THE EASTERN CARIBBEAN SUPREME COURT

THE TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2019/0015

BETWEEN:

OBRA PIA LTD

Applicant

And

SEAGRAPE INVESTORS LLC

Respondents

Appearances:

Mr Dan Wise and Mrs. Asha Johnson-Willins of O'Neal Webster for the Applicant
Mr Iain Tucker and Ms. Rhonda Brown of Walkers for the Respondent

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2019: April 11

2019: May 22

JUDGMENT

Application to set aside statutory demand- whether bona fide dispute of debt-whether reasonable grounds for establishing a set off-Principles applied

[1] Adderley, J (Ag.): This is an application by the Applicant, Obra Pia Ltd, to set aside a statutory demand. The demand was served on it by the Respondent, Seagrape Investors LLC, on 21 January 2019. It is in respect of a debt in the sum of US$5,099,917.39 allegedly due and payable pursuant to a Credit and Security Acknowledgement Agreement ("the Agreement") dated 25 August 2016 entered into between the Applicant, the Respondent and others.

[2] The grounds for the application are :

(1) that the Respondent breached a Subordination Agreement by failing to give advance notice of the statutory demand and therefore the debt was not due and owing at the time the statutory demand was served on the Applicant.

(2) that the Applicant has a reasonable prospect of establishing a set-off, counterclaim or cross claim against the Respondent in an amount greater than the amount specified in the statutory demand.

[3] Ground number (1) was not pursued at the hearing. Ground number (2) is pursued on the basis that the Applicant can pursue an action under the laws of New York, the agreed governing law of the Agreement, against the Respondent for causing a sale to be aborted which would have yielded proceeds more than sufficient to liquidate the debt, and that the Applicant had intended to pay the Respondent from that sale. The aborted sale, it is alleged, was due to certain false and inaccurate allegations concerning its branch, Obra Columbia, to a government regulatory institution in Colombia which brought about an investigation against Obra Columbia and led to it being placed under supervision which caused or contributed to the prospective purchasers not proceeding with the possible purchase.

[4] It claims that the loss suffered is at least US$10,000,000.00, and that Obra Columbia is in the process of filing a claim against the Respondent for damages in excess of that sum in New York for tortious interference with prospective contractual claims and abuse of process.

THE INSOLVENCY ACT 2003

[5] I repeat what I stated in Anchorman Kavac Limited v Capener BVIHCM 2018/0031. Under s 155 (1) of the Insolvency Act 2003 (the "IA") a creditor may make demand on a company for payment of a debt owed by that company to him. In the event that the company fails to comply with a statutory demand that has not been set aside in respect of a valid debt, the company is deemed insolvent under s.8(1)(c)(ii) of the IA as being unable to pay its debts as they fall due, and this is a ground for seeking the appointment of a liquidator of the company under s.162(1)(a).

[6] Under s.156 (1) a person who has been served with a statutory demand may apply to set it aside within 14 days of the date of service of the demand on him (s.156 (2) IA).

[7] Section 157 of the IA provides the mechanism to set aside the statutory demand. For present purposes, the Applicant submitted that the Court should set aside the demand based on Ground number (2) namely s. 157(1)(b). That section reads as follows:

> "The court shall set aside a statutory demand if it is satisfied that-
> (b)the person on whom the statutory demand was served has a reasonable prospect of establishing a set of, counterclaim or cross claim in an amount equal to or greater **than the amount specified in the demand less the prescribed minimum; or…"**

[8] Section. 157(1)(b) has been interpreted by this court. In Wellgate International Limited v Crastvell Trading Limited BVIHCV 209/324 the respondent sought to rely on the English Court of Appeal case of Re Bayoil SA [1999] 1 All ER 374. In that case it held that where a company had a "genuine and serious" cross claim which it had been unable to litigate in an amount exceeding the amount of the petitioner's debt, the court should, in the absence of special circumstances, dismiss or stay the winding-up petition in the exercise of its discretion. In Wellgate Bannister J observed that section 157(1)(b) contains no condition that the debtor must have been unable previously to litigate the cross claim and instead of the words "genuine and serious cross claim" the test is whether the debtor has a reasonable prospect of establishing a set off, counterclaim or cross claim. In my judgment, the test in section 157(1)(b) is slightly different from the test in section 157(1)(a). The former is the summary judgment test. This was confirmed in Sparkasse Bregenz

Bank AG v The Matter of Associated Capital Corporation, BVI Civil Appeal No 12 of 2002 per Byron CJ followed in Anchorman, and later re-stated by the Privy Council in Vendort Traders Inc v Evrostroy Group LLC, UKPC 15 an appeal from the BVI, per Lord Sumption at [1].

[9] The Section 157(1)(b) test is not, in my judgment, the same as the test under section 157(1)(a). That test has been stated to be that the debtor must have a honest belief and that belief must be on reasonable grounds that the debt is disputed. Using the summary judgment test it means that there is a triable issue on which there is a realistic (as opposed to "fanciful") prospect of success. A "realistic" prospect of success (the summary judgment test) is not necessarily the same as a "reasonable" prospect of success. Since a reasonable prospect of success is not necessarily a realistic one, the evidence to satisfy the requirements of section 157(1)(b) need not reach the level required to satisfy section 157(1)(a) at this stage.

[10] Nevertheless, it is not enough for the Applicant to assert that it has a reasonable prospect of establishing a cross-claim. At the time of the application the Applicant must present evidence to the court on which the court can determine whether or not objectively it has a reasonable prospect of success. The court will have to look at the essential elements of the claim, the likely governing law, and what evidence there is to support the contention that the prospects of establishing the claim are reasonable. The judge must therefore conduct an investigation into the evidence.

THE EVIDENCE

[11] The Applicant's evidence is that it was in the process of negotiating a sale of the properties owned by Obra Columbia in Columbia to liquidate the debt owed to the Respondent when the respondent made certain allegations concerning Obra Columbia to the SDS (La Superintendcias de Sociedades de Colombia) a government regulatory body with wide powers to investigate corporations in Columbia). The Applicant claims that the complaints were false and inaccurate and that the Respondent also persuaded the firm of Barrera & Barrera, an architectural firm which had purportedly been unpaid, to join its crusade against Obra Columbia by falsely reporting to the SDS that Obra Columbia had defaulted on its payments due to the Firm. Although Barrera & Barrera later withdrew its complaint the damage had already been done: SDS had already launched its

investigation and even though there was no evidence of malfeasance, Obra Columbia was placed on suspension, it is claimed.

[12] The affidavit of Nataly Arenas Dominichetti corporate counsel for Obra set out the facts relating to whether as a subordinated creditor Seagrape properly complained to the SDS which led to the investigation into the Obra's Columbia branch of Obra Pia Sucursal Colombia Ltda, the parent borrower and whether this Seagrape- induced investigation led to the abortion of a $20 million sale of the OBRA properties (appraised value US$34,500,000 as of February 2017).

[13] In giving his legal opinion on New York law attorney Joseph P Garland in paragraph 22 of his opinion qualified his opinion by the statement that facts and representations had been made to him and that he had not independently verified their accuracy, but assumed for giving his opinion that the facts were accurate. In paragraph 26(b) of his opinion he stated that in 2017, GACP Cartagena LLC or an affiliate entered into a letter-of-intent to purchase the Project for approximately US$30,000,000.

[14] The evidence before the court shows that the Investment Agreement was subject to New York Law and to the non-exclusive jurisdiction of New York. The Credit and Security Acknowledgement Agreement (clause 12) is also expressly governed by New York Law, and the parties "with respect to any dispute, controversy or claim relating to, connected with or arising out of the Agreement" submitted to the jurisdiction of New York.

[15] Attorney Garland in his letter dated 15 February 2019 confirmed that the transaction documents were governed by New York law. He stated that if the facts were accurate as related to him (on which he relied entirely to give his opinion) it would found two potential claims: breach of an implied condition of good faith and fair dealing, breach of the provision to use its best efforts to support the sale or all of the Applicant's project. Success will render the respondent liable to damages, the quantum of which the Applicant will have to prove. He also opined that the Applicant may seek declaratory relief alone, success of which could mean that it will not have to pay the debt.

[16] Are there reasonable prospects that the Applicant can prove the breach? The Respondent had made the commitment at the eleventh paragraph of the Credit and Security Acknowledgement Agreement dated 25 August 2016 as follows:

> Seagrape shall exercise best efforts to support Debtor's sale of all or a portion of the Project that would result in repayment of the Cash Amount Due, and in no event do anything to block such a sale."

[17] Seagrape filed the complaint on or about 6 November 2017. According to the affidavit of Juan Luis Escobar filed 27 March 2019 who signed the complaint said that the ground of the complaint was that there were administrative accounting, economic and legal issues with Obra Colombia which necessitated the intervention of the SDS to protect the interests of its creditors.

[18] Unless such a letter of intent or some verification from GACP Cartagena LLC was produced, it would make it difficult to found a case on it. However it is beyond speculation that offers were made. In paragraph 4.42 of the complaint made by Mr Juan Luis Escobar reference is made to a series of purchase offers made to Mr Kaleil Isaza Tuzman, the head of Obra Pia, which were sufficient to satisfy the debt but Mr Tuzman did not accept them because he wanted an unrealistic consideration. He stated that even at the date of the complaint there were at least to [sic] purchase offers if accepted could allow the payment of the liabilities of Obra Pia and the investors in the project, and he demanded that Mr Tuzman assign the project free of liens and debt. He lamented the fact that Mr Tuzman continued to decline to accept the offers.

[19] Mr Tuzman in his affidavit dated 4 February 2019 stated that Obra Columbia had drafted a sale and purchase agreement for the Obra Properties since July 2018 but the SDS involvement has now caused negative reputational connotations which scared bidders away and has therefore made the Obra Properties practically impossible to sell, even at a reduced price.

[20] He states that the Respondent's action with the SDS has blocked Obra Colombia's ability to maximize a sale or development of the Obra Properties and pay off the debt to the Respondent. Based on the appraised value and offer value for the Obra Properties prior to the SDS involvement, Colombian lawyers have estimated that the value of the Obra properties were negatively impacted by at least US$10 million and perhaps as much or more than US$14.5 million.

[21] Obra, he says, is in the process of issuing civil proceedings against Seagrape in Colombia for defrauding a government agent with false statements for self-enrichment "inducer of error" and that Obra has been advised by its Columbian lawyers and verily believe that there is a good faith basis for Obra to make claims in excess of US$10 Million against Seagrape under Columbian law based on unclean hands, tortious interference with prospective contractual relations and abuse of process.

[22] Mr. Tuzman states that in his belief Obra has a reasonable prospect of establishing a set-off, counterclaim or cross claim against Seagrape in an amount greater than the amount specified in the statutory demand. This is consistent with Attorney Garland's opinion referred to earlier.

[23] Mr Edward Mullen the manager of Seagrape in his affidavit in support dated 13 March 2009 endeavours to make a case from paragraph 19 onwards that there is no 'realistic' prospect of establishing a counterclaim. This, in my judgment, is seeking to support the wrong test. There is no burden on Obra to satisfy the test under section 157(1)(b) at this stage.

[24] However, he makes a number of points. Mr Tuzman did not provide any details of the "fraudulent accusations" made to the SDS, nor does he present any facts to support his allegation of loss, or provide facts to show that the complaint to the SDS was either inaccurate or unwarranted. Furthermore, only since the Statutory Demand was made has the prospect of a claim against Seagrape been raised. He denied making false allegations against Obra. He maintained that submission to SDS has not blocked any sale because being under the control of the SDS does not prevent a sale, and as far as he is aware no purchase offer has been submitted to the SDS for its consideration.

[25] Seagrape argues that the application under this head should be dismissed for several reasons;

(a) The actions in Columbia began on 8 November 2017 and could not have led to the default

(b) No claim has been brought in any jurisdiction

(c) The initiation of government supervised intervention was proved to be justified following an investigation by the Columbian Superintendent of Corporations

(d) The controller of Obra Columbia was arrested and was being extradited to the United states on charges of fraud.

(e) Obra has not provided details of the "fraudulent accusations" which it says Seagrape made and denies they made any.

[26] Statements are made as to whether the SDS supervision has blocked a sale or prevents sales from proceeding. Seagrape also states that Obra has not demonstrated that it is not in a financial crisis, nor submitted any payment plan as to how it will satisfy its debts. This approach overlooks the fact that the crisis, if there is one, may have been caused or contributed to by the complaint to the SDS.

[27] There are arguments on either side. Based on the evidence before me I am unable to conclude on a summary basis whether or not the applicant has a reasonable prospect of launching a claim. For example, it would appear that the complaint to SDS might have been premature. It was a precondition to making the complaint that notice of default had to be given before the sums were due and payable. In argument it was conceded that from the time notice was given the payment did not in fact fall due until the end of August 2017 (not 31 March as submitted in written submission). On its face, therefore, the complaint to the SDS was made prematurely which it appears could only be made when the debtor was 90 days in arrears. It also appears that the complaint may have been induced by the charges in relation to fraud against, Mr Tuzman in the United States. In my judgment there are triable issues relating to the complaint and whether it caused or contributed to Obra not being able to meet the debt.

[28] On the evidence if successful it would be able to offset the debt which at the time of the hearing was said to be Cop$15,000,000 Columbian Pesos (approximately US$4,870,275.00). It appears that New York law applies. Mr Garland concludes: "*These facts, if established, would in my opinion be a breach of Seagrape's obligation to the Obra entities under the Agreements, for which Seagrape would be liable for damages it caused. According to the Dominichetti Affidavit, these damages would exceed US$10,000,000*."

[29] I therefore set aside the statutory demand. The foreshadowed action must be commenced by the applicant within 30 days from the date of this judgment unless the parties settle the matter in the meantime. If such action is not commenced and diligently pursued within 30 days the debt shall thereupon be payable immediately.

Hon Mr Justice K. Neville Adderley (Ag)
Commercial Court Judge

By the Court

Registrar