IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 230 of 2018

BETWEEN

DONNA UNION FOUNDATION

Applicant

and

SVOBODA CORPORATION Respondent

Appearances:

Mr Edmund King QC and Mr Andrew Willins with him of Appleby for the Applicants
Mr Robert Nader for the Respondent

……..

2019: May 1, 3, 14

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REASONS FOR JUDGMENT

[1] Adderley J (Ag.): This was an application by Donna Union Foundation ("DUF"), the applicant, for an Order pursuant to Section 159(1)(a),and sections 162(1)(a) and (b) and

or sections 163(1)(a) or (b) of the Insolvency Act 2003 (" the IA") that Paul Pretlove of Kalo (BVI) Limited be appointed as a Liquidator over the respondent, Svoboda Corporation ("Svoboda"). Section 162(1)(a) is on the ground that the company is insolvent, and section 162(1)(b) is on the ground that it is just and equitable that a liquidator be appointed. On 3 May, 2019 I acceded to the application and appointed Paul Pretlove as liquidator over Svoboda Corporation ("Svoboda") pursuant to section 159(1) of the IA on the basis of Section 8(1)(c)(i) of the IA. I promised to give my reasons and now do so.

[2] Although I have not devoted any time to it in this judgment, I have considered whether section 162(1)(b) of the IA and or section 163(1)(b), the just and equitable ground, applies in this case. In my judgment the matters that can reasonably be complained of came more properly within the ambit of the court proceedings and could have been or were dealt with in that context, so I did not think this was a viable alternative ground.

SHORT BACKGROUND

[3] DUF, Svoboda and Koshigi are shareholders in the capital of UHL, a Maltese company. They entered into a Shareholders agreement ("SHA"). DUF is the recipient of three London Court of International Arbitration (LCIA) awards against Svoboda jointly and severally with Koshigi on liability, quantum, and costs being the awards of the Tribunal in an unfair prejudice action. The Tribunal has ordered that the KS Shareholders buy out DUF's shares in Ulmart Holdings Ltd ("UHL"), formerly one of the largest retailers in Russia, at the share price prevailing in February 2016 for the sum of US$67,159,546.

[4] DUF is a foundation established in Liechtenstein which holds a shareholding in UHL. A dispute had erupted between the shareholders of UHL, and DUF founded by Mr Vasinkevich, brought proceedings before the LCIA alleging that it had been subjected to unfair prejudice by the majority shareholders in UHL, Koshigi and Svoboda said to be owned beneficially by Mr Kostygin and Mr Meyer respectively. Because Koshigi and

Svoboda have throughout made common cause within the LCIA proceedings, they have become known in those proceedings as the KS Shareholders (the "KS Shareholders").

[5] The Tribunal was selected by the LCIA Court. It comprised Barbara Dohmann QC, Michael Collins SC and John Beechey CBE. Proceedings commenced hearings on 28 June 2016.

[6] The LCIA directed that the proceedings before them (the LCIA Proceedings) should be tried in two phases: liability and quantum. The liability phase of the trial was heard over two weeks in September and October 2017, concluding on 5th October 2017.

[7] On 23 March 2018 the LCIA delivered its award on liability, and directed the KS Shareholders to acquire DUF's shareholding in UHL at a price to be determined, but to be measured on a historic valuation basis. The trial on quantum took place in April 2018, but an award on quantum was handed down 16 July 2018.

[8] On 7 February 2018 Chivers J had granted a freezing order by this court. It was continued by him on 7 March 2018.

[9] On 20 April 2018 DUF served on the KS Shareholders an application to discharge the then existing orders, and to reimpose identical relief; and also for the appointment of receivers. This was for a hearing due to take place on Monday 23 April, and in accordance with Chivers J's instruction that short notice should be given to the KS Shareholders. On 23 April 2018, the Court indicated that it was not able to accommodate the hearing that day and it was relisted for 9 May. On the same day, in what Svoboda says is a co-incidence, Svoboda changed its registered agent, removing TMF and replacing it with FH Corporate Services Limited (a company connected with Forbes Hare). The next day, 24 April 2018, Svoboda re-domiciled itself to Anguilla. No notice of these matters was given to DUF and Svoboda knew at the time that it did this that DUF had an extant application before the Court that would have prevented this re-domiciliation.

[10] Notice of Svoboda's change of domicile was only given to DUF at 1.09pm on 9 May 2018 less than an hour before the relisted application for a freezing order, and at which Svoboda

submitted that its change of domicile might have jurisdictional implications for the Court's ability to make a receivership order. At that hearing, the Court granted worldwide freezing orders over the KS Shareholders, and appointed receivers over them.

[11] On 29 May 2018, the Chief Justice ordered that "any action or proceeding filed by Donna Union Foundation in Anguilla which seeks to enforce any award made by the London Court of International Arbitration or which seeks interim relief in anticipation of the enforcement of that award shall be transferred and placed on the commercial list to be heard in the Commercial Division of the Virgin Islands, by a Judge of the Commercial Division assigned to the Territory of the Virgin Islands."

[12] The freezing order and the receivership order were further continued by Adderley, J on 5 June 2018. In its judgment dated 19 July 2018, the court made the following findings:

> "[39] There was a clear risk of dissipation found by Chivers J in February 2018 and it appears to be continuing. The court was taken to the organization chart of the group of companies owned by the KS Shareholders (Koshigi Ltd and Svoboda Corporation) and showed how since 5 October 2017 after the completion of the liability stage of the LCIA Arbitration assets in the group have been disposed of. Among other things company searches show that the assets of the Cyprus company Ulybka Investments Limited was transferred on 5 October the very day the arbitration hearings ended by Koshigi to Volya Corporation which is not a Koshigi entity. On 18 February Volya transferred not to Mr Kostygin's wife but to Inna Meyer, Mr Meyer's wife. Mr Meyer is the beneficial owner of Svoboda. The transfer was made after Chivers J made the freezing order on 7 February so to the extent that Volya was holding on trust for Koshigi it was a breach of the injunction.
>
> [40] Kohuhu Enterprises Ltd in which Koshigi was 99.14% owner was transferred to Volya on 19 November 2017 and on 5 March transferred to Mrs Meyer. That 5 March transfer occurred 2 days after (3 March) when the respondents declared that Chivers J's order ceased to have effect on its own terms.
>
> [41] Also Elshtere Ltd (BVI) which was 75% owned by the Koshigi/Svoboda parties has been disposed of. This can be verified from the structure chart. On 3 April 2018 Elshtere transferred its shares in Polnamon Trading & Investments Ltd (Cyprus) to Leinka Investments and Linka to Inna Meyer.

[42] Volya was continued out of the BVI jurisdiction on 13 March 2018….

[45] The sequence of transfers after the October conclusion of the LCIA hearings to Volya outside the Koshigi/Svoboda group and ultimately Mrs Meyer, the continuance of Volya to another jurisdiction, the timing of the continuation of Svoboda to Anguilla having taken place on 24 April, the day after the hearing for the worldwide freezing order and receivership order was re-scheduled to take place, the fact that the re-domiciliation was only communicated to DUF on 9 May 2018 (despite the affidavit of Mr Bruce) together with the breach of Court orders, as well as their non-cooperation with the appointed Receiver to date, constitute in my judgment cogent evidence that there is a real risk of dissipation now existing, and it is even stronger than at the time of Chivers J's finding to that effect. I therefore find that there is still a risk of dissipation."

[13] On 16 July 2018 the Tribunal issued its Second PFA giving the quantum of its award ordering the KS shareholders to buy DUF shares, and set out a mechanism for the closing of the transaction. In the events which happened after two attempts and blame being laid on both sides the mechanism did not work and closing has still not taken place.

[14] On 19 January 2019, the Court of Appeal gave judgment on the KS Shareholders' appeal from the judgment of Adderley J made on 19 July 2018 following upon the 5 June hearing. The court of Appeal dismissed the appeals. The Court observed that it is "*passing strange, to say the least, that Koshigi and Svoboda have not complied with disclosure orders and that, as Mr Midwinter [their counsel] quite properly admitted, they are in contempt of court*". The KS Shareholders were ordered to pay the costs of the appeals. These have not yet been assessed or paid.

[15] On 4 February 2019, the day before the hearing of DUF's contempt of court (the "Hadkinson Application") against the KS Shareholders for failure to comply with the disclosure order, the KS Shareholders filed affidavits setting out what they claimed to be their assets. Green J adjourned the 5 February hearing to 21 February.

[16] On 20 March 2019 Green J gave judgment on the Hadkinson Application. At paragraph 28, he set out the KS Shareholders' evidence as to their means. As Green J set out:

1. Svoboda's position was that it had no assets other than its shares in UHL.

2. Koshigi's position was that its principal asset was its shares in UHL. Its only other assets are said to be shares in Panarisco Trading Limited ("Panarisco") and European Prime Limited ("European Prime").

[17] During the conduct of the arbitration there were numerous interlocutory applications and actions from both sides pertaining, among other things, to the mechanism for closing set out in the award, and as yet the award of the Tribunal has not been carried out. In an expert report obtained from Lord Hoffmann, he has given an opinion on numerous matters concerning the award. Among them he has stated that he has "no doubt" that the award for the payment of the sums awarded by the Tribunal is enforceable by DUF as a liability for money due from Svoboda and Koshigi.

THE LAW

WINDING UP A COMPANY

[18] The starting point is section 162 of the IA. It provides as follows:

> "the court may, on application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1), if
>
> (a) the company is insolvent;
>
> (b) the court is of the opinion that it is just and equitable that a liquidator should be appointed

[19] Section 162(2) provides for who has locus standi to apply. It reads as follows:

> " subject to subsections (3), (4), and (5), an application under subsection (1) may be made by one or more of the following:
>
> (a) the company;
>
> (b) a creditor;…"

[20] "Creditor" is defined in section 9. A person is a creditor of another person (the debtor) if he or she has a claim against the debtor whether by assignment or otherwise, that is or would be, an admissible claim in (a) the liquidation of the debtor, in the case of a debtor which is a company or a foreign company; or (b) the bankruptcy of the debtor in the case of a debtor who is an individual.

[21] Subsection (3), (4) and (5) of section 162(2) deals with applications by a member or the Commissioner.

[22] Section 159(1)(a) gives the court the jurisdiction to appoint a liquidator of a company. Section 159(1)(b) give it the power to appoint a liquidator of a foreign company.

[23] The definition of "insolvent" in section 8 means either

(i) The value of the company's liabilities exceeds it assets; or
(ii) The company is unable to pay its debts as they fall due

[24] The word "debt" has not specifically been defined, however English Authority has defined debt with reference to 'liability'. In Tottenham Hotspur plc v Edennote plc [1995][1] the definition of debt contained in in r 13.12(1) of the Insolvency Rules 1986(SI 1986/1925) was noted to be as follows:

"Debt", in relation to the winding up of a company, means (subject to the next paragraph) any of the following (a) any debt or liability to which the company is subject at the date on which it goes into liquidation; (b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; and (c) any interest provable as mentioned in Rule 4.93(1).

13.12(3) For the purposes of references in any provision of the Act or the Rules about winding up to debt or liability, it is immaterial whether the debt or liability is present or

[1] 1 BCLC 65

future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly"

[25] "Liability" as defined in section 10 means

(1) a liability to pay money or money's worth including any liability under an enactment, a liability in contract, tort or bailment, a liability for breach of trust and a liability arising out of an obligation to make restitution, and it includes a debt.

(2) A liability may be present or future, certain or contingent, fixed or liquidated, sounding in damages or capable of being ascertained by fixed rules or as matter of opinion"

[26] It will be noted that the definition of liability under the IA covers everything a debt covers under the English legislation and more. Accordingly any English authority pertaining to debt will be applicable to the BVI jurisdiction.

[27] Under section 10(3) an illegal or unenforceable liability is deemed not to be a liability.

[28] Vendort[2] reaffirmed that arbitration awards that have not proceeded through the enforcement proceedings are nevertheless capable of founding a winding up petition. The EC Court of Appeal in that case at [18] also confirmed that "unenforceable" means incapable of being enforced in law. The Privy Council in rendering its decision[3] on the appeal noted that the award takes effect immediately and the awardee does not have to wait for the enforcement proceedings in order to enforce it as a judgment of the court.

[29] "Assets" are defined in Section 2 of the IA to include money, goods, things in action, land and every description of property wherever situated and obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property. It should be noted that this definition under the IA is more

[2] BVIHCVAP 2012/0041

[3] Vendort Traders inc v Evostroy Grupp LLC [2016} UKPC 15

inclusive in relation to assets than that of s 123(2) of the English Insolvency Act 1986 which excludes contingent and prospective assets.

[30] A company is unable to pay its debts if the court can establish that the liabilities of the company are greater than the value of its assets that is to say it is insolvent as defined in section 8(1).

WINDING UP A FOREIGN COMPANY

[31] Foreign companies are governed by section 163. Insofar as it is relevant to this application it provides:

> "163. (1) the court may, on the application by a person specified in section 162(2), appoint a liquidator of a foreign company under section 159(1) if the court is satisfied that the company has a connection with the Virgin Islands and-
>
> (a) the company is insolvent
>
> (b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed…
>
> (2) For the purposes of subsection (1), a foreign company has a connection with the Virgin Islands only if-
>
> (a) it has or appears to have assets in the Virgin Islands;
>
> (b) it is carrying on, or has carried on , business in the Virgin Islands;
>
> (c) there is a reasonable prospect that the appointment of a liquidator of the company under this Part will benefit the creditors of the company.

[32] In amplification of section 163(2)(c), the Court of Appeal has determined that the court must take into account the preference of the substantial creditors as to where they wish the liquidation of the foreign company to be pursued. In KMG International NV v DP

Holding SA[4] the EC Court of Appeal per Nelson JA speaking for the panel (Nelson, Michel, and Thom JJA) allowed an appeal from the trial judge, holding that he erred "*By failing to consider that the appellant is the most substantial of DPH's creditors on the available evidence and wishes to pursue a BVI liquidation*;". That was a case where the learned judge, upon application of KMG, DPH's largest creditor, had appointed provisional liquidators over DPH, a holding company registered in Switzerland, and given permission to serve the winding up proceedings outside the jurisdiction. Upon application by DPH to set aside the permission and the appointment of the joint provisional liquidators, the judge revoked the permission to serve out and ordered that the appointment of the joint liquidators would fall away upon the expiry of any period for appeal or if the appeal court upheld the appeal. On appeal by KMG, the Court of Appeal dismissed DPH's cross appeal to set aside the appointment of the joint provisional liquidators, and reversed the order of the judge revoking his permission to serve out. While acknowledging the importance of assets in the jurisdiction, one of four reasons for allowing the appeal was that the learned judge had fallen into error by failing to consider that KMG was the most substantial of DPH's creditors and wished to pursue a BVI liquidation.

[33] The meaning of "carrying on business" in the Virgin island is not defined in the IA. However in the BVI Business Companies Act ("BCA") it is defined in section 185 as follows:

> "185. (1) a reference in this part [Part XI] to a foreign company carrying on business in the Virgin Islands includes a reference to the foreign company establishing or having a place of business in the Virgin Islands."

[34] In section 2 it goes on to list a number of circumstances (a) to (i) that are not regarded as carrying on business in the Virgin Islands.

[4] BVIHCMAP 2017/0013

THE EFFECT OF CONTINUATION

[35] Under section 184 of the BCA, a company may by resolution of the directors or by resolution of members continue a company incorporated under the laws of a jurisdiction outside the Virgin Islands. Under section 184(4A) a certificate of discontinuance issued under the Act is prima facie evidence that

> (a) all the requirements of the Act in respect of the continuation of a company under the laws of the foreign jurisdiction have been complied with; and
>
> (b) the company was discontinued on the date specified in the certificate of discontinuance

[36] Redomiciliation does not relieve a company of its existing debts at the date of continuance. Under section 184(5)(a) of the BCA the company continues to be liable for all its claims, debts, liabilities and obligations that existed prior to its continuance as a company under the laws of the jurisdiction outside the Virgin Islands.

UNASCERTAINED DEBTS

[37] It is well settled that a creditor can include a person to whom a future or unascertained debt is owed. In Tottenham Hotspur plc v Edennote plc [1995][5] it was held that the holder of a costs order which had not been taxed was a creditor for the purposes of winding up the company. In that case the court used the definition of 'debt' referred to above which is materially the same as that included in the definition of liability. In that case the trial judge had dismissed a winding up petition on the basis of a submission by the company that at the time the petition was presented the petitioners had no *locus standi* since they were not creditors. The petition had been presented on the basis of a costs order before in fact any bill of costs had been delivered to the company. In rejecting that submission Rattee J ruled as follows:

[5] 1 BCLC 65

"To the extent that the judge in either *Re a Company* or *Re Laceward* Ltd - the cases to which I have referred - decided that a liability for untaxed, unagreed costs could not be a debt capable of founding a winding-up petition, because the amount of the indebtedness was unascertained and unascertainable at the date of the petition, the petitioners submitted that that decision is no longer valid in the context of the 1986 legislation. I accept this argument.

At the date of the petition the company was under a present obligation to the petitioners to pay the costs ordered by Chadwick J to be paid by the company when taxed. Such obligation was, in my judgment, a debt within the definition in r 13.12(1)(b) and r 13.12(3) of the 1986 Rules. In my judgment, it follows that the petitioners were accordingly creditors of the company and had locus standi necessary to present the petition by virtue of section 124 of the 1986 Act."

Section 124 of the 1986 Act is equivalent to section 10 of the IA.

BALANCE SHEET INSOLVENCY

[38] In BNY Corporate Trustee Services Ltd v Eurosail-UK[6] the UK Supreme Court gave guidance on how to apply the test to determine if it could be concluded that a company is balance-sheet insolvent. The UK Supreme Court said that the burden of proof will be on the one who asserts balance sheet insolvency and the standard is on a balance of probability.

[39] In Eurosail, the Court was considering the UK Insolvency Act 1986 which does not take into account contingent and prospective assets as does the IA but otherwise the English Act and the IA are materially the same. As to what constitutes balance sheet insolvency, Lord Walker expressly approved the approach of Toulson LJ in the English Court of Appeal at [42] where he stated that the English provision:

"..requires the Court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent

[6] [2013] 1 WLR 1408

liabilities, it cannot reasonably be expected to meet those liabilities. If so it will be deemed to be insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be able to establish."

In this jurisdiction use of Lord Toulson's formula will require proper allowance to be made for contingent and prospective assets as well.

[40] In England as well as the BVI, as can be seen from the definition at section 10 of the IA, "liabilities" is broader than "debts".

[41] In Evans v Jones[7] Lewison LJ observed that although traditionally the test had been applied mechanically that is not always the case. In referring to Eurosail he said:

> One of the lessons that emerges clearly from the Eurosail case is that the statutory test in section 123 [s 10 IA] must not be mechanically applied, but must be applied in a way that has regard to commercial reality"

The Supreme Court endorsed the approach that a court must look at the company's finances from a commercial and overall perspective and consider the facts of each case.

[42] It held that "…Whether or not the section 123(2) test of balance-sheet insolvency was satisfied would depend on the available evidence as to the circumstances of the particular case, with the court, having looked at the company's assets and made proper allowance for its prospective and contingent liabilities, asking whether it could not reasonably be expected to be able to meet those liabilities; but that the more distant the liabilities the harder it would be to deem insolvent a company that was currently able to pay its debts as they fell due".

[7] [2016] EWCA Civ660 at [24]

IS THERE A BONA FIDE DISPUTE AS TO THE DEBT OR LIABILITY?

[43] It is common ground that if a debt is disputed on reasonable grounds then a statutory demand can be set aside because for the purpose of *locus standi* there is no debt. The same applies if there is a bona fide dispute as to the liability. The debtor must have a *bona fide* belief as to the dispute of the debt but that belief must be on reasonable grounds. Reasonable grounds mean substantial grounds. Fanciful grounds are not reasonable. That was the test laid down by the EC court of Appeal per Byron, CJ, in Sparkasse[8]. The test has been repeated and applied many times, recently by Adderley J in setting aside a statutory demand in Anchorman Kavac limited v Jonathan Capener[9] The Privy Council per Lord Sumption in Vendort Traders Inc v Evrostroy Group LLC [10] (an appeal from the BVI) has stated the test differently. At [1] he stated:

"*The test for whether there is a substantial dispute" is not in doubt. It is the same test for summary judgment, namely whether the debtor can raise a triable issue on the point"*

[44] Part 15 of the EC Supreme Court Civil Procedure Rules ("CPR") provides that the court may give summary judgment on a claim or a particular issue if it considers that the –

(a) Claimant has no real prospect of succeeding on the claim or the issue; or
(b) Defendant has no real prospects of successfully defending the claim or issue.

The meaning of "no real prospect of success' was outlined in Michael Wilson & Partners Limited v Temujin International Limited and others Claim No. BVIHCV2006/0307 where Hariprashad-Charles J relied on Lord Woolf MR's guidance where she said:

> "In *Swain v Hillman and another*, Lord Woolf MR said that "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success." At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to their proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the

[8] Sparkasse Bregenz Bank AG v associated Capital Corporation Civil appeal NO. 10 of 2002
[9] BVIHC(COM)0031 of 2018
[10] [2016] UKPC 15

> trial. Further, summary judgment hearings should not be mini-trials. … They are simply to enable the Court to dispose of cases where there is no real prospect of success. The Court has to caution itself against the exercise of a preliminary trial of the matter without discovery, oral examination and cross-examination."

[45] To conclude whether the debtor could entertain a *bona fide* belief that the debt is disputed on reasonable or substantial grounds, the court must carry out an investigation on the evidence available. It is not sufficient for the court to throw its hands up in the air and say that since the debtor has raised the issue he should allow it to be tried. This was the reason for the EC Court of Appeal allowing an appeal from the judgment of Bannister J, in Jinpeng Group Limited v Peak Hotels and Resorts Limited.

[46] In Jinpeng Webster JA [AG] delivering the judgment for the panel (Webster, Baptiste, and Kentish-Egan JJA), concluded that the trial judge was in error for not carrying out a preliminary investigation and setting the standard of the test too low test too low. In setting aside the judgment the Court of Appeal's reasoned as follows at [29]:

> "The judge was correct to observe that the winding up court should not be used to resolve disputes about debts or to decide issues of fact on a summary basis. But the court has a duty to carry out a preliminary investigation of the facts to determine whether the dispute that the company has raised about the debt is on genuine and substantial grounds. The analysis that the judge carried out was limited to referring to the appellant's [Jinping Group Limited] 'considerable swerve' regarding its status which he said did not 'contribute to the feeling that the [respondent] has nothing to argue about'. He expressed doubts about the respondent's chances of proving that the appellant had accepted an allotment of shares in the respondent, but decided that 'serious doubts are not enough'. And finally, he suggested that any challenge, other than a 'hopeless challenge' by the respondent would be sufficient to establish a sufficient dispute for the purpose of removing the appellant's status as a creditor. The question that the judge did not ask himself was whether the dispute raised by the respondent is one that is on

genuine and substantial grounds. In my opinion, this is a higher standard than one that I would associate with expressions used by the judge such as "serious doubts are not enough' and 'hopeless challenge'. The judge did not assess the dispute by the tried and tested expression that the debt and the appellant's status as a creditor are 'disputed on genuine and substantial grounds'. He did not apply the standard set by the former Chief Justice Sir Dennis Byron's judgment in the Sparkasse Bregenz Bank case. Accordingly, I would allow the appeal."

RULES GOVERNING THE AWARD

[47] The LCIA arbitration Rules effective 1 October 2014 under which the arbitration took place contain the usual provisions applicable to awards; among them are:

> Article 26 Awards
>
> 26.3 the Arbitral Tribunal may make separate awards on different issues at different times…such awards shall have the same status as any other award made by the Arbitral Tribunal.
>
> 26.8 Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.
>
> Article 27 *Correction of Award(s) and Additional award(s)*
>
> 27.1 Within 28 days of receipt of any award, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature. If the Arbitral Tribunal considers the request to be justified, after consulting the parties, it shall make the

correction within 28 days or receipt of the request. Any correction shall take the form of a memorandum by the Arbitral Tribunal…

Article 28.4 Arbitration Costs and legal fees

…Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision.

DISCUSSION

[48] In the interest of time Mr Nader adopted the submissions made by Ms Tameka Davis on behalf of Koshigi, and made his own submissions and so I will outline the arguments which Koshigi relied on first.

[49] Koshigi contended that DUF was not a creditor or contingent creditor because there is no debt and that the respondent is not insolvent and (b) the debt (if it is such) is in any event disputed on bona fide and substantial grounds.

[50] Koshigi noted that the Second Award valued the applicant's shares at US$67,159,546 and then provided as follows:

"(2) the KS Shareholders are ordered to jointly and severally purchase the said shares and to pay the claimant the Purchase Money in accordance with the terms of this Second partial final Award.[emphasis added]

(3) Claimant is ordered to sell the said shares to the KS Shareholders in accordance with the terms of this Second partial final Award [emphasis added]

(4) the tribunal directs that the parties shall implement and close the sale and purchase of the said shares (the "Transaction") in the following way:

[51] It argued that the Second Award is in terms an order for specific performance requiring the KS shareholders to purchase, and the applicant to transfer, its shares to the KS shareholders at a price determined by the tribunal of US$67,159,546.

[52] Ms Davis argued that even if the applicant does not agree that it is an order of specific performance, at the very least there is a bona fide and substantial dispute about whether the appellant is a creditor because Koshigi has put forward bona fide and substantial reasons for not paying: the debt is disputed. Its statement that there is a bona fide dispute on substantial grounds whether the award is enforceable is based on the disagreement of the experts. Her submissions state: "*it is apparent from the evidence of the experts and the exchanges between the parties and the tribunal that there are sufficient substantial grounds identified by the company to raise a real question on whether the Award should be enforced on public policy grounds*.

[53] Koshigi relied on section 86(3)(b) of the Arbitration Act) "…*it would be contrary to public policy to enforce the award*". No absence of due process, or breach of natural justice or other specific public policy ground was in fact raised. While recognizing that this ground should be applied in exceptional and narrow circumstances and should be interpreted restrictively, Ms Davis submited that this is one of those exceptional cases and relies on what Koshigi calls the presentation by the appellant's representatives of a forged share certificate for the purpose of closing. In circumstances where there is no dispute that DUF is the true owner of the shares and is on the share register of the company, this cannot be entertained as a bona fide and substantial ground. Furthermore the share certificate which was in evidence, states on its face that it was a re-issue. In light of there being no dispute that DUF is validly on the Register of Members of UHL, this issue has no real prospect of succeeding and therefore does not pass the summary judgment test.

[54] Koshigi next relied on section 86 (2)(d) which states other reasons why enforcement of an award may be refused:

> "(i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or
>
> (ii) contains decisions on matters beyond the scope of the submission to arbitration

It submited that based on the expert reports when the Tribunal went on to vary the August Award it is arguable that it went beyond the scope of its authority to do so, it is

arguable that the failure to include the need for compliance with FAS Regulations is contrary to public policy as it would violate national regulations of Russia, and it is arguable the cost orders made in respect of the unenforceable awards are also not enforceable as a matter of public policy

[55] In reviewing the evidence to determine whether these present triable issues, it seems to me it must first be determined whether the identified issue is relevant to the award itself. Assuming that Koshigi is right that the award is for specific performance of a buy and sell agreement for a particular sum, on the evidence the dates set up by the arbitral completion mechanism had failed. On the facts of this case does failure of the completion mechanism render the award unenforceable? This is a legal question and in my judgment there is no triable issue that it renders the award itself unenforceable in the sense that a court of competent jurisdiction will refuse enforcement under section 86 of the Arbitration Act. It is fanciful to believe that the award itself relating to the payment of US$ 67,159,546 would fall into a black hole and disappear because of a need to amend the completion mechanism. The Arbitral Tribunal concluded as much. DUF made an application through its attorneys BCLP to the Tribunal by letter dated 28 August requesting that it make paragraphs 3-6 of its Order dated 19 August (which amended the Second partial Award) into a formal award, instead of by Order, under Article 27 of the LCIA Rules and 47 of the Arbitration Act. In refusing the application the Tribunal said this at recital (xxix)(b) of its Order dated 18 October 2018:

> "In the opinion of the Tribunal, matters arising out of the allegations and counter allegations in respect of any asserted non-compliance with the terms of the Share transfer procedure, which form the basis of the Second partial Award, are properly matters for a court of competent jurisdiction to which any application for enforcement of the Second partial Award might be made.

[55] On the other hand, whether the Arbitral Tribunal had jurisdiction to amend the Second partial Award's mechanism as it purported to do by Order dated 19 August 2018 does, in

my view, raise a triable issue. This emerges from the difference of opinion of the experts Lord Hoffmann and Mr Gary B Born. At this stage the court ought not to prefer one expert over the other. However, in my judgment as a matter of law this issue is irrelevant as a basis for refusing the enforcement of the award under the BVI Arbitration Act. In this regard, in my judgment, Lord Hoffmann is right in his analysis of the law, following Halkett v Earl of Dudley (1907) 1 Ch 590, that it is not possible for a unilateral repudiation of an order for specific performance to occur and that the court must be involved in such a purported repudiation. Therefore, the award must still be enforced. Incidentally although expert evidence was brought by the KS Shareholders to oppose other parts of Lord Hoffmann's opinion, none challenging this conclusion was brought to my attention.

[56] On the question of the compliance with the Russian FAS (the anti-monopoly administration) the Tribunal noted, and the court agrees, that it must be post-award issue because it was not raised before the Tribunal. The Tribunal said this:

> "While it may be necessary for the KS shareholders(or either of them) to apply for an obtain FAS clearance, that is not a matter that was ever addressed before the Tribunal in the context of submissions relating to the form of any Buy-Out Mechanism in respect of Claimant's shares in UHL-or at all. …In any event this is a matter between the KS Shareholders and the FAS which constitutes a post – Transaction requirement. It is not something with which the Claimant can be expected to deal in transferring the beneficial interest in its shares "without restriction" to the KS shareholders. Any outstanding FAS approval does not affect the shares themselves and does not constitution a restriction on transfer of the beneficial ownership of them"

[57] For all the above reasons, in my judgment, the matters raised do not past the summary judgment test of raising a triable issue, or constitute a substantial grounds, or have any real prospect of success in proving that the award is unenforceable,

COSTS

[58] Next I consider the Final Award on Costs and Interest ("the Third Final Award") which was handed down by the Tribunal on 23 April, 2019. The KS Shareholders submit that if the Second Partial Final Award is unenforceable it would be against public policy to enforce a cost order based on that unenforceable award. This was raised before the Tribunal and dismissed and so the matter is res judicata as between the parties. In any event, I have ruled that as a matter of law there is no triable issue that the award is unenforceable.

[59] The KS Shareholders have raised two further objections to the Third Final Award, one under Article 27 of the Arbitration Rules and the other in respect of its right to appeal under s68 of the English Arbitration Act 1996. By letter dated 30 April 2019 from Fladgate on behalf of the KS Shareholders an Article 27 application was made on behalf of the KS Shareholders to the Tribunal in respect of the Third Final Award. The issue raised related to clarification of alleged ambiguities relating to when the award was payable and when interest was to accrue on the award. In its opposition to the application DUF contended that the Third Award is clear and contains no ambiguities and that the Tribunal by its own acknowledgment in paragraph 66(ix) of Third Final Award has no remaining jurisdiction to re-open substantive matters including the terms of the Third Final Award. I was advised in open court by the Claimant on 3 May that the application was dismissed on 2 May 2019. That being so, by Article 26.8 the convention costs award of US$5,645,000 plus UK£526,527.17 and interest at the US$ 12-month LIBOR rate plus a premium of 5% compounded with quarterly rests upon the sum of US$5,645,000 is a final and conclusive award now due and payable.

[60] Nevertheless the KS Shareholders state that the award can be appealed under s.68 of the English Arbitration Act 1996 within 28 days from the date of the award. It

foreshadowed an appeal on the ground that the Tribunal did not give reasons for its costs hearing.

[61] The KS Shareholders contend that there is a good arguable case that the Tribunal did not give reasons for its costs order. They state that while it gave reasons for reducing DUF's costs to 75% it did not give reasons why the KS Shareholders were not awarded any of their costs. They argued that if DUF was unsuccessful on the issue of valuation, and by implication the KS Shareholders were successful on that issue the KS shareholders ought to have gotten their costs proportionately. This, it contends, gives rise to a triable issue that the Tribunal overlooked the possibility of their getting costs and setting it off against the costs awarded to DUF.

[62] I have read the award and find that the objection does not meet the summary judgment test; there is no realistic prospect of succeeding on the objection that reasons were not given for the Third Award. There is no formula in the Rules on what form reasons should take and the Tribunal is entitled to use its discretion in how to formulate those reasons so that the parties may know the essential ingredients that went into their decision. Russell on Arbitration 24 Edition at paragraph 6-032 gives guidance as follows:

> "When giving a reasoned award the Tribunal need only set out what, on its view of the evidence, did or did not happen, and explain succinctly why, in light of what happened, the Tribunal reached its decision"

[63] What happened is detailed at [42]. That included that the claimant was only partially successful, that the valuation was based on the Aldermar transaction rather than the expert's model or on that proposed by the KS shareholders. But it noted that the KS Shareholders had defended the Aldermar transaction as a guide, while the claimant listed reasons why the Tribunal should not adopted it. The reasons given by the Tribunal are quite adequate and its conclusion is set out in [43] as follows:

> "43 In all the circumstances of the case, the Tribunal considers that an appropriate award in respect of Claimant's Legal Costs is to order the KS Shareholders to pay some 75% of those costs, that is to say US$5,645,000.00.

In any event, although there are other remedies in the Rules for failing to give reasons there is no realistic prospect that it will result in the cost award being overturned. It would not nullify the award. In the unlikely event that such appeal takes place, and it succeeds, in all likelihood all that would be the usual remedy that it would be sent back for the Tribunal for fuller reasons, and in light of the quantum and the argument raised by the KS Shareholders there is no chance that it would be reduced below the minimum that is required to qualify for obtaining a winding up order. Furthermore the statistical evidence from the Commercial Court Users Guide, which was in evidence, shows that appeals on this ground very rarely succeed.

[64] This award is final and conclusive and is immediately payable under Article 26.8. No tender of payment has been made. To determine whether Svoboda is unable to pay its debts, it remains to be seen if from the evidence Svoboda is a company that is balance sheet insolvent.

THE EFFECT OF THE CONTINUATION TO ANGUILLA

[65] It is common ground that Svoboda continued to Anguilla. The circumstances surrounding the timing of its discontinuance from the BVI to Anguilla is subject to justifiable scrutiny in that it occurred the day after a scheduled hearing which was was aborted because of the unavailability of court time, and DUF was given notice of its continuance one hour before the relisted hearing was to begin a week later. No commercial reason has yet been given by Svoboda for its redomicilation. Ostensibly it was done for other reasons.

[66] Svoboda raised issues of whether the service effected in the BVI after its continuance was valid but the provisions of section 184 of the BCA confirmed that the service would stand, and although Svoboda had taken the point again in is submissions for this hearing, it abandoned it on the date of the hearing.

[67] On the question of its objection that the winding up should not take place in the BVI, it relied on the KMG case considered earlier in this judgment, and it is clear on the reasoning of the Court of Appeal that it is appropriate to pursue its liquidation in the BVI if only for the reason that DUF is Svoboda's only known creditor, and DUF wishes to pursue the liquidation in the BVI. That satisfies section 163(2)(c). But there are other reasons which satisfy the connection required by section 163 of the BCA, including that on its own admission it carried on the business as a family trustee in the BVI (163(2)(b)), and it has assets in the BVI: it claims to have a claim against the former trustee for breach of trust in the BVI (163(2)(a)). I therefore dismiss those objections.

IS SVOBODA INSOLVENT?

[68] The evidential underpinning to prove that that Svoboda is insolvent lies in its admissions. From those admissions and corroborating evidence DUF reasonably concluded that it was insolvent and gave Svoboda notice by service on 2 January 2019 (over 90 days) that it would rely on that to prove its insolvency on a balance sheet basis. In [11] of the Amended Originating application the applicant averred as follows: "*The Respondent is unable to pay its debts as they fall due and/ or is insolvent on a balance sheet basis*". Assuming the evidence shows on its face that Svoboda is insolvent, Svoboda should adduce evidence to rebut that presumption. On the face of the evidence, a bare denial would not provide a substantial ground to the court for finding that Svoboda was not insolvent.

[69] Although not made in the context of determining whether or not Svoboda was solvent, there have been numerous authorized statements on behalf of Svoboda that it has little assets. These admissions, being against its interest, it cannot approbate and reprobate. The statements made under oath in relation to its assets being admissions, as a matter of law are admissible as the truth of the statements. The petitioner and the court are entitled to take them into consideration in assessing its solvency. Svoboda has offered no evidence in rebuttal except bare denials. True it has referred to payment of costs but it admitted that these were not paid by the company nor from assets of the company; they were paid by a benefactor without them incurring any liability.

[70] The evidence on which the claimant partly relies is summarized in [29] of the contempt judgment dated 20 March of Green J. There the learned judge outlined how Mr Meyer by affidavit dated 4 February 2019 summarized the dealing in the assets of Svoboda:

(a) In paragraph 10, Mr Meyer states that Svoboda has for several years been merely a "management company for the assets of a family trust." He goes on to assert that Svoboda did not own any assets beneficially and any that are registered in its name are actually held by Svoboda for beneficiaries of the family trust.

(b) In paragraph 11, Mr Meyer states that the only assets "since 7 February 2018" registered in its name are the shares of UHL.

(c) In paragraph 13, Mr Meyer refers to certain alleged legal claims that he says Svoboda has, including against the former trustees of the family trust and against DUF.

(d) In paragraph 14, Mr Meyer states "To the best of my knowledge [Svoboda] does not hold any assets other than the assets described above, either legally or beneficially."

(e) In paragraph 15 Mr Meyer says that Svoboda does not have any bank accounts.

(f) In paragraph 16, Mr Meyer says that Svoboda does not have any receivables and is not due any dividends and is not a creditor of any other person or entity.

(g) In paragraph 17, Mr Meyer states: "I can confirm that no assets have been transferred out of Svoboda] since 7 February 2018, the date the first freezing injunction made in these proceedings"

[71] As set out in the originating documents, in a skeleton argument dated 7 March 2018, Koshigi and Svoboda alleged that "UHL is facing imminent insolvency facing creditor demands of tens of millions of dollars". In a letter dated 10 September 2018, Forbes Hare on behalf of Koshigi and Svoboda stated that the shares issued by UHL were "effectively worthless". During the course of the arbitration reference, UHL shares have lost all their

value. They were only valued at over $67 million because the value was taken as of February 2016.

[72] In his second affidavit filed 4th April 2009 Roman Khodykin a partner in BCLP, London lawyers for the applicants, provided further evidence to shed light on Svoboda's balance sheet insolvency. He stated that the primary asset of Svoboda had been its shareholding in LLC Big Box.

[73] Green J in the contempt hearing commenting on the last minute disclosure of Svoboda on 4 February, 2019 said this:

> ".. this disclosure, while probably not being much of a surprise to the Applicant, does leave it in a very difficult position. On the face of it, if the Respondents now truly do not have any substantial assets, it shows that there must have been a concerted judgment proofing exercise carried out by the respondents. Furthermore, this seems to have largely taken place, at least as far as the Respondents are concerned, prior to 7 February 2018.

[74] DUF's case before the Tribunal (which the Tribunal accepted) was that the respondents had embarked on a scheme of contriving so-called "controlled bancruptcies" among the UHL Group (subsidiaries). These are taking place in the St Petersburg and Leningrad Regional Commercial Court in respect of companies in the group, LLC Ulmart, RSK was declared bankrupt, a supervision procedure was introduced for NAO Ulmart, and LLC Ulmart Development, and LLc Ulmart PZK. These appointments were at the instigation of LLC Big Box in its capacity as a petitioner for the bankruptcy of those entities.

[75] The Respondent's own case was that it held no valuable assets and the court dismissed DUF's Hadkinson Application on the basis that DUF could not establish that the Respondent did in fact hold any valuable assets after 7 February 2018.

[76] As seen from this judgment the KS Shareholders have significant liabilities to the applicant:

(1) Under the Second Partial Final Award of the LCIA Tribunal the KS Shareholders have a monetary obligation of US$67,159,546

(2) A liability in the arbitration of convention costs award of US$5,645,000 plus UK£526,527.17 and interest at the US$ 12-month LIBOR rate plus a premium of 5% compounded with quarterly rests upon the sum of US$5,645,000

(3) Under the costs order of the EC Court of Appeal. Claimed at $88,917.22

CONCLUSION

[77] The burden of proving the company's insolvency is on the petitioner. However, once prima facie presumption of insolvency has been established by credible evidence the company must give some evidence for the court to consider in deciding whether or not to accept that evidence relied on by the petitioner. In this context it must be remember that unless it is a public company its accounts are reposed in the company, and would not generally be known to other members of the public. As Lord Justice Buckley observed at p585 in Stonegate Securities v Gregory[11] in a slightly different but related context "*But he[the petitioner] is not entitled to have access to the company's books, and he is not entitled to demand to have any information with regard to the company's financial position"*. He must therefore rely on the debtor's declarations. Despite the prima facie evidence to the contrary, Svoboda has given bare denials and failed to rebut the prima facie evidence of its insolvency on a balance sheet basis.

[78] With what, on its face, is clearly balance sheet insolvency, Svoboda could, if it were not insolvent, easily have rebutted the evidence either by producing the bare minimum of financial information, or alternatively by its shareholders causing a capital injection of about US$80 million. But neither of these possibilities or any other was embraced.

[11] [1980] Ch 576

[79] The test for proving balance sheet insolvency is discussed above under "The Law". In Eurosail the UK Supreme Court was of the view that the court should look at the company's finances from a commercial and overall perspective and consider the facts of each case. The commercial reality is that UHL is a non-trading, holding company with its subsidiaries in the zone of insolvency under the controlled bankruptcies taking place. On Svoboda's own evidence its major current asset is the UHL shares and there was no evidence of any significant contingent or prospective assets. Its current liabilities to DUF alone are daunting.

[80] With evidence of asset stripping, the numerous declarations against interest made at the Tribunal and in the court proceedings that the UHL shares have little or no value, the substantial liability of about US$80 million to DUF alone, and the admission that the costs to date have not been paid out of assets of the company (either cash or arranged credit) and no evidence of any or any significant prospective or contingent assets, but the existence of "tens of millions" of perspective liabilities (on which it is not necessary to rely on in this case) all point inexorably to its insolvency-at least on a balance sheet basis. Svoboda cannot reasonably be expected to match with assets the liabilities that have been enumerated by DUF alone, not to mention any other creditors.

[81] It is settled law that a company does not have to have assets in order for it to be wound up.

[82] Absent actual financial records which Svoboda has not made available to the applicant, there could hardly be more cogent evidence to support a presumption that Svoboda is balance sheet insolvent. Not having rebutted the evidence which by itself is sufficient to prove insolvency on a balance sheet basis, and having been given ample opportunity to do so, I was satisfied on a balance of probability that Svoboda is balance sheet insolvent. And I so found. Where balance sheet insolvency is shown, the law presumes that the company is insolvent. Accordingly I appointed Paul Pretlove of Kalo (BVI) Limited as liquidator of the company pursuant to sections 159(1) and 8(1) (c)(i) of the IA.

[83] Costs will be paid to the applicant and the liquidator out of the assets of the company in the priority prescribed by Rule 199 of the Insolvency Rules 2005

The Hon Mr Justice K Neville Adderley

COMMERICAL COURT JUDGE

BY THE COURT

REGISTRAR