application for an interlocutory injunction or for the extension of removal of a caveat. This does not mean the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however unequivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be "not having sufficient prima facie plausibility to merit further investigation as to [its] truth, ...or a "patently feeble legal argument or an assertion of facts unsupported by the evidence..."[28] (My emphasis).

[23] With respect to Vendort's submission that there is a substantial dispute as to enforceability, it would have had to raise, to the satisfaction of the learned judge, a challenge which amounted to a bona fide dispute on substantial grounds for it to have succeeded on that point in the court below. On a claim that there is a substantial dispute as to the enforceability of an arbitration award, this Court[29] has applied the Sparkasse principle and held that the learned judge erred in law in embarking upon a merits review of the award

---

[24] Territory of the British Virgin Islands, High Court Civil Appeal BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).
[25] At para. 3.
[26] Territory of the British Virgin Islands, High Court Civil Appeal BVIHCVAP2010/0030 (delivered 13th February 2012, unreported).
[27] (1994) 12 ACSR 785.
[28] See para. 24 of Angel Wise Limited v Stark Moly Limited Territory of the British Virgin Islands, High Court Civil Appeal BVIHCVAP2010/0030 (delivered 13th February 2012, unreported).
[29] Pacific China Holdings Ltd v Grand Pacific Holdings Limited Territory of the British Virgin Islands, High Court Civil Appeal BVIHCVAP2010/0007 (delivered 20th September 2010, unreported).

having found that there was a substantial dispute as to whether due process was followed in arriving at the award. However, this decision is not to be taken to preclude *carte blanche* any consideration by the trial judge as to the soundness of the alleged dispute. In China Alarm Holdings Limited v China Alarm Holdings Acqusitions LLC et al[30] the court noted instructively the decision of Oliver LJ in In the Matter of Claybridge Shipping Company S.A. v In the Matter of the Companies Act 1948:[31]

> "But it ought not, in my judgment, to be an inflexible rule that the Companies Court should never take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground, and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings. Whilst I do not in any way, therefore, seek to weaken the rule of practice as a general rule, I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross-examination. The court must, I think, reserve to itself the right to determine disputes – even perhaps in some cases substantial disputes – even perhaps in some cases substantial disputes – where this can be done without due inconvenience and where the position of the company, whether it be an English company or a foreign company, is such that the likely result in effect of striking out the petition would be that the creditor, if the established the debt, would lose his remedy altogether."

[24] Vendort seeks to establish this challenge to enforcement by relying on what it says is fresh evidence discovered after the making of the Award to show that at the time of the SPA and afterwards both Evrostroy and Vendort were under the control of Mr. Andrey Alexandrovich Kozlov ("Mr. Kozlov") and that Mr. Mamporia lied to the arbitration tribunal when he claimed that Mr. Koltsov who was then listed as the sole director and shareholder of Vendort was an independent businessman, that he Mr. Mamporia as manager of Evrostroy worked with Mr. Koltsov and that Mr. Koltsov sold his shares in Evrostroy to Mr. Mamporia for RUR10,000.

---

[30] Territory of the British Virgin Islands, High Court Claim BVIHCV2008/0385 (delivered 20th April 2009, unreported).
[31] [1997] 1 BCLC 572 at p. 579.

Fresh Evidence

[25] In the arbitration proceedings as well as in the court below, Vendort admitted that it had entered into the SPA with Evrostroy to purchase the ISKOG Shares for RUR44, 672,769.36 and that in pursuance of this SPA it had paid RUR15,183,713 and received the shares. The sole dispute between the parties at the arbitration was whether the balance of the purchase price was owing and due under the SPA. Vendort's defence to the claim for payment of the balance was that the SPA was not an arms-length commercial transaction as the two companies were part of a group of companies under the control of Mr. Kozlov and that subsequent to the conclusion of the SPA and throughout 2006 there was a variation of the agreement by which Evrostroy waived the balance of the purchase price.

[26] The Arbitrator found that clause 16.1 of the SPA required any amendments to the SPA to be made in writing for such amendment to be effective and binding.[32] After hearing evidence from witnesses for both parties the Arbitrator concluded that there was no evidence in support of Vendort's claim that the SPA had been varied by consent.[33] Indeed, after considering the law, he indicated that the absence of documentary evidence of the variation was fatal in view of the unambiguous word and effect of clause 16.1. Additionally, the Arbitrator found that there had been no evidence of waiver of the balance by Evrostroy or any estoppel as regards the balance due under the SPA.[34] That conclusion effectively disposed of Vendort's defence.

[27] Vendort however maintains that the pursuit of the arbitration and the enforcement of the Award are part of an overall fraudulent scheme by Mr. Kozlov to divest it of its ISKOG Shares. The fraud complained of by Vendort is not clearly particularized as required at law when making an allegation of fraud. The fraud complained of must go to the substance of the dispute and not be merely ancillary to it.

[32] Record of Appeal, Volume 2 Tab 3, para. 74, p. 48.
[33] Record of Appeal, Volume 2 Tab 3, para. 79, p. 49.
[34] Record of Appeal, Volume 2/Tab 3, para. 83, p. 50.

[28] It appears however from the arguments filed by Vendort that the fraudulent activity which it complains of is Mr. Kozlov's orchestrated plan (which he was successful at) to misappropriate the 626,020 ISKOG Shares held by Vendort and the fraudulent transfer of the said shares to Carnavon Limited, a company found to be owned by Mr. Kozlov. Mr. Kozlov relied for support on an assignment which he said was signed by Mr. Koltsov on behalf of Evrostroy and himself on behalf of Crompton Solutions Limited (**"**Crompton") to assign to Crompton the balance due from Vendort to Evrostrostroy. Crompton was then to transfer the shares to Carnavon to complete the transaction. Vendort's former director, Eduard Samoilov ("Samoilov"), assisted in signing documents on behalf of Vendort including the transfer of the shares to Kozlov's company. It is further claimed by Vendort that Mr. Mamporia falsely represented in the arbitration the role played by Mr. Kozlov and Mr. Koltsov respectively in the running of Evrostroy in that Mr. Kolstov was not an independent businessman as Mr. Kozlov claimed but was a person wholly unconnected with the company and its business activities.

[29] The fresh evidence which the appellant says now establishes that this fraud occurred is the testimony of Mr. Koltsov in the Russian criminal proceedings that he had no real connection with Evrostroy or Mr. Kozlov and that his identity had simply been used in connection with the registration of the company and its business. The respondent submits, and I agree, that this does not amount to evidence which would have been material to the outcome of the arbitration. The fact that Koltsov may not have been who it was claimed he was does not affect the validity of the SPA or the claim for the balance due thereunder. Indeed despite this allegation of fraudulent representation as to the identity of Mr. Koltsov, Vendort continues to rely on the validity of the SPA to ground its right to own and recover the ISKOG Shares, and in fact, the Russian court notwithstanding the evidence of the identity of Mr. Koltsov accepted that the SPA was valid and binding on the parties. Vendort simply says the SPA was varied to reduce its liability to Evrostroy. However, the respondent submits that the true identity of Mr. Koltsov does not advance matters in this regard in the Vendort's favour. It is critical that no finding of variation of the SPA or waiver of the balance was made by the Russian court

in which this fresh evidence as to Koltsov's identity was discovered. In fact, it is important to note that on the contrary, notwithstanding the evidence of Koltsov's identity, the Russian court acknowledges and confirms the ruling of the LCIA[35] that Vendort was required to pay the balance due to Evrostroy under the SPA as a debt. This is because this allegation of fraud does not go to the substance of the dispute between Evrostroy and Vendort.

[30] In the circumstances, Vendort's ground is bound to fail as there is no fresh evidence being advanced to show that there had been a written variation of the SPA or that there had been a waiver of the balance, which is the only defence it could have to Evrostroy's claim. No evidence is advanced as to when precisely this variation or waiver took place or the circumstances in which it occurred and the evidence of Koltsov's identity does not take the matter any further. The evidence simply does not meet the threshold set out in Ladd v Marshall[36] which is referred to in Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd. and Others.[37]

[31] In Westacre the defendant sought to defend arbitration proceedings on the basis that the contract was an instrument of fraud having been entered into for the purpose of bribing government officials or to influence them. Subsequent to an award being made in the plaintiff's favour the defendants sought to adduce evidence at the enforcement stage to show that the plaintiff's witnesses had given perjured evidence resulting in the award being procured by fraud. Waller LJ held that the party alleging fraud had to establish that:

> "(a) … the evidence … was not available to [him] … at the time of the hearing before the arbitrators; and (b) where perjury is the fraud alleged, i.e. where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result."[38]

The court found that the defendants had not established that the evidence could not reasonably have been obtained at the time of the arbitration or

---

[35] Record of Appeal, Volume 2 Tab 12, p. 446, last para.
[36] [1954] 1 WLR 1489.
[37] [2000] 1 QB 288.
[38] At p. 309.

subsequently in time to challenge the award on the basis of the perjured evidence.

[32] The respondent submits that the evidence is not information which could not have been reasonably obtained at the time of the arbitration. In any event, even if this information was available it was not material to the central issue before the tribunal and as such the learned judge in the court below was correct in dismissing Vendort's application to set aside the statutory demand. I agree.

[33] The respondent notes that no mention has been made by Vendort in its argument that Mr. Kozlov is now deceased[39] and whether in view of his death it can still be maintained that the enforcement of the arbitration award is part of a fraudulent scheme being perpetrated by him. Vendort's argue that Mr. Kozlov was the mastermind in control of the Finvest-Evrostroy-Vendort group of companies and that he orchestrated the SPA. Vendort further argues that after Mr. Kozlov fell out with Finvest and the common owners of the group he sought to fraudulently divest Vendort of its ISKOG Shares which he did by influencing Vendort's director, Samoilov to transfer the shares to one of Kozlov's other company. The Russian court in criminal proceedings against Mr. Kozlov convicted him of fraud for misappropriating the assets of Vendort and ordered him to re-transfer them.

[34] The respondent posits that it is unmeritorious to argue that the fraud of which Mr. Kozlov was convicted somehow affects the validity of the debt under the SPA. The reason being that the fraud complained of by Vendort occurred in 2007, long after the obligation to pay the debt under the SPA had become due. Under the SPA the purchase price was due within 45 days of the execution of the agreement which would have been in July 2006. Accordingly, it is inconceivable that this alleged fraudulent scheme could have had any bearing on the Vendort's obligation and failure to repay the debt due under the SPA. I agree.

[39] Record of Appeal, Volume 2 Tab 3, p. 44, para. 53.

[35] In my judgment, in the absence of any fresh evidence that the SPA had been modified to reduce the purchase price, these allegations of fraud and misconduct have no bearing on the issue which was before the arbitral tribunal, that is, whether the balance of the purchase price was due. Vendort cannot be seeking to rely on the SPA to claim ownership of the ISKOG shares as it is clearly seeking to do, while at the same time trying to impugn the validity of the SPA by claiming that the then director of Evrostroy, Mr. Koltsov, was a fictitious character being used in Mr. Kozlov's fraudulent scheme. The fact that Mr. Koltsov may not have been who Mr. Mamporia said he was does not affect the validity of the SPA. The SPA having been found to be valid and binding, the appellant's only defence to a demand for the payment of the balance under the SPA could only be that the SPA was modified. It was already properly found by the Arbitrator, and there is no challenge to that finding or the procedure by which it was arrived at, that there was no such modification.

[36] Furthermore, the respondent's counsel submits that the theory that Evrostroy is seeking to divest Vendort of its ISKOG shares by obtaining the Award and winding up the company is misguided and devoid of merit. Vendort claims that Evrostroy is seeking to wind up Vendort and appoint a liquidator so that it can take control of Vendort and influence its decision on (a) whether or how to proceed with its claim for the re-transfer of the ISKOG Shares, (b) whether to pursue claims in relation to the reorganization of ISKOG and (c) whether and how to institute further criminal proceedings against the wrongdoers.[40] The respondent contends, quite correctly, that this view is wholly incongruous with the operation of liquidation in the British Virgin Islands since upon the liquidation of the company any assets owned by the company, including the ISKOG shares will be in the control of a qualified insolvency practitioner under the supervision of the court. Evrostroy as creditor would be in no position to exercise management rights or decisions over the assets of Vendort. Furthermore, Evrostroy has no interest nor has it demonstrated that it has any interest in recovering or dealing with the ISKOG shares and is only concerned

[40] Record of Appeal, Volume 2 Tab 2, para. 20.

with recovering the full purchase price for the shares which it transferred to Vendort pursuant to the SPA.

[37] There has been no finding whether in the arbitration proceedings or the Russian criminal proceedings that Evrostroy was a party to any fraudulent scheme with Mr. Kozlov. He was neither a director nor officer of Evrostroy and was not authorized to act for or on behalf of Evrostroy. His actions in relation to the ISKOG shares were not binding on Evrostroy neither did he act in tandem with Evrostroy in perpetrating any frauds. There was no finding that Ms. Smirnova is a front person for Mr. Kozlov. The court recognized that Ms. Smirnova is the lawful director and shareholder of the respondent and is fully entitled to pursue her company's right to recover the debt owed.

[38] I agree with the respondent's view that it appears that the alleged fraud by Mr. Kozlov is being propounded by Vendort to muddy the waters on the issue of whether there is a substantial dispute as to the debt. It is clear that Vendort's obligation to pay the entire purchase price under the SPA was unaffected by any fraudulent actions by Mr. Kozlov which took place after the debt became owing and due under the SPA. The Arbitrator correctly found that Vendort's indebtedness to the respondent is not impacted by Mr. Kozlov's impugned conduct or his conviction. Vendort does not allege that the SPA was fraudulent but instead agrees that it was bound by it and performed duties thereunder such as the part payment of the purchase price. It should also be noted that after Vendort received 834,693 ISKOG shares from Evrostroy in 2006 it successfully sold 208,673 ISKOG shares in 2007 to a third party. In my judgment, in the absence of any fresh evidence of a variation of the SPA, there is no substantial dispute that the Debt is owing and due or that this Award should be enforced.

GROUND 3

The learned judge erred in holding that Vendort accepted that "the rendering of the [Award] created an estoppel between [it] and Evrostroy". Vendort did not accept that the Award created an estoppel and it did not

[39] Vendort complains that the finding of Bannister J [Ag.] on this point is not supported by the transcript of the hearing which clearly shows (at page 90) that Vendort's counsel was interrupted by the judge on the point before he could finish. In any event, Vendort contends that it was patently obvious that it was averring that the Award should not be enforced; secondly, any estoppel would have risen only if it had sought to challenge the issue of fraud in the curial jurisdiction in England and thirdly, the evidence of fraud, which undoes the Award, arose after it had been rendered and would therefore undo any estoppel.

[40] The respondent states that the issue of estoppel was raised in the course of the hearing before the learned judge as precluding Vendort from re-trying the issues which had already been ventilated during the arbitration proceedings and determined by the Award. I agree that the learned judge was correct in acknowledging that Vendort was estopped save in exceptional circumstances, from re-litigating the issues which had already been decided by an arbitral tribunal of competent jurisdiction. There was and could be no challenge to the process or to the rendering of the Award itself, the appellant having been given full opportunity to participate therein.

[41] Bannister J [Ag.] was correct in finding that there was no substantial dispute that the debt was owing and due. Having transferred the ISKOG shares to Vendort in accordance with the SPA, Evrostroy is entitled to be paid the remaining RUR 29,489,056.36 under the SPA, together with interest and costs as awarded by the LCIA.

[42] The appeal fails on all grounds. It is accordingly ordered that the appeal is dismissed. The parties are to file submissions on costs within 21 days.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal