EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 0062 OF 2019

BETWEEN:

IN THE MATTER OF PRASAN PTC LIMITED (AS TRUSTEE OF THE PRASAN TRUST)

AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

BETWEEN:

PRASAN PTC LIMITED (AS TRUSTEE OF THE PRASAN TRUST)

Applicant

and

GLOBAL STEEL HOLDINGS LIMITED (IN LIQUIDATION)

Respondent

Appearances:

Ms Tamara Cameron and Ms Catherine O'Connell of Walkers for the Applicant
Mr Peter Ferrer, Mr Christopher Pease and Mr Romane Duncan of Harneys for the Respondent

---

2019: June 11
June 12

The applicant applied to set aside a statutory demand made by the joint liquidators of the respondent. The statutory demand was for a sum in the amount of US$31,017,197.69 payable under a Loan Facility Agreement dated the 12 October 2008 and triggered by non-payment of an amount of US$7,624,994 interest to 11 October 2018. The applicant applied to set the statutory demand aside on the ground that by an oral agreement made between representatives of the parties, the payment of interest allegedly due was

deferred and accordingly there was a bona fide dispute as to whether the debt was due. Held: The Statutory Demand should be set aside.

Authorities applied

Sparkasse Bregenz Bank AG v Associated Capital Corporation [BVI Civil Appeal No 10/2002 dated 2003]
Vendort Traders Inc v Evrostroy Gruup LLC [2016] UKPC 15

JUDGMENT

[1] Adderley J, Ag.: The Applicant, Prasan PTC Limited (as Trustee of the Prasan Trust) ("Prasan"), a British Virgin Islands company, applied under s. 155 of the Insolvency Act, 2003 ("IA") to set aside a statutory demand made by the joint liquidators of the respondent Global Steel Holdings Limited (in Liquidation), an Isle of Man company.

[2] The statutory demand was made on 16 April 2019 in respect of a sum in the amount of US$31,017,197.69 payable under a Loan Facility Agreement (the "Loan Agreement") dated the 12 October 2008. The Respondent went into liquidation on 10 May 2018 in the Isle of Man and since then according to the affidavit dated 22 May 2019 of Mark John Wilson one of the Joint Liquidators of the Respondent, they or their attorneys sought repayment under the Loan Agreement by letters dated 30 July, 10 October and 5 November 2018 and 14 February, 12 March, 28 March 2019, and finally by a Statutory Demand on 17 April 2019 served on 17 April 2019.

[3] The non-payment of an amount of US$7,624,994 interest to 11 October 2018 said to be due and payable led to the default which triggered the payment of all monies under the Loan Agreement. However, the applicant claims that there is a *bona fide* dispute as to whether the debt is due on the ground that by an oral agreement made between representatives of the parties, the payment of interest allegedly due had been deferred (the "Deferment Agreement").

[4] In the First Affidavit of Mr Rajiv Das, a director of the Applicant, dated 30 April 2019 he swore that the parties (represented by Mr Umesh Somany on behalf of that Applicant and Mr Ashok Agarwal, former director, on behalf of the Respondent) agreed that the interest payments be "*deferred until the Repayment Date…*", 13 October 2023, in accordance with clause 4.4 of the Loan Agreement.

By definition that date is 15 years after the Drawdown Date which was 12 October 2008. Mr Das also gave evidence that in accordance with this Deferment Agreement, for the first 10 years of the Loan Agreement no interest was paid by the Applicant and the Respondent never sought or demanded payment of any accrued interest under the Loan Agreement. Furthermore the accrued interest was recorded in the balance sheet of the respondent. He states that the Loan Agreement did not provide for revoking or reversing the decision to defer. The Loan Agreement provides that the "request" by the Borrower for the accrued interest to be deferred must be in writing.

[5] The Respondent denies it agreed to such forbearance, and states that even if it did, it has given adequate notice of the withdrawal of that forbearance, and therefore the loan is now due and payable under clause 6 of the Loan Agreement by the default triggered by failing to pay the interest when it was due. Clause 6.1 specifies as an event of default "*if … the Borrower fails to pay any amount due under this agreement on the due date for payment*" then the Lender may cancel the facility and declare all or part of any amount outstanding under the Facility to be immediately due and payable, whereupon they shall become so due and payable together with all interest accrued thereon and any other amounts then payable under the agreement.".

[6] Under s.156 (1) a person who has been served with a statutory demand may apply to set it aside within seven days (subject to the court extending the time) of the date of service of the demand on him (s.156 (2)). No issue has been raised that the application was not made in time.

[7] Under s.157 the statutory demand may be set aside

THE LAW

[8] The parties agree on the law. The leading case in the BVI is the Court of Appeal case of Sparkasse Bregenz Bank AG v Associated Capital Corporation [BVI Civil Appeal No 10/2002 dated 2003] where Sir Dennis Byron, CJ, as he then was, set out the tests that in order to set aside a statutory demand the debt must be *bona fide* disputed which means that the debtor must subjectively entertain an honest belief, and that belief must be based on objectively reasonable

grounds that the debt is disputed. The Sparkasse test has oftentimes been repeated and applied (see eg. Anchorman Kavac Limited v Capener BVIHCM 2018/0031).

[9] Under s 155(1) a creditor can only make a demand on a person "…*in respect of a debt that is due and payable at the time of the demand*."

[10] If there is a bona fide dispute as to the debt being due and payable then it is not a valid demand within the meaning of the section.

[11] The test was restated by Lord Sumption in Vendort Traders Inc v Evrostroy Gruup LLC [2016] UKPC 15, 13 June 2016, an appeal from the BVI where Lord Sumption speaking on behalf of the Board stated at [1]

> "*1. The combined effect of sections 8 and 155 of the Insolvency Act 2003 of the British Virgin Islands is that a company is deemed to be insolvent and liable to be wound up if a statutory demand for a debt is made upon it and the demand is neither set aside by the court or complied with within 21 days of its service upon the debtor. The grounds on which a statutory demand may be set aside by the court are identified in section 157 of the Act. One of them is that there is a "substantial dispute as to whether …the debt…is owing or due". The test for whether there is a "substantial; dispute" is not in doubt. It is the same as the test for summary judgment, namely whether the debtor can raise a triable issue on the point."*

DISCUSSION

[12] This case is a classic case of the defence provided under s157(1) which provides

> "(1) the court shall set aside a statutory demand if it is satisfied that
>
> (a) there is a substantial dispute as to whether
>
> (i) the debt, or
>
> (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed Minimum
>
> Is due or owing."

[13] The debt claimed is US$31,017,197.69. The Loan Agreement provides that at the request of the applicant the interest payments may be deferred in the discretion of the Respondent.

[14] The Respondent submits that it is implausible in the context of the Loan Agreement, which is itself in written form and appears to have been drafted by professional advisors, an agreement to defer interest would not have been documented in written form, particularly where the interest payments in question amounted to many hundreds of thousand dollars each year. It argues that the mere assertion of the existence of an oral agreement to defer interest is insufficient to make the existence of the Debt a triable issue. There can be no substantial dispute as to the Debt in light of such thin and implausible evidence, it argues.

[15] On the evidence the claim by the applicant is not a mere assertion; corroboratory evidence appears from the course of dealing. On the evidence, from the time the Loan Agreement was entered into in 2008, almost 11 years ago, the interest payments have been deferred and accumulated on the balance sheet.

[16] Clause 4.4 of the loan agreement provides:

> *"On the last day of each Interest period, the Borrower [applicant] shall pay the interest accrued during that Interest period. If requested by the Borrower, the Lender may in its sole discretion agree to payment of any accrued interest being deferred until the Repayment Date upon such terms as the Lender may stipulate.*

[17] The repayment date is defined as "the date falling 15 years after the Drawdown Date, which was 12 October 2008, the date of the Loan Agreement."

[18] Clause 6.1 defines as one of the events of default "*if the Borrower fails to pay any amount due under this agreement on the due date for payment*".

[19] Clause 10 provides that each notice, request, demand, consent, approval, agreement or other communication under the agreement:[emphasis added]

"*10.1 must be in writing and given by delivery, post or facsimile*."

[20] The Respondent argued that no evidence of a written request in accordance with the express terms of the Loan Agreement has been presented, and that even if the Respondent had given forbearance to the Applicant it has given the Applicant notice on more than one occasion of its intention to bring that forbearance to an end. Counsel stated that it is highly implausible that with such a professionally drafted agreement, there would be no written contemporaneous evidence of the company having agreed to the Deferment Agreement, such as directors' minutes approving the agreement, e-mails or other communication.

[21] However, the Applicant foreshadowed obtaining further evidence from the representatives from each of the parties to the purported Deferment Agreement. In particular the Applicant produced an affidavit dated 6 June 2019 by Mr. Pramod Mittal the Chairman of the respondent company which corroborated the claim of the Applicant. Mr Mittal stated that as Chairman he had instructed the negotiation and entering into of the Loan Agreement. About a year after execution of the Loan Agreement the Applicant made a request through Mr. Ashok Agarwal under clause 4.4 of the Agreement to defer all interest accrued to the Repayment Date, being 13 October 2023. He stated that as Chairman he agreed to it and instructed Mr. Agarwal to accept the Applicant's proposal, and to agree in irrevocable terms that no interest would be payable by the company (Applicant) until the Repayment Date. He further stated that in around October 2009 Mr Agarwal confirmed to him, and he believed, that in accordance with his instructions he had orally relayed the Respondant's, GSH's, agreement to the proposed deferment to the Applicant and that the Applicant and GSH had expressly discussed the terms and the fact that it is irrevocable.

[22] The evidence is that the companies have historically had a close relationship, sharing directors, and Mr Mittal is a beneficiary under the trust which is the ultimate shareholder of the Respondent, and Mr Mittal is a beneficiary of the trust and the Chairman of the Respondent.

[23] The affidavits before the court are from two businessmen whose integrity has not been impugned and the evidence should be given some weight even though at this stage some is hearsay.

[24] The issue is not whether there is a triable issue of the existence of the Debt, the issue is whether, applying Vendort, there is a triable issue as to whether the debt was due at the time the Statutory Demand was made on 17 April 2009. That *prima facie* issue has been raised by the Applicant, and its resolution depends on the outcome of trying the issue of whether the Deferment Agreement was entered into and subsisted at the material time.

[25] There are a number of related issues which arise including but not limited to the following: despite the absence of writing as required by the Loan Agreement whether in law the Deferment Agreement nevertheless came into effect, whether by the contemporaneous independent evidence of the conduct of the parties and the carrying the accrued interest on the balance sheet of the Respondent for 10 years raises an estoppel against the Respondent in relation to denying the Deferment Agreement, whether unilateral revocation of the Deferment Agreement is possible, whether the Joint Provisional Liquidators appointed in the Isle of Man had authority to revoke the Deferment Agreement by letter dated 30 July 2018 as they purported to have done, and if the Joint Provisional Liquidators did not have the authority whether the Liquidators had the power to revoke the Deferment Agreement retroactively to October 2018 as they in effect purported to. In this regard it is noted that the Liquidators, not the Applicant's, first raised the question of the Deferment Agreement and sought to set it aside in circumstances where there is no evidence put forward by the Respondent that the Joint Liquidators made any effort to verify with the directors whether the Deferment Agreement existed.

[26] On its face, the Deferment Agreement issue needs to be explored by investigation and will require examination of witnesses. It does not lend itself to a summary process. By clause 12, the parties have chosen English law as the governing law and England as the governing jurisdiction. On the facts of this case it is not possible for the court to conclude that there is no reasonable prospect for the Applicant to succeed in establishing that the Deferment Agreement was entered into and that it was subsisting at the time of the demand. It therefore fails the summary judgment test; there is a triable issue. As such there is a *bona fide* dispute as to whether the debt was due within the meaning of s. 157(1) of the IA. The statutory demand must therefore be set aside on established principles. Accordingly I hereby set it aside.

[27] Costs are to be paid by the Respondent to the Applicant within 21 days to be assessed if not agreed.

Hon K. Neville Adderley
Commercial Court Judge

By the Court

Registrar