IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 248 of 2023 (MRHCJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF BPGIC HOLDINGS LIMITED

IN OPEN COURT

Appearances:	**Mr. Anthony Beswetherick KC, and with him, Mr. Barnaby Gowrie of Walkers for the Petitioner** **Mr. Ben Valentin KC, and with him, Mr Liam Faulkner of Campbells for the Respondent**
Before:	**The Chief Justice, the Hon. Justice Ramsay-Hale**
Heard:	**24 October 2023**
Draft Ruling circulated:	**31 October 2023**
Sealed Ruling handed down:	**20 November 2023**

HEADNOTE

Companies - compulsory winding up - grounds for winding up - inability to pay debts - debt disputed - agreement to refer dispute to foreign arbitration - court to determine whether debt *bona fide* disputed on substantial grounds before dismissing petition in favour of arbitration - public policy in the legislative context of section 4 of the Foreign Arbitral Awards Enforcement Act

RULING ON PRELIMINARY ISSUE

Introduction

1. This is the decision on the Company's application to strike out a winding up petition on the basis that the debt is disputed, that the agreement between the parties under which the debt is said to

arise provides for any disputes to be arbitrated in London and that the dispute falls within the terms of the arbitration clause.

2. The Petitioner says the debt is not *bona fide* disputed on substantial grounds and the Court should refuse to stay the proceedings.

3. The issue for resolution in this application raised is whether the petition should be stayed or dismissed pending resolution of the disputed debt by a foreign arbitral tribunal without an inquiry by this Court as to whether the debt is genuinely disputed on substantial grounds.

The Company's Position

4. The Company's position is that, where there is an agreement to arbitrate, the Court should only consider whether there exists a dispute about the debt - that is to say, the debt is not admitted - and whether the dispute falls within the scope of the arbitration agreement. The Court should not inquire whether the debt is *bona fide* disputed on substantial grounds.

5. In support of this proposition, Mr. Valentin KC relies on the Grand Court decision of *Re Times Property Holdings Limited* [2011 (1) CILR] in which Foster J held that,

> *"19 …Where, as here, parties have expressly agreed that <u>any dispute</u> between them arising out of the relevant contract is to be determined in a particular forum by a particular tribunal, it is not obvious to me why they should not be held to that agreement. In the present case the parties have clearly and unequivocally agreed that any dispute concerning or arising out of the subscription agreement which has not been resolved through negotiation within 30 days is to be resolved by arbitration in Hong Kong….The arbitration proceedings will obviously determine whether the grounds on which the company disputes its alleged indebtedness to the petitioners are successfully made out or not...the company is saying (a) that it wishes to deploy its arguments relating to the Panyu acquisition and the IPO in opposition to the petitioners' claims; (b) that it is contractually entitled to deploy these arguments in the arbitration in Hong Kong; and (c) that it is not for this court to deprive it of this right.*
>
> *…*
>
> *22 …the parties having agreed that any dispute arising out of or relating to the subscription agreement should be resolved by arbitration in Hong Kong, which is now taking place and will result in a determination of the dispute between the parties, it is not appropriate for this court, even if minded to do so, to deprive the company of putting its case and pre-judging the issue by seeking to determine that the company's dispute of the*

alleged indebtedness has no real substance. It seems to me that that question is for the arbitral tribunal in Hong Kong, with the agreement of the parties."

6. The learned Judge ostensibly relied on two decisions of the BVI Court: the decision of the Court of Appeal in *Sparkasse Bregenz Bank AG* v. *Associated Capital Corp* where a winding up petition was stayed where the debt was disputed and the parties' agreement contained an exclusive jurisdiction clause and a decision of the High Court in *Pioneer Freight Futures Co. Ltd.* v. *Worldlink Shipping Ltd*. in which it was held that the principles laid down by the BVI Court of Appeal in the *Sparkasse* case applied equally to an application to set aside a statutory demand where the parties' agreement had an exclusive jurisdiction clause.

7. More particularly, Foster J relied on the analysis of the law by Bannister J, then an acting Judge of the BVI High Court, at paragraphs [16] and [17] of the judgment in *Pioneer Freight.* There the Judge accepted that he was required by the relevant legislation to be satisfied that there was a substantial dispute as to the debt before setting aside a statutory demand but decided nonetheless that he should not determine the issue for the reason that, if he decided there was not any substantial dispute, then he would have made a judicial determination as to the parties' rights under the contract in the face of their agreement to submit their disputes to the High Court in England.

8. Bannister J(Ag) said further, in language that was expressly adopted by Foster J, that the strength of the debtor's argument as to why the debt was not owed was not the only consideration, given that the putative debtor's position was:

(a) that it wishes to deploy its construction point (b) that it is contractually entitled to deploy the point in the High Court in London and (c) that it is not for the BVI court to deprive it of that right.

9. He concluded that,

"Understood in this way, it seems to me that [the applicant], whatever I might think privately about its point of construction, does indeed raise a dispute of substance."

10. Mr. Valentin submits on behalf of the Company that this matter is on all fours with *Times Property* and that the Court should not embark upon an inquiry as to the whether the dispute is genuine and substantial as that would be to pre-judge an issue which the company was entitled to seek resolution in arbitration in London.

11. Mr. Valentin also relies on the English case of *Salford Estates (No. 2) Ltd v Altomart Ltd. (No 2)* [2014] EWCA Civ 1575; [2015] Ch 289 in support of the Company's proposition that the petition be dismissed without any inquiry into the question of whether the debt is genuinely disputed. In *Salford Estates,* the Court of Appeal upheld the decision at first instance to dismiss a winding up petition where there was an arbitration clause in the lease from which the alleged debt was said to have arisen. Sir Terence Etherton C, delivering the principal judgment in that case, said at [41]:

> *"…it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds."*

12. In *Telnic Ltd v Knipp Medien und Kommunikation GmbH* [2020] EWHC 2075 (Ch), to which Mr. Valentin also referred, Sir Geoffrey Vos held that the decision in *Salford Estates* was authority for the proposition that:

> *"Once it is accepted that the petition debt is alleged to arise under an agreement that contains a binding arbitration clause and the debt is disputed or not admitted, this approach precludes, save in wholly exceptional circumstances, an inquiry by the Companies Court as to whether the debt is disputed in good faith on substantial grounds."*

13. The "*wholly exceptional circumstances"* test is an exacting one, and one which Mr. Valentin submits is not met on the facts of this case with the result that I am precluded from embarking upon the inquiry that the Petitioner seeks.

The Petitioner's Position

14. In his response to the Company's application, Mr. Beswetherick KC, who appears for the Petitioner, relies on the decision of Parker J in Re *Grand State Investments Limited* (unreported, 28 April 2021, FSD 11 of 2021 (RPJ)) following the decision of Jones J in *Re Duet Real Estate Partners 1 LP* (unreported, 7 June 2011, FSD 77 of 2011 (AJJ)) in which the learned Judge proceeded on the basis that the court will need to be satisfied as to the existence of a *bona fide* dispute on substantial grounds prior to being able to exercise its discretion to stay proceedings in favour of arbitration: Parker J at [74].

15. *In Re Duet Real Estate,* Duet disputed the debt and sought to restrain the petitioner from presenting a winding up petition until such time as the dispute about the existence of the debts was resolved by arbitration. Jones J considered the evidence presented and, having determined

that there was no evidence from which to infer that there was a genuine and substantial dispute as to the debt, refused the injunction sought.

16. With respect to the *Salford Estates* line of authority, Mr. Beswetherick makes the point that the public policy in the UK derives from its arbitration laws which are not in *pari materia* with the Cayman provisions where the arbitral seat is foreign. In the UK, where an arbitrable dispute is raised, the courts may not inquire into the dispute but must stay proceedings in favour of arbitration.

17. In the Cayman Islands, by contrast, where the arbitral seat is in a foreign country, section 4 of the **Foreign Arbitral Awards Enforcement Act** ("FAAEA") provides that the matter should not be referred to arbitration unless there is a dispute, where this has been interpreted by the Courts to mean a *"genuine and serious dispute."* Unlike the UK provisions then, which limit the scope for court intervention where the parties have agreed to arbitrate, section 4 directs the Court to determine whether there is in fact a dispute which raises issues which ought to be determined by the arbitration.

18. The legislative policy in the Cayman Islands, unlike the UK following *Salford Estates*, is not that the Court should stay or dismiss a petition once the debt is disputed, but that it should inquire into the question of whether the debt is *bona fide* disputed on substantial grounds.

19. For completeness, I set out the relevant parts of section 4 of the FAAEA below:

> *"If any party to an arbitration agreement … commences any legal proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied* ***…..that that there is not in fact any dispute between the parties with regard to the matter agreed to be referred,*** *shall make an order staying the proceedings."* [my emphasis]

20. Mr. Valentin did not treat with section 4 of the FAAEA except to say that it would produce incoherent and inconsistent results if petitions were dismissed without any determination of the merits by the Court where the parties had agreed to arbitrate their disputes within the Cayman Islands but not where the arbitral seat was in a foreign country.

Discussion

21. I say at once that the case of *Sparkasse* on which Foster J relied in *Times Property* is not authority for the proposition that the Court should not determine whether the debt is disputed on substantial grounds where there is an agreement that some other body shall have jurisdiction to resolve the dispute. It is plain from paragraph 4 of the judgment of Byron CJ that the judge at first instance made inquiry and, having decided that there was a genuine and substantial dispute, then stayed the petition so the dispute could be resolved in the jurisdiction agreed by the parties:

> *"[4] . . . The agreement between the parties clearly mandated that the agreement is subject to the law of Austria and that the Court responsible for the bank's headquarters in Vienna has exclusive jurisdiction over any possible legal dispute arising out of the agreement. This provision is unambiguous. Austrian Law would be relevant to resolve the questions that were raised by the parties. It is not necessary to rely on Austrian Law to determine whether there was a dispute. One can conclude that a dispute exists without knowing how the dispute would be resolved. The learned trial Judge concluded that there were disputes of both a factual and legal nature and it is not for this Court to resolve those disputes. He concluded that the dispute between the parties should be settled in accordance with the terms of the agreement before it could be said that there was a debt which could ground a winding up order. The principles outlined above [relating to disputed debts] clearly indicate that it was his duty to determine whether there is a genuine and substantial dispute as to whether there is a debt. None of the jurisprudence indicates that it was his duty to resolve the dispute. I reject the contention that the failure to lead Austrian Law in evidence was an error or impacted on the burden of proof. The questions that the judge was required to answer, and those that he did answer did not require any knowledge of Austrian Law. If he had attempted to resolve the dispute he would have been improperly encroaching on and usurping a jurisdiction which the parties had conferred on the Austrian Court."*

22. Bannister J's decision in *Pioneer Freight* to summarily dispense with what he accepted was his statutory duty to carry out the threshold inquiry on the ground that, if he did so, he would be pre-judging a dispute which the parties had agreed to refer to the High Court in London was plainly wrong. The learned Judge mistakenly elided the determination of the threshold question of whether there was a genuine dispute on substantial grounds with the resolution of that dispute. The distinction between them is clear, as was emphasised by Byron CJ in *Sparkaase.*

23. Bannister J himself acknowledged his error in his later decision in *Alexander Jacobus De Wet v Vascon Trading Limited BVIHCV* (COM) 2011/0129.[1] When referred by Counsel for the Company

[1] Not referred to by Counsel but previously referred to by this Court in *Kris Energy (Gulf of Thailand) Ltd. v Rubicon Advantage International Pte Ltd* 12 June 2020 dealing with an application to restrain a petition where the parties' agreement had an exclusive jurisdiction clause.

to paragraphs 16 and 17 of his decision in *Pioneer Freight* - the very paragraphs on which Foster J relied - Bannister J said this at [16]:

> *"Although I am satisfied that the case was rightly decided on its facts, I consider that my analysis in those two paragraphs was wrong. On reflection, I consider that Ms Robey's submissions were correct. I agree that the Court must first decide on the evidence before it, whether there is a dispute at all. If the evidence (as in this case) discloses no ground at all for challenging the debt, then it is irrelevant that there may be an exclusive jurisdiction or arbitration provision. It seems to me that insofar as I held otherwise in Pioneer I was misinterpreting, rather than following, the decision of the Court of Appeal in Sparkasse Bregenz Bank AG. Although it was not brought to my attention in Pioneer, I referred the parties in the present case to the decision of the England and Wales Court of Appeal in BST Properties v Reorg Apport Penzugyi RT. In that case the English Court of Appeal upheld a decision that there was no substantial dispute about the debt relied upon by the petitioning creditor. In granting leave to appeal at an oral hearing, however, Chadwick LJ had taken the view that the presence of an exclusive jurisdiction clause in the relevant loan agreement meant that it was reasonably arguable that the debtor had good grounds for restraining further prosecution of the winding up petition (in other words, he thought that the view I took in Pioneer was at any rate arguable). At the hearing of the substantive appeal, the Court of Appeal held that the exclusive jurisdiction clause was irrelevant to the question whether the debt was bona fide disputed on substantial grounds. Only if a substantial dispute is identified will the exclusive jurisdiction clause fall to be taken into account."*

24. It follows that, insofar as *Times Property* is said to be authority for the proposition that once the debt is disputed the Court should not determine the threshold question as to the genuineness of the dispute, the decision is wrong and cannot assist the Company.

25. *Salford Estates* cannot assist the Company either. As formulated by Sir Geoffery Vos in *Telnic*, *Salford Estates* established that, save in exceptional circumstances, if the debt is not admitted then it is disputed and the Petition must be stayed or dismissed for the dispute to be resolved in arbitration, consistent with the parties' agreement as to the proper forum for the resolution of their disputes and the legislative policy of the **English Arbitration Act** 1996.

26. In *Salford Estates,* the policy underpinnings of the decision were expressed by Lightman J in this way at [40]:

> *"It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding*

> *up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration**. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement - as a standard tactic- to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition.** The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act."*

27. In contradistinction to the position in the UK, the approach of the Cayman Courts, which is to determine the threshold question of whether the dispute is genuine and substantial before dismissing a petition in favour of arbitration as in *Duet,* is entirely consistent with the legislative policy in of the FAAEA.

28. I do not share the view that, in undertaking the threshold inquiry, the Court would be carrying out a summary judgment type analysis. The Court's normal practice is not to resolve or determine the dispute in the petition (see *Sparkasse* supra) but rather to stay the petition if it finds that there is a genuine dispute of substance with respect to the debt, leaving the dispute to be resolved in a different action or in a different forum. That is not to say that in an appropriate case the Court could not resolve the dispute: see Vos JA in *In the matter Of GFN Corporation Limited* [2009 CILR *650]*at [94], but there is a distinction between the resolution of the threshold question, which is being proposed by the Petitioner here, and the resolution of the substantive dispute for which proceedings by way of petition are ill-suited.

29. Such an approach may be inconsistent with the internationalism endorsed by the Privy Council in *Family Mart* which was expressed by Lord Hodge at [28] of the judgment:

> *"It is important in cases which arise out of domestic legislative provisions implementing the New York Convention to have regard to jurisprudence in other contracting states to promote legal certainty in the jurisprudence relating to international arbitration",*

but it is consistent with the law with respect to stays in favour of foreign arbitration and with the long-standing approach of the Courts on applications to stay or dismiss petitions on the ground that the debt is disputed.

30. Counsel are to agree a date for the resumed hearing of the Company's application to dismiss the Petition on the ground that the petition debt is disputed.

DATED 20th November 2023

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Hon. Justice Margaret Ramsay-Hale
CHIEF JUSTICE