TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/030

BETWEEN:

ANGEL WISE LIMITED

Appellant

and

STARK MOLY LIMITED

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Paul Dennis for the Appellant
Mr. Oliver Clifton for the Respondent

2011 January 11;
2012: February 13.

Civil Appeal – Loan agreement which was governed by the laws of Singapore - Setting aside of a statutory demand – Whether the trial judge erred in holding that there was no substantial dispute as to the loan agreement on which the statutory demand was based – Section 157 of the Insolvency Act, No. 5 of 2003, Laws of the Virgin Islands

The respondent, a company incorporated in the Cayman Islands loaned to the appellant, a company registered in the British Virgin Islands, the sum of USD9,699,185.00. This loan agreement was governed by Singapore law. The appellant failed to repay the loan amount and the interest thereon. The respondent served a statutory demand on the appellant demanding payment of USD14,737,258.44. This amount exceeded the prescribed statutory minimum under the Virgin Islands Insolvency Act, 2003. The appellant filed an application to set aside the respondent's statutory demand claiming *inter alia* that, under Singapore law there was a real and substantial dispute as to the legality and enforceability of the loan agreement which was the subject of the statutory demand and; that the dispute ought to be resolved by the courts of Singapore. Additionally, the appellant filed an expert report alleging the loan was illegal and unenforceable. The respondent also filed an expert

report alleging the contrary. The learned judge found it incredible that a professionally drafted agreement between a Hedge Fund and a professional investor in an amount of almost $10 million US should be unenforceable under its chosen law. He found that the evidence sworn on behalf of Angel Wise did not carry any conviction at all, and held that there, was no substantial dispute as to the statutory demand. He dismissed the appellant's application and granted the respondent leave to make an application for the appointment of a liquidator over the appellant.

The appellant appealed alleging *inter alia* that the learned trial judge erred in finding that there existed no substantial dispute in regards to the loan agreement on which the statutory demand was based and; that the trial judge failed to give sufficient or any consideration to their expert evidence. Thereafter, the respondent applied for and was granted leave to adduce fresh evidence at the hearing of the appeal which disclosed that following the decision of the learned trial judge, the respondent commenced proceedings in Singapore against the appellant for the enforcement of the same loan; and a final default judgment was entered in its favour as the appellant failed to enter an appearance to the writ.

Held: dismissing the appeal and affirming the decision of the trial judge and; ordering that the appellant pay to the respondent costs to be agreed on by both parties or otherwise two thirds of the costs the court below pursuant to CPR 65.13 (b), that:

1. To determine whether the dispute about the legality and enforceability of the agreement was a substantial dispute qualifying under Section 157 (1) (a) (i) or 157 (2) (b) of the Virgin Islands Insolvency Act 2003, required an evaluation of the affidavit evidence of the experts. The trial judge had to carry out a preliminary assessment of the facts on which the injustice was raised. The trial judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact, have sufficient prima facie plausibility to merit further investigations as to their truth. An appellate court ought not to interfere with the judge's exercise of his discretion unless the way in which he exercised it is shown to have been manifestly wrong.

   Eyota Pty Ltd v Hanave Pty Limited (1994) 12 ACSR 785 considered; Eng Mee Yong & Ors v Letchumanan [1980] A.C. 331 applied.

2. Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically every affidavit statement however equivocal and lacking in precision it may be, as raising a dispute of fact which calls for further investigation. The trial judge obviously did not consider that the assertions of the appellant through its expert witness were inherently probable, rational or plausible as to warrant further investigation by the courts in Singapore or elsewhere. This exercise of the learned trial judge's discretion was consistent with established principles.

   Eng Mee Yong & Ors v Letchumanan [1980] A.C. 331 applied.

JUDGMENT

[1] EDWARDS, J.A.: This appeal is against the order of Bannister J. [Ag.] contained in an oral judgment dated 20th July 2010. In this order the appellant's application to set aside the respondent's statutory demand dated 12th April 2010 was dismissed; and the respondent was granted leave to make an application for the appointment of a liquidator over the appellant. The learned judge also ordered that the appellant pay the costs of the respondent to be assessed if not agreed. On 12th April 2010, the respondent, which is a company incorporated in the Cayman Islands, served the statutory demand on the appellant, a company registered in the British Virgin Islands. This demand was based on a loan US$699,185.00 the respondent made to the appellant under a loan agreement in two tranches, so that the appellant could purchase 38,815 ordinary shares in a company incorporated in Cayman Islands called Fabulous Way Limited ("Fab Way'). This loan agreement is governed by Singapore law. The demand was for payment of the sum of US$14,737,258.44, an amount which exceeds the prescribed statutory minimum under the Virgin Islands Insolvency Act, 2003[1] ("the Act").

[2] Under the loan agreement, where the public listing of the ordinary shares in Fab Way did not occur on or before the final maturity date defined in the agreement, the appellant was required to repay the loan in full together with maturity interest, less any interest received by the extended maturity date. The final maturity date passed on 2nd October 2009 without the public listing taking place. The extended maturity date also passed on 2nd April 2010 without the appellant repaying either the loan or any interest thereon. It was against that background that the statutory demand was served.

The Grounds of the Application

The grounds of the application to set aside the demand alleged that: (i) the loan agreement on which the statutory demand is based is illegal and unenforceable

[1] Act No. 5 of 2003, Laws of the Virgin Islands.

under the laws of the Republic of Singapore and the appellant disputes that it is liable to pay to the respondent the amount of US$14,737,258.44 claimed; (ii) even if the loan agreement was enforceable (which is disputed) only the sum of US$13,877,895.00 would have been owing, and under Singapore law enforcement of a debt of a quantum in excess of what is owed renders such enforcement liable to be set aside; and (iii) the statutory demand was issued by the respondent in bad faith, being designed to thwart the appellant's ability to raise the monies to repay the loan by exercise of the put option which the parties contemplated would provide the means by which such monies would be raised, and it would be unjust for a statutory demand issued in such circumstances to be allowed to stand.

The Relevant Statutory Framework

[3] Section 155 of the Act provides:

> "155 (1) A creditor may make demand on a person for payment of a debt owed by that person to him. (2) A demand under subsection (1) shall (a) be in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum."

[4] Section 156 of the Act states:

> "156 (1) Where a person has been served with a statutory demand he may apply to the Court to set it aside."

Subsections (2) and (3) set out certain requirements regarding the application and there is no dispute that the appellant complied with the requirements.

Subsection (4) states that:

> "Subject to an order of the Court under section 157, the time for compliance with the demand ceases to run as from the date upon which an application under subsection (1) is filed with the Court."

[5] Section 157 of the Act states:

> "157. (1) (a) The Court shall set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether the debt, or (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum, is owing or due….
>
> (2) The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused (a) because of a defect in

the demand…or (b) for some other reason…

(4) If on hearing an application to set aside a statutory demand, the Court is satisfied that there are no grounds for setting aside the statutory demand, it may extend the time for compliance with the statutory demand.

(5) If the Court dismisses an application to set aside a statutory demand, it shall make an order authorizing the creditor to make application for the appointment of a liquidator or a bankruptcy order, as the case may be.

[6] Based on the wording of section 157 the issues that were before Bannister J. [Ag.] were in a relatively narrow compass: (1) whether he is satisfied that there is a substantial dispute between the appellant and respondent that the sum claimed US$14,737,258.44 or a sum US$13,877,895.00 short of the sum claimed was owing or due; and if not: (2) whether substantial injustice would otherwise be caused for some other reason if he did not set aside the statutory demand.

The Evidence and Reasons

[7] It is convenient to reproduce below that part of the judge's oral decision delivered on 20th July 2010 which is challenged:

> "Angelwise says that the loan agreement which is the subject of the statutory demand is illegal and unenforceable under its proper law which is the law of Singapore. I have been referred to two expert reports on the matter. This expert report served on behalf of the Applicant says that since this was a loan carrying interest and since there is a presumption in the Singaporean, the relevant Singaporean statute, that anyone lending money at interest is a money lender and since there is no reason for disapplying this presumption the loan was illegal and unenforceable.
>
> The expert who has given evidence on behalf of the respondent Stark Moly says that is too simple an approach to the Singaporean statute. That the presumption is rebuttable in cases where the person….providing the funds is not in the business of lending money; and he points to a number of Singaporean authorities which make it clear that ordinary commercial transactions between, if I can put it like this, grown up Commercial concerns that could look after themselves, will not be considered by the Singaporean Courts as money-lending transactions [which] are to be struck down by the relevant legislation.
>
> Mr. Paul Dennis who has appeared for the applicant Angel Wise says I should not attempt to resolve this issue. He says there is a substantial

> dispute upon the point and he points to the well-know[n] Court of Appeal authority, the Sparkasse Bregenze Bank and Associated Capital Corporation. I accept that where there is substantial dispute as to the indebtedness of a person who is subject to a statutory demand, the Insolvency Court should not resolve it. But I am satisfied in this case that there is no substantial dispute on this particular point. It is not, in my judgment, credible that a professionally drafted agreement between a Hedge Fund and a professional investor in an amount of almost $10 million US should be unenforceable under its chosen law, I am hesitating to prefer the expert evidence sworn on behalf of Stark Moly, the creditor.
>
> In my judgment the evidence sworn on behalf of Angel Wise does not carry any conviction at all, and in those circumstances I am quite satisfied that I should not defer a decision on this matter, but resolve the point myself, as I have done…"

The Fresh Evidence Application

[8] Before addressing the grounds of appeal I must state that the respondent filed an application on 7th January 2011 to adduce fresh evidence at the hearing of the appeal. This application was not opposed by counsel for the appellant. This new evidence discloses that following the oral decision of Bannister J. [Ag.] the respondent commenced proceedings against the appellant in Singapore on 7th October 2010, seeking repayment of the said loan with interest under the said loan agreement, totaling US$9,699,185.00 plus interest. Copies of the loan agreement, Writ of Summons with Statement of Claim and Memorandum of Service were exhibited. It was pleaded at paragraph 11 of the Statement of Claim as Particulars of Interest that interest under the loan agreement continues to accrue at a rate which would provide the plaintiff with an internal rate of 18% per annum on the loan from 31st October 2007 until the date the loan is fully repaid (less the interest payments already made consisting of the sums of US$362,270.00 and US$481,915.00 respectively).

[9] Clause 15.2 of the loan agreement provides for the appellant to be served at a stipulated address in Singapore. The memorandum of service shows that the appellant was served by leaving the Writ of Summons at the stipulated address on 11th October 2010. The appellant failed to enter an appearance to the Writ of

Summons. A certified copy of the Final Judgment in Default of Appearance was also exhibited. It shows that on 20th October 2010 default judgment was entered by the Registrar of the High Court of the Republic of Singapore in the sum of US$9,699,185.00 and interest on the sum of US$9,699,185 from 31st October 2007 at the rate which would provide the Plaintiff with an internal rate of return of 18% per annum; and costs S$2,300.00. Finally, a copy of a document titled Notice of Appointment of Solicitor dated 11th November 2010 was also exhibited. This document shows that Ms. Khattar Wong of TSMP Law Corporation of a stated address in Singapore has been appointed to act as Solicitors for the appellant Angel Wise Limited.

[10] Mr. Benjamin Rhys Harris in his supporting affidavit for the application stated that:

> "The Singapore documents show that Angel Wise, despite what is said in its Notice of Appeal, failed to participate in the Singapore proceedings, resulting in the Singapore Judgment in favour of Stark Moly."

[11] We found that the Ladd v Marshall[2] criteria for admitting that evidence was satisfied and gave leave for the documentary evidence to be adduced. These documents were not available at the hearing of the application before Bannister J. [Ag.]. The uncontested documents are presumably credible. They are also relevant to the appeal as they impact on the sincerity and seriousness of the appellant's assertions before Bannister J. [Ag.] that the loan agreement was illegal and unenforceable. The evidence is of such that, if given it would probably have an important influence on the result of the application to set aside the statutory demand.

[12] Learned counsel Mr. Clifton stated that the respondent is relying on this fresh evidence to demonstrate that the decision of Bannister J. was not wrong. I must confess that I have reservations as to how this evidence ought to be used. Its useful purpose would dissipate were the appeal to be dismissed. Further, I do not think that this Court could use it to establish that Bannister J. [Ag.] was correct in his decision.

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[2] [1954] 3 All E.R. 745.

[13] It seems to me that it is only where the court allows the appeal that the court would consider remitting the application for a rehearing and the fresh evidence could then be used at the rehearing. This is the approach advocated in Ladd v Marshall.[3]

[14] In Mulholland v Mitchell (No.1)[4] Lord Wilberforce opined that:

> "Possibly it may be expected that courts will allow fresh evidence, when to refuse it would affront common sense or a sense of justice. All these are only non-exhaustive indications. The application of them and their like must be left to the Court of Appeal. The exceptional character of cases in which fresh evidence is allowed is fully recognized by that court."

[15] Apart from this, the law is that unless a judgment recovered after litigation between parties is reversed or set aside, it binds the parties and determines their rights and liabilities inter se according to its tenor.[5] Lord Mansfield said in Moses v Macferlan[6] that:

> "It is most clear that the merits of a judgment can never be overhauled by an original suit, either at law or in equity. Till the judgment is set aside, or reversed, it is conclusive, as to the subject matter of it to all intents and purposes."

No civil proceedings which impugn a judgment can be brought by parties bound by the judgment except proceedings to have it reversed or set aside. This would bring into question the efficacy of continuing the appeal which could be regarded as an abuse of process to my mind. The parties have not had the opportunity to address my observations, so they remain observations in passing. Besides, there is no evidence that this foreign judgment has been registered and is enforceable in the BVI.

The Grounds of Appeal

[16] The Notice of Appeal was filed on 2nd September 2010. The grounds of appeal

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[3] Supra.
[4] [1971] A.C. 666 at 679 to 680.
[5] See Livesey v Harding [1855] Eng. R, (1855) 21 Beav. 227, 52 E.R. 846; Peareth v Marriott (1883) L.R. 22 Ch. D. 182; Thompson v Thompson [1923] 2 Ch. 205 at p. 214; Badar Bee v Habib Merican Noordin [1909] A.C. 615.
[6] [1558-1774] All E.R. Rep 581.

allege that the judge erred in finding that there was no substantial dispute; failed to give sufficient or any consideration to the expert evidence of the appellant on the point; misdirected himself by substituting his own opinion for that of the expert; and erroneously resolved the issue of the legality and enforceability of the loan agreement himself which fell to be resolved by the Court in Singapore.

[17] Learned counsel for both parties made similar submissions as were made at the hearing before Bannister J. [Ag.]. Mr. Clifton embarked on a detailed analysis of the expert testimony for the appellant and respondent in endeavouring to persuade us without reliance on any authority, that the learned judge applied the correct approach. I do not think it necessary to burden this judgment with the analysis of the expert testimony in light of how the appeal was argued by Mr. Dennis.

Discussion

[18] In Sparkasse[7] the court below dismissed a petition to wind up the respondent company, having concluded that a winding up order could not be made until the Court in Austria, which had exclusive jurisdiction to resolve legal disputes under the parties' agreement, resolved the genuine and substantial dispute as to whether the debt was due. It was contended by Sparkasse on appeal that Capital had failed to lead evidence of Austrian law in order to prove that there was a substantial dispute of the debt under Austrian law; and that despite the clause in the agreement providing that the Austrian Court had exclusive jurisdiction, the court in the BVI was obliged to evaluate the validity of the claims of the parties. The Court of Appeal reviewed the settled law governing the making of winding up orders and affirmed the decision of the court below. It was held that the question to be determined as to what were the terms of the contract was a possible legal dispute which under the agreement was within the exclusive jurisdiction of the Austrian Court. Since the agreement is governed by Austrian law and there is also an exclusive jurisdictional clause, the petitioner should go to the correct forum to

[7] British Virgin Islands Civil Appeal No. 10 of 2002 delivered 18th June 2002 (unreported).

determine the debt and if necessary then present a petition for an undisputed debt.

[19] Sparkasse predated the Act and the provisions I have previously reviewed. These provisions in the Act reflect some of the settled law that Byron C.J. (as he then was) considered in Sparkasse where he stated at paragraph 3 of his judgment:

> "The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. 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. A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of insolvency of the company."
> (Emphasis mine.)

[20] However, unlike the situation in Sparkasse, clause 27 of the loan agreement between the appellant Angel Wise and the respondent Stark Moly does not give exclusive jurisdiction to Singapore. It states that, "This agreement shall be governed by, and construed in accordance with the laws of Singapore. The parties hereto irrevocably submit to the non-exclusive jurisdiction of the courts of Singapore." Apart from this, the principles governing an application to set aside a statutory demand were not directly considered in Sparkasse or the other case Re Bayoil S.A., Seawind Tankers Corp v Bayoil SA[8] that Mr. Dennis referred to.

[8] (1999) 1 BCLC 62.

[21] The existence of the dispute between the experts about the correct interpretation of the Singapore Money Lending Law and how it affects the loan agreement between the parties means that there is a dispute about the legality of the debt if the appellant's expert's preferred construction is correct. The court below did not consider whether the consequences of the appellant's assertions that the contract was illegal would probably preclude the appellant from approaching the court to set aside the statutory demand through the medium of an illegal transaction to which the appellant was a party. Neither did the respondent's counsel raise it as an issue at the hearing or before us.

[22] We are therefore left with a dispute as to the existence of the debt which is the product of the dispute about the legality and enforceability of the agreement under the Money Lending Law of Singapore, and which would qualify under section 157(1)(a)(i) or 157(2)(b) only where the Court considered that ground to be substantial dispute. To determine whether it was a substantial dispute would require an evaluation of the affidavit evidence of the experts in my view. To determine whether the appellant would suffer substantial injustice required the learned trial judge to carry out a preliminary assessment of the facts on which the injustice is raised. Otherwise, the judge would be obliged to accept what was in the affidavits even where he discerns that it is spurious, blustering, lacking in genuineness or devoid of substance.

[23] Australian case law is replete with helpful pronouncements on the applicable principles to be applied in determining applications to set aside statutory demands. Sections 459E[9] (when a creditor may serve a statutory demand); 459G (power to an applicant to apply to a court for an order setting aside a statutory demand under specified circumstances); 459H[10] (provisions concerning the grounds for

[9] Section 459E "(1) A person may serve on a company a demand relating to: (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or…"

[10] Section 459H "(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following: (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates; (b) that the company has an offsetting claim."

setting aside the statutory demand and the determination of the application by the court); and 459J[11] (other reasons for setting aside the statutory demand) of the Corporations Act 2001 of Australia are comparable to sections 155, 156, 157(1) and 157(2) respectively of the Act.

[24] In Eyota Pty Ltd v Hanave Pty Limited[12] McLelland C.J. said the expression genuine dispute in the Australian legislation:

> "connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or 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 equivocal, 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" (cf Eng Mee Yong v Letchumanan [1980] AC 331 at 341), or a "patently feeble legal argument or an assertion of facts unsupported by evidence…But it does mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute."

[25] In Eng Mee Yong & Ors v Letchumanan[13] (a Malaysia case dealing with an application to set aside a caveat) Lord Diplock delivering the judgment of the Privy Council Board stated:

> "Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as

[11] Section 459J "(1) [O]n an application under section 459G, the Court may by order set aside the demand if it is satisfied that: (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or (b) there is some other reason why the demand should be set aside."
[12] (1994) 12 ACSR 785.
[13] [1980] A.C. 331 at 341.

> he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigations as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion…unless the way in which he exercised it is shown to have been manifestly wrong."

[26] Despite the language used by the learned judge in dismissing the application, it is obvious that he did not consider that the assertions of the appellant through its expert witness were inherently probable, rational or plausible as to warrant further investigation by the courts in Singapore or elsewhere. His approach was consistent with established principles. This was not a wrong exercise of his discretion in my view. In the circumstances I see no reason to interfere with the learned judge's decision.

[27] I would dismiss the appeal, affirm the decision of the learned judge and award costs to the respondent, to be agreed on by the parties to the appeal, or otherwise two thirds of the costs the court below pursuant to CPR 65.13 (b).

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]