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Claim No: 4414 OF 2013

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 28 June 2013

BEFORE:

MR JUSTICE WARREN

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BETWEEN:

RUSANT LIMITED

Claimant

- and -

TRAXYS FAR EAST LIMITED

Defendant

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MR ROBERT JAN TEMMINK (instructed by Messrs Fox Williams LLP) appeared on behalf of the Claimant

MR MARK HUBBARD (instructed by Messrs Marriott Harrison LLP) appeared on behalf of the Defendant

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Approved Judgment

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J U D G M E N T

MR JUSTICE WARREN:

1. This is an application by Rusant Limited against Traxys Far East Limited (who I will call the applicant and the respondent) to restrain the presentation of a winding up petition against the applicant.

2. I start with the facts with reference to an agreement between the parties headed "Loan Agreement Against Exclusive Distributorship" dated 27 May 2010 and, as its title suggests, it comprised provisions for financing as it happens by the respondent to the applicant coupled with an exclusive distributorship in favour of the respondent. I do not need to go through the agreement in detail. Paragraph 1 deals with the loans. Paragraph 2 deals with exclusive marketing agency. Paragraph 3 concerns the products which had to be marketed. Paragraph 4 deals with pricing, commission and other financial aspects. Clause 5, which is important, concerns arbitration, choice of law and jurisdiction. The agreement is governed by and construed in accordance with the substantive laws of England. Importantly:

> "5.2 Any dispute, controversy or claim arising in connection with or relating to this agreement, including its interpretation, execution and effect or the breach, termination or invalidity hereof should be referred to and finally resolved by arbitration of a single arbitrator.
>
> 5.3 The place of arbitration is to be in London."

3. Paragraph 8, headed "Miscellaneous", contains at clause 8.1 a provision which reads as follows:

> "This agreement constitutes the entire understanding of the parties and supersedes all oral or written representations or agreements, privileges or understandings between the parties. If any provision of this agreement is held by the arbitrator to be contrary to law, such provision shall be changed."

4. More importantly, at paragraph 8.2:

> "Any change, amendment and/or addition to this agreement shall have no effect and shall be regarded as null and void unless done in writing and signed by both parties."

5. There was a variation of that agreement in August 2012. Materially for present purposes it was provided that the applicant acknowledged that it had received loans in the aggregate of $300,000. The respondent will make one further loan in the amount of $300,000 and they shall bear interest at the rate of 12 months Libor plus 8 per cent per annum. The outstanding balance of the loans together with accrued interest to the extent not converted into equity, which never happened, shall be repaid to the respondent no later than 20 August 2012. It was provided that the exclusive marketing agency granted to the respondent covered the entire world and was for a term commencing on the date of

the agreement and continuing for as long as the applicant maintains production from (inaudible) or any other concession for which it produces and in any concentrates.

6. There had been an attempt comparatively recently to persuade the respondent to convert its loan into equity, but that was rebuffed. There were concerns about repayment made in e-mails in April 2013, as appears from the evidence in support of the application given by Mr Waller, a director of the applicant, in particular at paragraph 11, the whole of which I will read out:

> "Mr Doctor [who was a director, indeed the president, of the respondent] assured me, at a meeting in New York on 4 April 2013, that the loans had been extended to 'July or some such date' and that the lawyers had taken care of the documentation and that I should not worry about it. I have had absolutely no doubt about that. On behalf of the applicant I was pleasantly content with that arrangement and on the basis of the amendment to the repayment date I had made no effort to procure the applicant's repayment of the loans in August 2012 and subsequently in the light of the many assurances I had received."

7. Pausing there for a moment, there is no evidence about many assurances which he had received and Mr Temmink, who appears for the applicant, does not rely upon that.

> "In fact, to the contrary, the board organised its financial affairs on the basis that the loans would not mature until July 2013 (or 'some such date') at the very earliest. I saw no need to chase up the documentation extending the repayment period of the loans, particularly since the original time for payment of the loans had long passed and no demand had been made for their repayment."

8. The respondent denies that any agreement was made at the New York meeting, although it is accepted that there were discussions about continuing the loan. But even the applicant accepts that no date was agreed other than the rather vague phrase "July or some such date". I comment in passing in relation to the sentence concerning organising the company's financial affairs. That is the limit of the evidence. No detail is given and no particular aspects of reliance on detriment are alleged.

9. There then came a statutory demand. It is dated 10 June 2013 and it is served under section 123(1)(a) of the Insolvency Act 1986 and seeks immediate payment of the loan and interest, the loan being $600,000 and the interest at the date of the demand being claimed at $64,932.63. It is the issue of that statutory demand which has prompted the present application. The applicant seeks injunctive relief to prevent reliance on the statutory demand because, as Mr Temmink submits, no money is yet due. It does not, at least at this stage, seek to enjoin reliance on section 123(1)(e) or subsection (2). If that is done no doubt the court can expect a further application. Whether the respondent would want to seek to present a petition on such an alternative basis without first giving the applicant the opportunity to apply for further relief I do not know. I am not asked today to restrain such an application. I would think, however, that if an injunction would be granted, if it could only be made in time, then there would be a very strong case for striking out any petition which had in fact been made in the interim.

10. On this application Mr Hubbard for the respondent accepts that there is no evidence that the applicant is balance sheet insolvent and does not rely on that in any case. However,

he does say that there is sufficient to show that there is cash flow insolvency as an alternative to the statutory demand.

11. Mr Temmink's essential case is that the meeting in New York on 4 April resulted in a binding agreement between the parties that the date for payment of the loans and interest would be postponed to the end of July 2013, or at least until the beginning of July, but that alternative is not of much assistance as that is next Monday.

The Law: Arbitration.

12. Mr Temmink submits that the reliance on the statutory demand is precluded by the arbitration provisions of the agreement read with the Arbitration Act 1996, s ection 9. Section 9 refers to a claim or counterclaim, and it is perhaps sensible that I read subsection (1):

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

13. Mr Temmink submits that a petition is a claim and that the arbitration agreement, which in our case is a very wide one, entails that the matter in dispute must go to an arbitrator. Put that way, and I have probably distorted his submission, it is not quite right. An arbitrator cannot wind up a company. So the question is how the petition and the claim which would be made in order to found the petition interact in the context of an arbitration agreement. M r Temmink says in effect that if any dispute is raised between the parties, that dispute must go to an arbitrator before a petition can properly be issued. Mr Hubbard says that that is wrong. T he petition is not a claim. R ather, he relies on the decision of Park J in Best Beat Limited v Michael Joseph Russell, which I will come to later. He says the position is not a claim and does not fall within the scope of section 9. It is a class action and the arbitration provision has nothing to do with it.

14. Mr Temmink submits that Best Beat is irrelevant. It is true that the judge in that case held that the dispute in that case was one which was not within the scope of the arbitration agreement, whereas the dispute about the debt which is said to be due in our case is clearly within the arbitration agreement. Having said that, it is to be noted that Park J does start with the Arbitration Act and identifies as one of the difficulties facing the applicant in that case the fact that the petition was not a claim or counterclaim. However, that aspect of his judgment is not, as I read it, a matter of decision. He did not actually decide the point because he referred only to difficulties and the fact that it would appear, to use his words, that the claim was not within the Act. One might think that the petition in such a case is brought at least in respect of the debt on which the petition is based and thus falls within the words of subsection (1). It is only because of the words in brackets, "whether by way of claim or counterclaim", that the contrary can be argued.

15. Whilst on the subject of arbitration I need to refer to one other case, which is the decision in Halki Shipping v Sopex Oils. This was a decision of the Court of Appeal which came effectively to the conclusion that the word "dispute" or "claim" had to be given its ordinary meaning and that, once the court was satisfied that there was a dispute, it was obliged under section 9 to send the matter off to the arbitrator and it could not retain it

for itself. That was so even though underneath there was really no issue of fact or law that could properly be asserted in defence of the claim. It was not a straightforward decision. Hirst LJ dissented from the majority, who were Henry LJ and Swinton Thomas LJ. At page 750 Henry LJ deals with the Arbitration Act and he sets out at that point a description of the Act and the principles on which it is based. I will not read out the passage at letters A to C but they repay re-reading. He says between letters C and D:

> "Section 9 deals with the stay of legal proceedings, the relevant parts have already been set out in these judgments. I refer to the first paragraph of this judgment to show how the charterers qualify to apply for a stay of legal proceedings under Section 9(1). Once the Court is satisfied that they are so qualified, ie that there is such a dispute, then under Section 9(4):
>
> > "'The Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.'.
>
> "This arbitration agreement is none of those things."

16. That is something that applies equally to our case. So notwithstanding in that case that the matter would have been appropriate for summary judgment if it had been in the court, it still had to be sent off to arbitration. So the conclusion is that ordinarily a dispute including unjustifiable refusal to pay a debt should go off to an arbitrator. There is nothing surprising about that really because the policy of the Act is to hold people to the arbitration agreements that they have made and, having chosen a forum, that is where they should go to have any dispute resolved.

17. In relation to the Companies Court practice, it is well established and there is no need for me to go to the cases, that the insolvency process is not to be used for debt recovery. Where there is a bona fide dispute about a debt, a petition based on that debt is an abuse of process and presentation will be enjoined or, if a petition is already presented, the petition will be struck out. It will be a matter of fact in each case whether there is a bona fide dispute, as that phrase is used in the company law cases. Certainly if the case is not one for summary judgment there does exist a bona fide dispute, but the Companies Court is not to carry out even a summary judgment assessment unless it can be done very quickly and straightforwardly. Further, it seems to be enough to establish even a shadowy defence (see paragraph 22 of the judgment of Etherton LJ in Tallington Lakes Ltd v South Kesteven DC [2012] EWCA civ 443). It is not always the case that the court will refuse to resolve any dispute. For instance, a short point of construction on a simple agreement may, when the matter comes before the Companies Court, be dealt with by the judge. Having resolved the issue there is then no longer a dispute and the petition can proceed. But that is a rule of practice and not a rule of law.

18. How does the arbitration provision interlink with the Company Court approach? Usually the point raised by Mr Temmink will not arise. If there exists a bona fide dispute the petition will not be allowed and the question of arbitration does not come into it other than that the dispute which then has to be resolved, has to be resolved that is to say apart from the petition, which means of course that it will have to go off to the arbitration. In context there may be cases of a bona fide dispute which the Companies Court may nonetheless decide on a petition, as I have mentioned, a short construction point. But in cases where there exists an arbitration agreement the point ought to go off to arbitration,

and that is because that is where the parties have agreed it should be dealt with.

19. It seems to me that for the Companies Court to embark on it, even if absent an arbitration agreement it might be prepared to decide the point, would be to embark on the court dealing with "a claim". This is because an issue on the petition which is essential to the foundation of the petition becomes, in my judgment, a claim and falls within section 9. Or, if that is wrong, the Companies Court should exercise its discretion to reject the petition and leave the debt to be established in the forum which the parties have agreed is the appropriate place. The Companies Court is not the place to decide even summary judgment claims. A defence can be *bona fide* even though the court dealing with the claim sees fit to give summary judgment. It is only if there is no *bona fide* defence that the Companies Court will proceed.

20. So I return to the interaction where the Companies Court considers that the defence is not *bona fide* within the concept as established in the Companies Court where there is an arbitration agreement. As I have said, even in a clear case for summary judgment, the arbitration agreement bites in an ordinary action applying the Halki Shipping approach. The policy is clear that disputes between parties should be decided in the forum which they have chosen. For the Companies Court to decide that there is no *bona fide* defence requires it to adjudicate on the claim or the dispute. Certainly when this court makes a decision, for instance, on a short point of construction (by this court I mean the Companies Court), it does so in respect of the matter which under our agreement is to be referred to arbitration. In my judgment, resolving that sort of issue falls within section 9(1) and should go off to the arbitrator and the petition should not proceed.

21. If I am wrong about that, then whether a dispute which is not a bona fide dispute should be referred to an arbitrator will be a matter of discretion according to the ordinary Companies Court principles. Although disputes about debts may result in there being no petition, disputes about solvency manifestly are matters for the Companies Court. It is on the petition that issues of insolvency are to be resolved, although I dare say that if it is absolutely clear that a company is solvent both on a cash flow and balance sheet basis, the petition will be restrained. But even then a statutory demand might be relied on if it has not been complied with. I do not need to decide that because Mr Temmink only seeks an injunction today based on the statutory demand.

22. In the light of this and the facts as I have described them, there is, in my judgment, a dispute which should be referred to the arbitrator. In that context there is no arbitration on foot but the applicant has, I am told, started the process. In my judgment, section 9 applies. I should not therefore allow the petition based on this debt in reliance on the statutory demand to proceed.

23. In case I am wrong on that and the matter were to go further, I should deal with the alternative basis that this court has a discretion, applying ordinary company law principles, to restrain the petition. Mr Temmink says that extension which I have described was an agreed extension which was contractually binding. Mr Hubbard said there was no agreement. He does not on this application suggest, as I have said, that I can resolve the disputed account of the meeting in New York, but says that even on the applicant's own evidence there exists no contract, and he relies on the following things at least. First, that the term is uncertain, secondly, that there was no offer or acceptance at the meeting on 4 April and no consideration for what was effectively a voluntary

extension for no consideration and, thirdly, that the variation was not in writing. I deal with those in turn.

Uncertain Terms.

24. The agreement alleged by the applicant was "until July 2013 or some such date". This is not a promising starting point for the applicant, especially against a background of the fact that Mr Waller, the director of the applicant, was told, on his own evidence, that lawyers had taken care of it. So the date would be, one would expect, stated or would be ascertainable from the documentation that the lawyers had prepared. Although I take the view that this term is uncertain, I must be careful not to pre-empt the arbitration agreement. This point is one which I think is for an arbitrator on any footing for it may be interpreted as meaning until July 2013 and the issue, to which the answer is not obvious, is whether that means the beginning or the end of the month. Although I have to say this defence is shadowy and may even be one for summary judgment, I consider that it is not one that is so clearly in favour of the respondent that it should not go off to arbitration.

No Offer or Acceptance.

25. Here I think there is no arguable defence at all. The evidence does not suggest any offer or acceptance by either side at that meeting. On the contrary, Mr Waller asked where the refusal to extend the finance left the company. He was simply told that the loans had been extended and that lawyers had taken care of it. It is not suggested that the applicant's own lawyers had been involved and Mr Waller himself clearly knew nothing about it. Accordingly, there was never any agreement at the meeting. There might have been at the most an assertion of a unilateral variation, but I see no power for the respondent to grant such a unilateral extension, or there was a representation that something had already been done which would be binding. More likely, it was that the documents had been prepared, if it was said at all, but there was no suggestion that they would not then need signing. The lawyers may have taken care of it, but there was still something to do. I see no offer and acceptance.

26. The respondents would say, if the matter went to trial, that Mr Waller cannot have believed that there was a contract, he did not check up the document or even seek to ascertain what date his company would have to pay this debt by. That question, if I were to answer it, would be usurping the function of the arbitrator, but that is not the point. My point on this aspect of the case is that there was no offer and acceptance and therefore no contract. Even if that is wrong, the variation is not in writing. I accept Mr Temmink's submissions that there can be cases where the absence of writing is not fatal, even where a contractual provision says that variations must be in writing. But in the present case clearly writing was contemplated. Paragraph 11 of Mr Waller's statement refers to the documents drawn up by lawyers. Obviously, I would say, if there was an agreement, the fact that documents had been taken care of shows that writing was expected and that Mr Waller could not reasonably have thought, if he did think, that it was unnecessary, especially given that this is what the contract required. I do not think that there is anything at all in the point and no hint that what was said at the meeting, as recorded in paragraph 11, gives rise to a binding contract without writing.

27. The next point is one on consideration. It is said on behalf of the respondent that this was a case only of forbearance which is not for consideration. Mr Temmink relies on <u>Williams v Roffey Brothers & Nicholls (Contractors) Ltd</u> [1991] 1 Q.B.1 and submits

that the applicants gave consideration for the respondent's agreement to extend payment. That case concerned the recovery of an extra payment which a contractor had agreed to pay to his subcontractor to carry out work which the subcontractor was already contracted to do. The subcontractor was in financial difficulties and the contractor was concerned that the subcontractor would not complete in time. In that context Glidewell LJ said, at the bottom of page 15:

> "Accordingly, following the view of the majority in Ward v. Byham and of the whole court in Williams v. Williams and that of the Privy Council in Pao On the present state of the law on this subject can be expressed in the following proposition:
>
> (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and
> (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and
> (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and
> (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and
> (v) B's promise is not given as a result of economic duress or fraud on the part of A; then
> (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding"

28. Mr Temmink points out that the present contract is not simply a loan contract but appoints the respondent as a marketing agent. He relies particularly on paragraph (4) that I have just read and says that there is a commercial benefit because a disbenefit to the respondent is obviated. In other words, there is more chance of getting their money back and avoiding insolvency.

29. Mr Hubbard said there is nothing in the point. This is a straightforward case of forbearance when it is clear that no binding contract results. He refers me to In re Select Move Ltd [1995] WLR 474. At page 480 Peter Gibson LJ at H says

> "Mr Nugee submitted that although Glidewell LJ in terms confined his remarks to a case where B is to do work for or supply goods or services to A, the same principle must apply where B's obligation is to pay A and he referred to an article by Adams and Brownsword, "Contract, Consideration and the Critical path" (1990) 53 M.L.R. 536, 539-540 which suggests that Foakes v Beer, 9 App.Cas. 605 might need reconsideration. I see the force of the argument, but the difficulty that I feel with it is that, if the principle of Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 Q.B 1 is to be extended to an obligation to make payment, it would in effect leave the principle in Foakes v Beer without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in doing so. In the absence of authority there would be much to be said for the enforceability of such a contract. But that was a matter expressly considered in Foakes v Beer yet held not to constitute good consideration in law. Foakes v

> Beer was not even referred to in Williams v Foffey Bros & Nicholls (Contractors) Ltd and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of Williams's case to any circumstances governed by the principle of Foakes v Beer. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately by Parliament after consideration by the Law Commission.
>
> In my judgment the judge was right to hold that if there was an agreement between the company and the revenue it was unenforceable for want of consideration."

30. He submits that the principle in Williams v Williams applies in the present case. There is nothing left for the application of the rule in Folkes v Beer, a point really made by Peter Gibson LJ in the passage that I have just not read out. Were the matter only for me, I would have little difficulty in resolving this issue in favour of the respondent. I would decide the point and say that there could be no *bona fide* defence based on it, but I would do so because, although there is an albeit shadowy defence, it is so easy to deal with that it is appropriate to do so on this petition. It may however be that the matter should go off to the arbitrator and that the petition should on that ground be restrained, but I do not need to decide that point given my primary findings on the contract where there is no offer and acceptance.

31. That leaves the alternative claim based on equity. This is a claim that as a result of what was said in the meeting on 4 April 2013 the respondent is somehow estopped from claiming the money before the end of July of this year. On the evidence this suggestion rests solely on the proposition that the board of the applicant organises its financial affairs on the basis that the loan would not be payable until that late date. There is absolutely nothing to support that assertion. We do not know what the board said or what actions it has or has not taken as a result of the alleged representation. There is not even evidence about what the board considered "until July" meant, or why they considered, if they did, that it meant anything other than 1 July rather than 31 July. In addition, there is no evidence of any detriment to the applicant as a result of having ordered its affairs in this way. Accordingly, on this evidence, if there were nothing more, the claim on the part of the applicant would be bound to fail so that, putting aside the arbitration, this would not be enough to establish a bona fide dispute.

32. The inadequacy of the evidence is perhaps emphasised if one considers what the position would have been if the contract point had never been raised. It is inconceivable, I would suggest, that the evidence concerning estoppel would have rested with the short statement in paragraph 11 of Mr Waller's evidence. In any event it is submitted on behalf of the respondent that any estoppel has come to an end, the applicant having been given notice as early as 8 May that repayment was required. That, however, raises a real issue of what it is reasonable to expect as a period of notice and that would only be decided in the light of what the representation resulted in in terms of conduct of the applicant. That, in my judgment, would clearly be a matter for the arbitrator.

33. So, apart from the arbitration agreement, the conclusion is that I would not grant an injunction on the basis of an estoppel of this sort. But the arbitration agreement, it seems to me, trumps the decision which I would otherwise have made. Second,

123(1)(e) has been raised on behalf of the respondent. This is a matter to be decided on the petition. There is not enough evidence before me to show that the company is without doubt solvent. So the petition could not be struck out as a result of section 123(1)(e) on that evidence. But if the matter comes back again, it may be possible for Mr Temmink to show that the applicant is indeed solvent on a cash flow basis on the basis of different evidence. So the upshot is that I allow the application to the limited extent which relates to the statutory demand and I say nothing more about whether it is proper to present a petition on other grounds.

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