Action No: CL 91/2021

IN THE SUPREME COURT OF

THE TURKS AND CAICOS ISLANDS

BETWEEN:

BUCKEYE HOLDINGS LTD

Plaintiff

-and-

(1) RWI MANAGEMENT LTD

(2) THE PROPRIETORS, STRATA PLAN NO. 30

Defendants

JUDGMENT

CORAM:	**The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)**
Appearances:	**Mr. Craig Oliver for the plaintiff**
	Ms. Karen Savory for the defendants
Hearing Date:	**20 July 2022**
Venue:	**Court No. 5, Graceway Plaza, Providenciales**
Date Delivered:	**12 August 2022**

1. The Plaintiff ("Buckeye") owns an apartment in the Royal West Indies Resort, and it entered into a Maintenance and Rental Management Agreement ("the Agreement") with the 1st Defendant ("RWI"). The apartment is part of a strata plan registered under the Strata Titles Ordinance CAP 9.04, and the 2nd Defendant ("the Strata Corporation") is the statutory corporation established under the Ordinance for that strata plan.

2. On 8 October 2021 RWI issued a demand to Buckeye pursuant to section 155(2) of the Insolvency Ordinance CAP 16.18 ("the Statutory Demand"). The Statutory Demand was for:

    a. $12,413.70 allegedly due to the Strata Corporation for strata fees, and
    b. $5,268.29 allegedly due to RWI for fees and charges, presumably pursuant to the Agreement.

3. On the 21st day after service of the Statutory Demand, Buckeye initiated this action seeking an order to set it aside. Buckeye contends that the Statutory Demand should be set aside because RWI is in breach of the Agreement and as there is a substantial dispute in relation to the alleged debt within the meaning of section 157 of the Insolvency Ordinance.

4. Buckeye contends that:

    a. The Agreement includes a dispute resolution clause which provides that any dispute relating to the terms of the Agreement shall be resolved by arbitration proceedings conducted in terms of the Arbitration Ordinance CAP 4.08;

    b. RWI has charged $1,794.00 in maintenance/repair costs to Buckeye's account without approval and (in summary) some entries in previous statements are confusing or contradictory; and

    c. The Force Majeure clause in the Agreement has been triggered by the Covid-19 pandemic.

5. Section 155 of the Insolvency Ordinance provides that a creditor may serve a demand on a debtor for a debt that is due at the time of the demand, and section 156 provides that the alleged debtor can apply to set it aside. Sections 5 and 161 indicate the importance and consequence of such a demand. Section 5 provides that "**a company is presumed to be insolvent if it fails to comply with the requirements of a statutory demand that has not been set aside under section 157**", and section 161 provides that the court may appoint a liquidator of a company which is insolvent.

6. In the circumstances, the statutory demand procedure should not be used as a means of collecting disputed debts. That is why section 157(1) provides that "**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 debt to less than the prescribed minimum, is owing or due**".

7. The submissions by both counsel made an issue as to whether a dispute existed at the time RWI issued the Statutory Demand, but that is irrelevant. Section 157(1) uses the present tense, indicating that the question is whether at the time the Court is hearing the application, it is satisfied that there is a substantial dispute as to all or part of the debt.

8. The requirement that the Court find a "substantial dispute" means that a debtor cannot simply say it is disputing the debt. The dispute must have some substance. In **Vendort Traders Inc. v. Evrostroy Grupp LLC** [2016] UKPC 15 (BVI), the Privy Council was interpreting the similarly worded British Virgin Islands Insolvency Act 2003. Lord Sumption observed that "[t]he 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".

9. In **Sparkasse Bregenz Bank AG v In The Matter of Associated Capital Corporation** BVI Civil Appeal No. 10 of 2002, Byron C.J commented in more detail:

> [2]
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> …

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 the insolvency of the company. If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court. The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court.

10. If the hurdle of establishing a "substantial dispute" is crossed, the Court will not go on to attempt to resolve the dispute. It must set aside the statutory demand. The parties may then seek a resolution by filing an ordinary action or pursuing some other procedure.

11. In this case it is important to consider the two claimed debts separately. There is no evidence of a substantial dispute in relation to the debt claimed by the Strata Corporation. Buckeye's contentions based on the arbitration and the force majeure clauses in the Agreement are not relevant to this debt, because it arises pursuant to Buckeye's statutory obligations as a strata title owner, and not pursuant to the Agreement with RWI.

12. Similarly, the issues in relation to RWI's repair expenditure, or its statements and accounting do not raise any or in any event, any substantial dispute in relation to the debt claimed by the Strata Corporation. The English Court of Appeal made this point in **Salford Estates (No 2) v Altomart Limited** [2014] ECWA Civ 1575. Sir Terence Etherton C delivered the leading judgment. He explained:

> **[29]** If a debt is due and undisputed, the failure to pay is itself evidence of inability to pay for the purposes of IA 1986 ss 122(1)(f) and 123(1)(e): see Gore-Browne on Companies para 55.13B and the cases cited there. **Even if there is a substantial dispute as to part of the debt, the winding up petition will not be dismissed if there remains an undisputed debt above the statutory minimum.** Neither of those principles was put in issue by either party on this appeal.
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> ...
>
> **[34] If several alleged debts are stated in the winding up petition as evidence of the company's inability to pay its debts within IA 1986 s 122(1)(f) and only some arise out of a transaction containing an arbitration agreement, the concept of a non-discretionary "stay" of the winding up petition pursuant to s 9(1) and (4) of the 1996 Act makes no sense. Plainly, there is no basis for staying the Petition itself; and, if the Petition proceeds, there can be no reference to arbitration of any of the debts because the making of a winding up order brings into effect the statutory scheme for proof of debts which supersedes any arbitration agreement.**
> (my emphasis)

13. That would be enough to dispose of this application, since the debt to the Strata Corporation ($12,413.70) far exceeds the prescribed minimum, which is $750.00[1]. However, there are other difficulties with Buckeye's case.

14. The fact that there is an arbitration clause does not mean that there is a dispute. What is the "dispute relating to the terms of the Agreement" that must be resolved by arbitration? Apart from the disputed $1,794.00 charge, what specific issue would the arbitrator be asked to decide? Buckeye's evidence does not disclose one.

15. Also, even if the force majeure clause applied to the debt due to the Strata Corporation, it would not assist Buckeye. That clause stated:

> 20.6 Neither party shall be deemed to be in breach of this Agreement or otherwise be liable to the other Party by reason of any delay in performance, or non-performance of any of its obligations hereunder to the extent that such delay or non-performance is due to any Force Majeure of which it has notified the other party and the time for performance of that obligation shall be extended for such time as may be fair and reasonable in the circumstance.

16. Buckeye submitted that the Covid 19 pandemic and its resulting impacts constitute force majeure and as a consequence, any non-performance on its part is excused under that clause. Buckeye says its income was reduced and its director lost his employment.

17. **Tandrin Aviation Holdings v Aero Toy Store**[2] is one of the many cases coming out of the 2008 financial crisis. The claimant agreed to sell a private plane to the defendant. The defendant paid a deposit ($3M of $31M) but failed to pay the balance. The agreement included a *force majeure* clause that covered:

[1] Insolvency Rules 2019, r 74.
[2] [2010] EWHC 40.

> Acts of God or the public enemy; war, insurrection or riots; fires; governmental actions; strikes or labor disputes; inability to obtain aircraft materials, accessories, equipment or parts from vendors; or any other cause beyond the Seller's reasonable control.

18. The purchaser claimed that the "unforeseeable and cataclysmic downward spiral of the world's financial markets" in 2008 had triggered the clause. Hamblen J rejected that defence on a number of bases. The learned judge observed[3]:

> It is well established under English law that a change in economic / market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a force majeure event. Thus a failure of performance due to the provision of insufficient financial resources has been held not to amount to force majeure. (my emphasis)

19. He also pointed out the important difference between a party whose only obligation is to make payments (such as a purchaser), and other parties to a contract[4].

> …it is the seller who has the principal performance obligations under the Agreement. The purchaser's essential performance obligation is to pay the price and accept delivery, obligations that are far less likely to be affected by force majeure circumstances. (my emphasis)

20. Even assuming that the pandemic constituted a force majeure event for the purposes of the clause, it would not relieve Buckeye of its payment obligations, and would not constitute a substantial dispute that would require the court to set aside the Statutory Demand.

[3] [2010] EWHC 40, at [40].
[4] [2010] EWHC 40, at [45].

Disposition

21. In the circumstances, I dismiss the action and direct that the Plaintiff pay the costs.

The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)
Judge of the Supreme Court
12 August 2022